

2011-2012 UPDATE COURSE

# A BROKER'S ROLE IN SHORT SALE TRANSACTIONS

<b>OUTLINE:</b>
<a href="#"><u>INTRODUCTION</u></a>
<a href="#"><u>SHORT SALE SITUATION IS A MATERIAL FACT</u></a>
<a href="#"><u>SERVICES OF A LISTING BROKER</u></a>
<a href="#"><u>LENDER APPROVAL</u></a>
<a href="#"><u>APPLICABLE LAWS &amp; RULES</u></a>
<a href="#"><u>SHORT SALE FRAUD</u></a>

**Learning Objective:** Upon completing this Section, real estate licensees should have a better understanding of what services they may provide to a consumer in a short sale transaction and the limitations on permissible services they may offer, advertise or perform.

**CAUTION:** This Section is intended as an overview to alert licensees to the many complex issues involved in a short sale transaction and various federal laws or regulations that may impact such a transaction. *The information herein will neither prepare nor equip a licensee to competently handle a short sale transaction without additional education.* Any licensee who is considering offering brokerage services in a short sale transaction is **strongly encouraged** to first take one or more of several approved continuing education elective courses in this subject **before** attempting to represent any consumer in a short sale transaction, particularly a distressed property owner.

## INTRODUCTION

“*Short Sale*” — a term that was virtually unknown a decade ago, but which is now part of every real estate broker’s vocabulary, even if the broker has not personally been involved as an agent in a short sale transaction. What does it mean?

Basically, a “*short sale*” is a sale of mortgaged real property where the proceeds from the sale are insufficient to pay in full the seller’s outstanding mortgage and any other liens against the property **and** the seller lacks sufficient other assets to pay the remaining amounts due on the secured debts after application of the sale proceeds. Because the seller lacks the financial resources to remove these encumbrances in order to convey marketable and insurable title, the seller’s lender, as well as all other lienholders, must consent to the sale and agree to voluntarily release the liens. The lienholders must agree to voluntarily release their respective liens or a sale

will not be possible. The lienholders may also agree to forgive the remaining debt, but they are also free to pursue a deficiency judgment against the seller for all or a part of the mortgage balance or lien that is not paid as a result of the sale.

In many instances, a potential short sale situation is created when the proposed or expected sale price is less than the outstanding indebtedness owed on the first mortgage alone. In other instances, a potential short sale situation might arise when the proposed or expected sale price is less than the total due on the combined first mortgage, second mortgage or home equity line of credit, and any other liens encumbering the property (such as a real property tax or special assessment lien, a lien for delinquent owner association fees/assessments or a judgment lien). *The more liens there are against a property, the less likely it is that a short sale will be possible, as the consent of **all lienholders** will be required.*

A short sale is different from a foreclosure. In a foreclosure, sale proceeds are applied to satisfy in full liens in order of priority. If the amount of the first lien exceeds the sale proceeds, then all junior liens will be extinguished, as there are inadequate sale proceeds to pay the first lien in full and, by definition, everyone else is junior or secondary to the first lienholder. However, because a short sale is a “voluntary,” rather than judicial, process, approval of **all** lienholders, first, second, third, etc., whether from a voluntary deed-of-trust, tax lien or judgment lien, is necessary in order for the seller to be able to convey a marketable title to the buyer. If a proposed short sale would produce little or no funds to pay off a junior lien, it may be difficult to persuade that junior lienholder to release the lien, unless it is reasonably clear that they would receive nothing in the event of a foreclosure sale as well. Any outstanding real property tax or special assessment liens are particularly troublesome for the owner wanting to undertake a short sale because they have lien priority and will be the first liens paid from the sale proceeds, thereby decreasing the amount available to pay towards the first mortgage, much less junior lienholders.

As of Spring 2011, it was estimated that, nationally, 27% of current property owners owe more on their real property than the property is worth. Thus, one out of every four sellers will find themselves in a short sale situation — also referred to as being “under water” or “upside down.” Realty Trac reports that there were more than one million foreclosures nationally in 2010 and 1.2 million are projected in 2011. According to the National Association of Realtors®, 40% of residential purchases nationally in March 2011 were either short sales or foreclosed properties, excluding properties sold at auction or public foreclosure sales. In some markets, such as Miami, Florida, two-thirds of residential properties sold involved either short sales or foreclosures.

According to the North Carolina Association of REALTORS®, North Carolina is faring better than many states; foreclosures decreased by 27% during the first quarter of 2011 compared to the last quarter of 2010, whereas nationally the rates decreased only 15%. There were 68,000 foreclosures in North Carolina in 2010, and contrary to the national norm, fewer (63,000) are projected for 2011. (See NCAR’s “The Real Facts of NC Real Estate,” Issue 15.) North Carolina ranks 37<sup>th</sup> nationally in foreclosure filings according to Realty Trac. Nonetheless, given these numbers, it appears highly likely that a real estate broker may encounter a transaction involving a distressed property. How these transactions differ from a “normal” sales transaction and the scope of a real estate broker’s services in these transactions is explored herein.

## SHORT SALE SITUATION IS A MATERIAL FACT

As previously indicated, a short sale situation arises when the proceeds from the sale of the property are insufficient to satisfy in full all liens encumbering the property *and* the owner lacks sufficient other assets to pay the deficiency between the amount secured by the property and the sale proceeds. Thus, the owner lacks the ability to convey “marketable and insurable title” as required by the standard form Offer to Purchase and Contract, unless all lienholders consent. While the lienholders technically are *not* a “party” to the transaction, their consent is indispensable and controls the owner’s ability to perform his/her obligations under the contract.

*If a potential short sale situation exists, is that a material fact that must be disclosed by a real estate broker? Yes!* Since the advent of the short sale phenomenon, the Commission has said that ***the fact that the owner is unable to convey marketable and insurable title without the express consent of his/her lienholder(s) is a material fact that all licensees must disclose.*** It bears directly on the principal’s ability to fulfill his/her contractual obligations. Potential buyers have a right to know *prior to making an offer* that the owner cannot unilaterally perform his/her obligations under the contract and that the transaction may take significantly longer to conclude because all lienholders must be involved in the process and basically control the owner’s ability to convey title free of encumbrances.

### **Broker Disclosure Requirement for Short Sale versus Foreclosure**

**Foreclosure Situation.** Some licensees may be confused in that for years the Commission has said that the fact that an owner may be delinquent in their mortgage payment and may be threatened with foreclosure is still confidential information that should not be disclosed by a seller agent. It does not become a material fact until the foreclosure action is actually filed with the court, at which time a broker must disclose that fact to all interested parties. This continues to be the Commission’s position as to *foreclosures*. Just because an owner is behind on his/her mortgage payments does not necessarily mean that the property is worth less than the amount owed on it or that the owner does not possess other assets from which to satisfy any deficiency. Therefore, there is no change in the Commission’s position regarding disclosure of information regarding a listed property’s status as to foreclosure. *A foreclosure does not become a material fact until a proceeding has been commenced against a listed property, but once filed, it must be disclosed to prospective buyers because it affects the seller’s ability to convey marketable title. However, if the seller is simply behind on his/her mortgage payments and may be facing foreclosure in the near future, that fact, in the absence of a short sale situation, is personal and confidential information regarding the seller’s financial condition that should NOT be disclosed to prospective buyers.*

**Short Sale Situation.** As noted earlier, a short sale situation exists when the expected sale price of a listed property will be insufficient to pay in full both the owner’s outstanding mortgages *as well as* any other outstanding liens *and* the owner lacks sufficient other assets to satisfy the deficiencies, thereby necessitating the consent and approval of all lienholders in order to convey title free of encumbrances. The owner may or may not be delinquent on his/her mortgage(s) in a short sale situation. *The existence of a short sale situation is a material fact because the owner can’t convey marketable title, and this fact must be disclosed to prospective buyers in a timely manner, i.e., before a buyer is allowed to submit an offer.*

Thus, where the value and expected sales price of a listed property exceed the total of all encumbrances, a seller's agent need not disclose anything about the seller's financial condition, unless or until a foreclosure action is initiated; but where the agent knows or reasonably should know that the fair market value of the property is less than the amount of the liens secured by the property and the owner lacks the financial ability to cure all deficiencies, then the owner is in a short sale situation and that is a material fact that all brokers must disclose.

## **Seller and Agent Responsibilities for Disclosure of a Short Sale Situation**

### **Seller's Responsibilities**

Must a seller disclose anything to a potential buyer? No; *caveat emptor* is alive and well in North Carolina. While most sellers of residential property are required by North Carolina law to provide the mandatory Residential Property Disclosure Statement to all buyers, owners are not compelled to reveal anything about their property since they have the option of checking "no representation." If a seller chooses to answer "yes" or "no," then the statement must be honest to the best of the seller's knowledge or s/he may be guilty of misrepresentation or fraud. Thus, *an owner selling his/her property without a broker is not required to disclose to a prospective buyer that the owner is in a short sale situation.* Will it become apparent at some point in the transaction? Absolutely, and it may derail the transaction, if the buyer was not aware of this fact prior to making an offer. Ultimately, though, it is the seller who will be in breach of contract, absent an addendum, if lender approval cannot be obtained.

### **Listing Agent's Responsibilities**

We have already established that the existence of a short sale situation is a material fact that any broker must disclose to a prospective buyer, even if the seller does not want to do so. The listing agent is obviously in the best position to ascertain the existence of a short sale situation. So how does a listing agent go about discovering whether an owner is "under water" while gathering pre-listing information? The recommended actions are discussed below.

**Explain agency.** Early in a listing presentation, the broker should provide the *Working with Real Estate Agents* brochure to the owner and explain that until the owner decides which company/agent to hire, no principal-agent relationship has been created and thus no fiduciary duties attach, including the duty of confidentiality. Thus, nothing the owner tells any real estate broker the owner may interview is privileged or confidential until the owner hires a brokerage company and then personal information known to those agents would be confidential. However, broker-agents are required to disclose information about their principal or property, even if seemingly personal or unflattering, if the information rises to the level of material fact.

**Advise seller of agent's duty to discover and disclose material facts.** It is important that during a listing presentation a listing agent explain to the seller the agent's duty to "discover and disclose" material facts about a property and that the agent make reasonable inquiries of the seller about property conditions and other facts that the agent must disclose to prospective buyers.

**Reasons to discover a potential short sale situation.** A real estate firm may have a policy that prohibits or restricts the taking of short sale listings due to the duration or complexity

or for whatever reasons. In such situations, a listing agent definitely needs to determine at the outset whether a short sale situation exists and, if so, obtain the approval of his/her broker-in-charge to accept the listing, as it is the company's listing. If an agent does not want to commit to the substantial amount of time that may be required to handle such a transaction or believes s/he lacks sufficient knowledge to properly assist the seller or buyer in a short sale, the agent may refer the owner to a broker with more expertise in such transactions. Lastly, in some situations, the listing company may be requested by the lender to reduce its compensation, depending on the amount agreed in the listing agreement, in order to approve the terms of the parties' contract. Note that in a HAFA short sale, discussed later herein, the lender may not request a commission reduction below 6% of the purchase price.

**Perform a comparative market analysis (CMA).** A listing broker always needs to *perform a comparative market analysis (CMA)* to estimate the probable sales price of the property in order to advise the seller on an appropriate listing price. This is also an essential step in identifying a potential short sale situation.

**Make appropriate inquiries of the owner during the listing presentation.** This is a necessary step to identify a possible short sale situation and is very important given today's current real estate market where so many homeowners are in a short sale situation. Questions the agent might ask include:

- How many mortgages/deeds of trust exist and are they a first or second mortgage? (Remember that a home equity line of credit is a second or junior mortgage.)
- Is the owner current on all mortgage and line of credit payments? If not, why not and does the owner expect to be able to correct the situation?
- Are there any delinquent owner association or governmental fees or assessments?
- Is the owner current on real property taxes and any special assessments?
- Are there any outstanding judgments against the owner(s) and if so, in what amount?
- If behind on mortgage payments, has the owner had any conversations with the lender or loan servicer concerning alternate arrangements or loan modifications? Is the lender threatening foreclosure? How much time might the owner have to attempt a voluntary sale?
- Has the owner sought counseling under any of the foreclosure assistance programs?

**Determine if expected sale proceeds will be sufficient to pay all outstanding liens.** Based on the information acquired about the amounts of outstanding liens, the listing agent will want to determine the total amount of such liens and compare this to the estimated sales price less seller's closing expenses.

**Determine if owner has other assets to cover any expected deficiency.** If it appears that there may not be sufficient proceeds from the sale of the property (after paying the seller's

closing costs) to pay off the outstanding liens on the property, then the listing agent will want to determine if the owner has other assets that s/he can use to make up that deficiency. If the owner does have other assets from which to satisfy any and all deficiencies, then it is not a short sale situation, but if the owner does *not* have sufficient other assets, then a potential short sale situation exists that must be disclosed to prospective buyers.

**Disclose the potential short sale situation.** A listing agent is not legally required to “advertise” the existence of a short sale situation in advertising (publications, flyers, for sale signs, MLS, etc.). The decision as to whether to advertise a short sale situation depends on the marketing strategy agreed to by the owner and the listing broker. Disclosing this information in the advertising may well discourage some prospective buyers from considering the property, but it might attract others. This issue needs to be discussed and resolved with the owner, bearing in mind the broker’s duty to discover and disclose.

Although Commission staff is not aware of listing services (such as MLS) that require listing agents to include short sale information as part of the posted property information (although fields are available for the information, if desired), if such disclosure is required by an advertising forum, then the listing broker obviously should and may comply.

*Listing agents are strongly encouraged to **disclose the existence of a short sale situation** to agents working with buyers (or directly to buyers with whom the listing agent may be working) at the earliest possible time, **preferably prior to the property being shown to a buyer.** Such a practice or policy might help avoid accusations or complaints from irritated buyers and/or their agents who may feel that they have wasted their time viewing a property the buyer may have categorically precluded, because the listing agent did not disclose the short sale situation earlier, for example, at the time the agent working with the buyer requested to show the property. At the very latest, the existence of a short sale situation **must** be disclosed to agents working with buyers (or directly to prospective buyers) not later than the time the listing agent becomes aware that a buyer plans to make an offer because that information may well influence the buyer’s decision whether to make an offer and/or what purchase price to offer. If the disclosure has not been made prior to the time an offer is presented to the listing agent by an agent working with a buyer, the listing agent must immediately disclose the omitted material fact and should allow the agent working with the buyer the opportunity to consult with the buyer to determine the buyer’s willingness to proceed prior to accepting the offer for presentation to the seller.*

Note that a **listing agent under a limited services listing arrangement** where the listing agent will not be involved in arranging showings, showing the property, presenting offers or providing other additional services beyond advertising the property, should disclose somewhere in the advertising that the property is subject to a short sale to satisfy the agent’s obligation to discover and disclose material facts. The limited services listing agent has the same obligation as a full services listing agent to assure that the buyer or agent working with the buyer is informed in a timely manner about the existence of the short sale situation.

### **Responsibilities of Agent Working with a Buyer**

An agent working with a buyer is in a very different position than a listing agent as to the ability to discover many material facts about a property. Thus, agents working with buyers are not expected to independently discover if a listed property will involve a short sale because they

are not in a position to reasonably obtain that information directly. However, given the critical importance of a buyer being aware of the existence of a short sale situation, and given the current real estate market circumstances, *any prudent agent working with a buyer should routinely inquire of the listing agent whether a property being considered for viewing by the buyer involves a short sale situation.* The agent working with the buyer should make such inquiry when selecting properties for viewing by the buyer.

Should an agent working with a buyer learn at the time the agent is submitting an offer from the buyer to the listing agent that a listed property involves a short sale situation, the agent working with the buyer should refrain from submitting the offer to the listing agent until s/he has had an opportunity to discuss the newly acquired (material fact) information with the buyer.

### **Practical Considerations**

Two other matters should be mentioned concerning brokers acting as buyer agents (although not necessarily related to disclosure). Buyer agents should not assume that just because the list price of the property is less than the amount owed that the property is worth the asking price, particularly in a declining market. A buyer agent should perform a comparative market analysis to assist his/her buyer-client in determining a reasonable amount to offer to purchase the property. Secondly, a buyer should be aware entering a short sale transaction that the seller may well lack the financial ability to make any repairs and that, as a practical matter, the buyer must decide whether s/he wants the property “as-is.” Understand further that whatever period is specified in the parties’ contract as the time within which the buyer must conduct his/her due diligence normally will commence immediately from the “Effective Date” of the contract and will not be stayed or tolled pending lender approval, absent express language to that effect.

## **SERVICES OF A LISTING BROKER**

Once a broker has a written listing agreement with an owner, the broker may begin providing services pursuant to that agreement. The broker should explain to a seller who is in a “short sale” situation that the lienholder is not obligated to accept or approve any offer that the seller may accept and that neither the seller nor the broker can compel any lienholder to cooperate with the seller. If a lienholder is not even willing to entertain a short sale, then why attempt to market the property, as any transaction is destined to fail.

The listing agreement should clearly state the scope of services the broker will provide and any obligations the owner has. The parties may enter into a *limited services agreement* under which the broker contracts to do little other than to place the property in a multiple listing service, but is not obligated to show the property or counsel the owner as to the merits of various offers or assist the owner in negotiating favorable terms, etc. In this instance, the broker’s primary obligation is to assure that whatever representations s/he makes about the property in the MLS or other advertising media are in fact true, because if they are not, the broker may be held accountable. If there are inaccuracies in the advertised statements and upon investigation the broker indicates that s/he never visited the subject property, but relied instead on information supplied by the owner, the broker may well incur disciplinary action. Remember, *a broker may*

*limit or restrict the services s/he provides, but will still be accountable for the competency of whatever services and the accuracy of information provided.*

Assuming, however, that the owner hires the broker to be the owner's *exclusive listing agent* for a period of time, what services may the broker lawfully provide? Basically, the same real estate brokerage services the broker may provide to any seller, namely:

- advertise, market and promote the property;
- provide information about and access to the property to others;
- present all offers received to and review them with the owner;
- answer any questions within the broker's knowledge;
- advise the owner concerning his/her options and counteroffers; and
- suggest the owner seek legal advice or tax advice from an attorney or accountant, when appropriate.

Sellers most likely will need legal or tax advice from an appropriately licensed individual because several consequences generally arise in most short sale transactions. The primary consequences include the possibility of a deficiency judgment, the tax implications if a lienholder "forgives" the deficiency, and the impact to the debtor/owner's credit. What, if any, services a real estate broker may offer in this area will be discussed shortly.

### **Contract Formation**

When is a "contract" formed in a short sale transaction? Contrary to popular misconception, ***a binding legal contract is formed once an Offer to Purchase has been signed by all property owners (and any spouses) and all buyers and the fact of such written acceptance has been communicated by the last offeree to the last offeror.*** The fact that the mortgagees or lienholders have not yet agreed to accept the purchase amount offered does not in any way alter the fact that a binding contract has been created. In other words, if the buyer has made the most recent offer under consideration, and all sellers, including record owners and their spouses, have signed the Offer without making any changes, then upon the listing agent telephoning the buyer's agent and informing him/her that all necessary individuals have actually signed the Offer, the Offer becomes a binding contract, even though the buyer agent may not yet have a copy of the signed agreement. A listing agent may also communicate acceptance by mailing, faxing or emailing the fully executed agreement to the buyer agent, thereby creating a contract. [Recall that acceptance is deemed "communicated" upon deposit of an envelope properly addressed to the last offeror or his/her agent into the U.S. Mail or upon receipt by the addressee's server or equipment of an email or facsimile.] See the definition of "Effective Date" in Paragraph 1(g) of the standard Offer to Purchase and Contract.

### **Deposit of Earnest Money**

When does the three banking day clock for the deposit of the earnest money check (or other negotiable instrument) into the trust or escrow account of a licensee acting as the escrow agent begin to tick? Again, contrary to common misconception, ***a licensee's three banking day clock for the deposit of an earnest money check begins to tick upon formation of the contract, i.e., communication of acceptance by the last offeree to the last offeror, and the licensee's receipt of the earnest money deposit.*** A licensee-escrow agent who waits for lienholder acceptance prior to depositing the earnest money check violates the express provisions of Rule

A.0107(a), which requires the deposit into a trust or escrow account *no later than* three banking days from the broker's receipt of the check or negotiable instrument once a contract is formed.

Understand as well that while the rule *allows* a broker-escrow agent the option of holding and safeguarding the negotiable instrument pending acceptance of the offer, the broker/payee is *not required* to wait until contract formation prior to depositing an earnest money check. The reason for this exception is so if no contract is ever formed, the licensee can just return the negotiable instrument to the payor, who can destroy it. A listing agent who deposits an earnest money check upon receipt of the offer, but who is notified two days later by the buyer agent that the buyer is withdrawing the offer and would like his/her earnest money deposit back please, technically will not be able to refund the earnest money deposit until s/he is sure it has cleared his/her trust account, which may be anywhere from 5 to 14 days. An earnest money deposit paid in ***cash must be deposited into a licensee's trust account within three days from receipt***, regardless of the status of the offer, as it is capable of immediate refund whenever necessary.

**But the parties (seller and buyer) aren't really under contract until the lienholder approves the deal, right? WRONG.** As discussed, the parties are under contract and bound by its terms the moment everyone has signed and acceptance has been communicated to the last offeror. However, *absent an addendum or qualifying/conditional language*, the seller has just entered into an agreement that s/he cannot perform and thus is doomed to breach, as s/he cannot convey marketable and insurable title as promised in the Seller Representations. *It is critical for both parties, but particularly the seller, that the Short Sale Addendum (Std Form 2A14-T), or similar qualifying language, be attached to the Offer to Purchase in every short sale transaction.*

The addendum basically confirms each party's recognition that their contract is conditioned on the lienholder's assent, allows the buyer to unilaterally terminate the contract any time prior to lienholder approval and receive a refund of the earnest money deposit, and absolves the seller from any liability to the buyer for the seller's inability to convey marketable and insurable title in the event the lienholder(s) won't approve the contract terms. Absent such provisions conditioning the seller's performance on the lienholders' approval, the seller ultimately would be in breach of the promise to convey marketable and insurable title, thereby entitling the buyer not only to the return of the earnest money deposit, but to a refund of any due diligence fee paid to the seller *and* reimbursement from the seller for all reasonable costs expended by the buyer during the due diligence period.

**NOTE:** the mere fact that the contract entitles the buyer to these "damages" does not mean that they automatically will be paid by the seller. While the buyer should be able to recover the earnest money from the escrow agent, if the buyer wishes to recover the other monies to which s/he is entitled under the contract, the buyer most likely must sue the seller, and it is questionable whether any judgment would be collectible, given that the seller already is in a short sale situation and, presumably, has more debts than assets.

Brokers representing sellers in residential short sale transactions where the standard forms are *not* used, should advise their seller-clients to have an attorney review the proposed contract *before* the seller signs to be sure that the seller can be released without liability if the lienholder does not accept the contract terms. Obviously, brokers should not attempt to craft

such additional language themselves. **Note** that there is no standard short sale addendum designed for commercial transactions. Thus, brokers representing distressed sellers of commercial property should caution their principals to consult an attorney to draft an appropriate contingency acknowledging the sellers' inability to convey marketable and insurable title (as promised in the Standard Form 580-T) without all lienholders' consent.

### **Short Sale Addendum**

**Standard Form 2A14-T**, the Short Sale Addendum, was created by the Joint Forms Task Force to address the need for a contingency or condition *in residential transactions* both qualifying the seller's performance of his/her contractual obligations on the necessary approval of all lienholders, but also allowing the buyer to unilaterally terminate the contract any time prior to lienholder approval if the buyer becomes tired of waiting for the lienholders' decision or otherwise chooses to walk. This need was heightened due to the restrictions on a real estate broker attempting to draft or craft language for a legal document for others, which constitutes the unauthorized practice of law. The addendum is reprinted at the end of this Section. (As previously mentioned, there is no corollary standard form for use in commercial transactions.)

The **primary provisions** of the Short Sale Addendum include:

- an acknowledgment by both parties that the transaction is a short sale and a definition of the term;
  
- one that conditions seller's performance upon all lienholders' approval of the contract terms, requires the seller to use his/her best efforts to obtain lienholder approval, warns that approval may take weeks or months, and allows either party to terminate the contract if the lienholder rejects the proffered terms;
  
- one that allows buyer the right to unilaterally terminate the contract by written notice to seller and receive a refund of the earnest money deposit any time prior to seller notifying buyer of lienholder approval;
  
- a recitation that no lienholder is obligated to accept the contract terms and that neither party nor their agents have any control over the lienholder(s);
  
- an acknowledgment that the seller may receive other offers while the contract is being considered by the lienholder and that such offers "... must be presented to the Seller and to Lienholders pursuant to North Carolina law ...," although the seller is not at liberty to accept any of these subsequent offers, except perhaps one in a back-up capacity;
  
- one that requires the seller to notify the buyer in the event a lienholder initiates a foreclosure action against the property while the parties' contract is still under review and provides that if the foreclosure action is completed prior to closing on the parties' contract, the contract becomes void and the earnest money deposit is refunded to the buyer;
  
- one that counsels the seller "... to seek advice from an attorney, certified public accountant or other professional regarding the credit, legal and tax consequences of a Short Sale."

Two of the more important points above are that:

1) the buyer may terminate the contract for any or no reason prior to notification of lienholder approval, *even if the stated due diligence period has expired*; and

2) if the lienholder does not approve the contract terms, the seller will only be obligated under the terms of the contract and addendum to return the earnest money deposit to the buyer, but will not be liable to the buyer for a refund of the due diligence fee or for any of the buyer's out-of-pocket expenses incurred for inspections, appraisals, etc.

**Example:** A residential property is for sale with a disclosure that it will be a "short sale" situation. Sellers and Buyers successfully negotiate an agreement and sign Standard Form 2-T and notice of Sellers' acceptance is communicated to Buyers' agent. The purchase price is less than the amount owed on the first Deed of Trust and there is a second Deed of Trust held by the same lienholder, both of which were used by sellers to purchase the property initially. The parties have attached Std Form 2A14-T to their contract. The contract states that Buyer's due diligence period will end six weeks from the Effective Date and that Settlement shall occur no later than 12 weeks from the Effective Date. The contract is submitted to the sellers' lienholder for approval.

### **Queries:**

1. What if eight weeks after the Effective Date, but prior to notification of lienholder approval, buyer finds another property he likes more and wishes to terminate the contract?

Buyer is perfectly free to do so upon providing written notification to seller or seller's agent pursuant to Paragraph 3 of the addendum, even though buyer's due diligence period has expired, and buyer is entitled to a refund of the earnest money deposit, but not any other monies paid or expended.

2. What if sixteen weeks after contract formation the parties still have not closed due to lack of lienholder approval?

Buyer may unilaterally terminate the contract by providing written notice of termination to the seller or seller's agent and will be entitled at least to a refund of the earnest money deposit.

3. What if the lienholder rejects the contract terms three weeks after submission?

Either party may terminate the contract by providing written notice of termination to the other or to the other's agent and the buyer would be entitled to a refund of the earnest money deposit, but not to any other monies paid or expended.

4. What if the lienholder forecloses while the contract is awaiting lienholder approval?

The seller must immediately notify the buyer that foreclosure has been initiated, and if the parties cannot close prior to the consummation of the foreclosure proceeding, then the

contract becomes void, and the buyer is entitled to a refund of his/her earnest money deposit, but no other monies expended.

**What if the parties' contract was limited solely to Standard Form 2-T with no addenda or other qualifying language? What would be the outcome for each of the foregoing "Queries?"**

1. If buyer changed his mind eight weeks into the contract, he would not have the right to unilaterally terminate the contract because his due diligence period expired two weeks earlier. Buyer would remain obligated under the contract terms until at least the Settlement Date. If lienholder approval *was* timely obtained, but buyer refused to perform, then seller would be entitled to receive the earnest money deposit. If the lienholder declined to approve the contract, then the seller would be in breach of the obligation to convey marketable and insurable title and the buyer would be entitled to a refund of the earnest money deposit, as well as any due diligence fee paid and out-of-pocket expenses incurred by the buyer during the due diligence period.

2. According to the terms of Std Form 2-T, the non-breaching party may terminate the contract upon written notice to the breaching party if the parties have not closed within fourteen days of the stated closing date, unless the parties have agreed in writing to an extension of the closing date. Because sixteen weeks later the seller still does not have lienholder approval and thus cannot convey marketable and insurable title, the buyer may terminate the contract by providing written notice to the seller any time on or after the 15<sup>th</sup> day following the stated closing date. For example, if 12 weeks from the Effective Date was October 31, then Buyer would be entitled to terminate the contract anytime on or after November 15. Buyer would be entitled to a refund of his earnest money deposit, *as well as* a refund of any due diligence fee paid and out-of-pocket expenses paid during the due diligence period.

Both Queries #3 and #4 have a similar result; because seller's performance is not conditioned on lienholder approval, the seller is in breach of his/her contractual obligations to convey and is doomed to fail absent lienholder approval. Whether the lienholder refuses to accept the contract terms or initiates foreclosure proceedings, the seller lacks the ability to convey marketable and insurable title in either case. The buyer will be entitled to a refund of the earnest money deposit, as well as a refund of any due diligence fee paid and reasonable out-of-pocket expenses incurred during the due diligence period. (As a practical matter, the buyer should be able to receive a refund of the earnest money deposit that was being held by some escrow agent, but whether s/he will actually receive either the due diligence fee or out-of-pocket expenses will depend on the sellers' financial condition.)

Hopefully the foregoing discussion illustrates the significant differences that result from the presence or absence of qualifying contingency language in the parties' contract in any short sale transaction. Brokers representing sellers in commercial sales transactions should counsel their clients to seek legal advice and have the attorney prepare appropriate language for inclusion in the seller's sales contract, particularly since there is no standard commercial short sale form available to brokers. Absent such qualifying language, a seller of commercial property will be unable to fulfill his/her contractual obligation to convey marketable and insurable title, if any lienholder refuses to voluntarily release its lien.

## **Receipt of Other Offers After Seller is Under Contract**

Must a seller cease marketing his/her property while the lienholders are deciding whether to approve a contract to sell/purchase with Buyer #1? No. While the rules of various advertising forums may impact how the listing is displayed or classified, there has never been a requirement that the seller cease marketing or showing his property or not entertain other offers on the property. Thus, the seller is free to continue to market the property as aggressively as the seller and the listing agent agree.

If the listing agent receives an offer from Buyer #2 after seller already is under contract with Buyer #1, must listing agent show that offer to the seller? *Absolutely*. Commission Rule 58A.0106(a) requires all licensees to deliver copies of all agency agreements, contracts, offers, leases or options affecting property to the parties thereto immediately, but in no event later than five days from the date of execution.

Must the seller consider the offer? No, the seller may reject it out of hand. If the offer is better than the terms of the present contract, may the seller notify buyer #1 that s/he is terminating the contract and accept offer #2? No, the seller has no right to terminate the pending contract unless the lienholder declines to approve its terms. *Because the seller already is under contract to convey the property to buyer #1, subject to the contingency of lienholder approval, seller is not free to accept offer #2 other than in a back-up capacity and an appropriate addendum should always be attached to the contract.*

What should a listing agent do if s/he receives other offers after the seller is already under contract, but the seller directs the listing agent *not* to notify the seller's lienholder of the other offers? While the lender/lienholder technically is not a party to the contract, it clearly has a financial interest in the transaction and is a necessary *third party* (as opposed to principal/party) in the transaction. It is being asked to release its security interest without receiving all the monies to which it is entitled. Thus, *once a lienholder is involved in a short sale transaction, as it necessarily must be, a real estate broker owes the same duty to disclose material facts to the lienholder as the broker owes to any third parties. **The fact that other offers have been submitted is material as to the lienholder's interest, whether the offers are for more or less than the purchase price in the pending contract, and the listing broker must disclose the existence of these offers to the lienholder.*** Must the broker still disclose if his/her principal, the seller, instructs the broker not to inform the lienholder? *Yes*, because an agent is only obligated to follow the *lawful* instructions of his/her principal. A principal has no authority to tell an agent to engage in behavior that would cause the agent to violate law, in this instance both License Law (G.S. 93A-6(a)(1)) and duties of honesty and fair dealing owed to third parties under the common law of agency.

The listing broker must notify the lienholder, preferably in writing, that another offer has been received. The lienholder may ask the listing broker to transmit a copy of the offer or to merely recite certain material terms of the offer, such as purchase price, whether financing is required, and projected closing date. Some lienholders may refuse to consider any subsequent offers unless the seller first accepts the offer in a back-up capacity, but the listing broker nonetheless should notify the lender/lienholder of the existence of the offer and follow the lienholder's instructions. If the lienholder refuses to consider the offer unless the seller accepts it as a back-up contract, *must* the seller accept the offer? No.

May a licensee reveal the material terms of an offer to the lienholder without violating Commission Rule 58A.0115? Yes. **Rule 58A.0115** prohibits a broker from disclosing the material terms of a party's offer *to a competing party* without the express authority of the offering party. The underlying intent was to require brokers to treat equally any buyers with whom the seller chose to deal and to level the playing field, rather than to pit buyers against each other by "shopping offers." The lienholder is an interested third party, rather than a "competing party" as contemplated by the rule. Thus, *a listing broker could inform the lienholder of the terms of the new offer without violating the rule.* However, if uncomfortable, the listing broker could request the buyer's consent to disclose the terms to the lienholder upon receipt of the offer, as Buyer #2 should be aware that the property already is under contract.

## **LIENHOLDER APPROVAL**

Lienholders may not all follow the same procedures when reviewing short sale requests. Each may have different document and eligibility criteria to determine whether a short sale transaction will be allowed. Generally, a lienholder will require proof that the borrower/owner is incapable of paying off the loan. Sometimes being "upside down" on the loan is enough, but the lienholder may still choose to evaluate the seller's financial circumstances to confirm that his/her resources are truly insufficient to cover the loan balance deficiency.

The lienholder also will assess all debts and costs to determine the feasibility of a short sale. Debts obviously include the amount of the loan balance, any second mortgages, home equity loans or other voluntary deeds of trust recorded against the property, past due owners' association fees or assessments and unpaid property taxes. The costs of sale include any agreed closing costs to be paid by seller (if allowed by the lienholder), escrow fees, and brokerage commissions. The lienholder must decide whether it will fare better through a short sale than through the foreclosure process and the consent of *all* lienholders will be necessary.

### **Contact with Lienholders**

How much contact may a listing broker have with a seller's lienholder on behalf of the seller? It depends, but the ***general rule is probably "not much."*** Real estate brokers are licensed to engage in real estate brokerage, not to negotiate debt forgiveness or reduction with the attendant potential legal consequences to the seller. Certainly, real estate brokers may act as conduits for the transmission of information. For example, *they may send a copy of the parties' contract to the lienholder for review, notify the lienholder if other offers are received, provide information requested by the lienholder, and receive the lienholder's response and communicate it to the seller and buyer, but they generally should refrain from negotiating with a lienholder concerning what terms and conditions the lienholder would accept.* Brokers who attempt to "negotiate" a short sale with the seller's lienholder may fall within the purview of recent federal regulations governing mortgage assistance relief service providers and may also risk the unauthorized practice of law.

While real estate brokers may routinely assist their seller-clients in negotiating the terms of an acceptable contract in a "normal" sales transaction where the sale proceeds are sufficient to

satisfy all liens and costs related to the transfer and both seller and buyer are capable of performing their contractual obligations without the consent or involvement of any third parties, such is not the case in a short sale transaction. The seller risks significant consequences if the lienholder approves a short sale, such as:

- The lienholder may accept the short sale amount and release the lien, but refuse to consider it full satisfaction of the underlying debt and may pursue the borrower/owner for a deficiency judgment.
- The lienholder may agree to accept the short sale amount in full satisfaction of the underlying debt, release the lien, and forgive the deficiency, but the seller may face tax consequences because the amount of the debt forgiven by the lender may be treated as income to the seller for tax purposes.

Regardless of whether the lienholder pursues the deficiency or forgives the remaining debt, the borrower's default on the loan obligation will impact the borrower's credit score and may impair the borrower's ability to purchase another property for some period of time.

*While listing brokers should alert their seller-clients that issues such as the foregoing exist that must be addressed, they should **not** attempt to advise sellers on any of these matters as to do so is to provide legal advice and could constitute the unauthorized practice of law unless the listing broker also has an active North Carolina law license. Rather the broker, upon determining that the seller is in a short sale situation, should recommend that the seller consult an attorney and a tax expert regarding the potential consequences arising from a short sale. The broker also might inquire whether the seller has had any discussions with his/her lienholder or servicer concerning the seller's eligibility for either HAMP or HAFA, discussed below.*

## **APPLICABLE LAWS & RULES**

There have been several attempts over the past three years at both the state and federal levels to enact legislation or rules to provide assistance to homeowners struggling to pay their mortgages and avoid foreclosure. One such federal initiative was the **Making Home Affordable (MHA)** Program in 2009 which generated the *Home Affordable Refinance Program (HARP)*, the *Home Affordable Modification Program (HAMP)* and the *Home Affordable Foreclosure Alternatives Program (HAFA)*. The latter two programs will be discussed briefly herein.

### **HAMP and HAFA**

To be eligible for consideration under the Home Affordable Foreclosure Alternatives Program (hereinafter "HAFA"), a borrower must first be eligible for the Home Affordable Modification Program (hereinafter "HAMP"). To be eligible for HAMP, the following criteria must be satisfied, namely:

- the property must be the *principal residence of the borrower*;
- the mortgage originated prior to January 1, 2009;
- the mortgage is owned or guaranteed by Fannie Mae or Freddie Mac;\*
- the borrower is delinquent or default is foreseeable;

- the borrower can demonstrate a hardship; and
- the principal amount of the mortgage is less than \$729,750.00.

Previously, the amount of the borrower's total monthly mortgage payments (PITI and association fees) had to exceed 31% of the borrower's gross income, but this requirement was eliminated (at least for non-GSE lenders/servicers) effective February 1, 2011. Property that is vacant or has been rented to a non-borrower for less than 12 months may still be eligible for HAFA so long as the borrower can document that it was his/her principal residence prior to relocation and s/he has not purchased any other residence within the 12 months prior to entering into a Short Sale Agreement with the servicer. The borrower no longer is required to document that his/her relocation was employment related.

\* **NOTE:** all Fannie Mae and Freddie Mac lenders (i.e., GSE lenders = Government Sponsored Enterprise) are *required* to participate in HAMP, and thus, generally, HAFA. Non-GSE servicers/lenders could participate, if they chose, by submitting a Servicer Participation Agreement (SPA) to Fannie Mae prior to October 3, 2010. A list of participating lenders with their contact information appears at the end of this Section.

*A borrower may initiate the evaluation process by submitting a **Request for Modification and Affidavit** to the borrower's servicer who will first assess whether the borrower qualifies for a loan modification under HAMP. If the borrower does not qualify for or does not successfully complete a Trial Period Plan, or the borrower misses two or more consecutive payments on a HAMP modified loan, then within thirty calendar days of the foregoing determination or event, the servicer must consider the borrower for HAFA. A borrower who meets the HAMP eligibility criteria may ask the lender to consider him/her for HAFA participation, rather than loan modification, and the servicer must respond to the borrower within thirty calendar days of the borrower's request. **Note** that the servicer may not suggest HAFA until it has first evaluated the borrower for HAMP, but a *borrower may initiate HAFA consideration by express request*, bypassing loan modification consideration.*

### **HAFA Short Sales**

According to Supplemental Directive 09-09 Revised issued by the U.S. Treasury Department on March 26, 2010:

HAFA is part of HAMP and provides financial incentives to servicers and borrowers who utilize a short sale or a deed-in-lieu to avoid a foreclosure on an eligible loan under HAMP. Both of these foreclosure alternatives reduce the need for potentially lengthy and expensive foreclosure proceedings. The options help preserve the condition and value of the property by minimizing the time a property is vacant and subject to vandalism and deterioration. In addition, these options generally provide a substantially better outcome than a foreclosure sale for borrowers, investors and communities.

### **Short Sale Agreement**

All participating servicers/lenders must have a written HAFA Policy. Generally within 30 calendar days of a request for HAFA consideration, whether lender or borrower generated, the

servicer/lender must notify the borrower whether it has determined that attempting a short sale is in the best interests of the investor and, if so, what sale terms would be acceptable to the lender/servicer. Specifically, the servicer sends the borrower a **Short Sale Agreement (SSA)** that by rule must address at least the following:

- A fixed termination date not less than 120 days from the date the SSA is mailed to the borrower; the term may be extended at the servicer's discretion up to a total of 12 months, with the borrower's consent.
- The property must be listed with a licensed real estate broker doing business in the community where the property is located.
- What an acceptable price is, expressed either as a list price or as acceptable net sale proceeds after subtracting specified costs allowed by the lender/servicer.
- The amount of closing costs or other expenses the servicer will permit to be deducted from the gross sale proceeds.
- The amount of the real estate commission it will allow to be paid, but it cannot require that a commission equal to or less than six percent of the contract sales price be further reduced.
- Permission from the borrower allowing the servicer to share personal financial information about the borrower with the U.S. Treasury and its agents as necessary to conclude the transaction.
- Notice that the sale must be an arm's length transaction (with certification language in the contract to this effect) and that the *buyer cannot resell for at least 90 days after closing*.
- Cancellation and contingency clauses in listing and sale agreements notifying prospective purchasers that the sale is subject to servicer/third party approval.
- An agreement that upon a successful closing acceptable to the servicer, the *borrower will be released from all liability on the underlying first mortgage debt*. However, the SSA also must include a **notice** to the borrower that there may be *income tax consequences* resulting from the short sale and it may negatively impact the borrower's credit score and the borrower should seek professional advice concerning these matters.
- An agreement that upon a successful closing, the borrower may be entitled to receive from the gross sale proceeds a \$3,000 relocation incentive.
- Notice regarding the extent to which the servicer will allow a portion of the gross sale proceeds to be paid to junior lienholders in exchange for a release of their liens.
- The amount of the monthly mortgage payment, if any, the borrower must pay during the period of the SSA.

- Terms under which the SSA may be terminated.

A form Short Sale Agreement used by participating HAFA servicers may be found at [www.hafahelp.info](http://www.hafahelp.info) or at [www.hafaprogram.com](http://www.hafaprogram.com) and click on HAFA Forms. The SSA is a six or seven page form that a borrower must sign and return to the servicer within **14 days of the effective date** (defined as the date on which the SSA is first sent to the borrower by the servicer). In addition to the signed SSA, the borrower also must send the servicer a copy of the listing agreement with a real estate broker and any information regarding junior liens. In accepting a SSA, the borrower agrees to cooperate with the real estate broker, to provide any information requested by the servicer, to make the monthly mortgage payment, if any, and to use best efforts to maintain the interior and exterior of the property in marketable condition. Short Sale Agreements signed by both servicer and borrower prior to December 31, 2012 will be eligible for HAFA program treatment, although the program is scheduled to expire on that date. Note too that a recent directive issued August 9, 2011 clarifies that the borrower's 14 day response period is intended to establish a minimum time frame and that servicers may still consider a borrower's eligibility regardless of whether the borrower responds within 14 days.

Once the borrower and servicer have entered into a Short Sale Agreement, the servicer may not increase the minimum acceptable net proceeds stated in the SSA until the initial SSA termination date is reached. Further, the servicer is required to accept a purchase offer if the net sales proceeds will equal or exceed the minimum net sale proceeds specified in the SSA or pursuant to a new verbal value determination resulting from a periodic re-evaluation when the property value has decreased. [See Sections 7.1 and 7.8 of Chapter IV, version 3.2 (June 2011) of the *Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages*.]

#### **Benefits to Real Estate Broker**

Some of the benefits to a real estate broker whose seller has a HAFA Short Sale Agreement with his/her servicer include knowledge going into the transaction of what the servicer's "bottom line" is, what expenses it will allow to be paid from the gross sale proceeds, and the servicer's inability to compel a real estate broker to reduce the commission below 6% of the sales price. Understand that the listing commission may be whatever amount the broker and seller-principal mutually agree; so long as it is equal to or less than 6% of the contract price, the servicer can not require the broker to lower the commission as a condition of approving the sale; however, if the listing agreement provides for a commission exceeding 6%, then the servicer may refuse to allow the amount in excess of 6% to be paid from the gross sale proceeds.

#### **Requests for Short Sale Approval**

The SSA establishes the parameters for the transaction and may minimize the amount of contact or negotiation needed with the servicer during the marketing phase, since terms acceptable to the servicer already have been identified. In addition to receiving a copy of the SSA, the borrower also will receive a ***Request for Approval of Short Sale (RASS)*** form from the servicer to use in transmitting information regarding terms of proposed offers to the servicer. The instructions are slightly confusing. One section states that the borrower or listing broker should deliver a RASS to the servicer "... within three business days following receipt of an *executed purchase offer* ...." Yet the completed RASS is to be sent to the servicer along with "... a copy of the *executed sales contract* and all addenda ...," as well as *proof of the buyer's funds or a pre-approval or commitment letter and any information regarding negotiations with junior*

*lienholders*. The servicer is to notify the borrower of approval or rejection within **ten days** of receiving the RASS and accompanying documents.

A related form is the ***Alternative Request for Approval of Short Sale (Alternative RASS)***. This form is used when the borrower-owner already has accepted an offer and is under contract to sell, but either has not previously applied to the servicer for HAMP/HAFA consideration, or the servicer is still considering the borrower's application and has not yet approved the terms of a SSA. The servicer must first evaluate the borrower's eligibility and will require a Request for Modification and Affidavit or similar documents, in addition to the Alternative RASS with the same information and documents that are to accompany a RASS. If the borrower qualifies for HAMP, the servicer must first notify the borrower that a loan modification may be available and allow the borrower 14 days to request consideration for a HAMP modification. If the borrower does not wish to be considered for a loan modification, the servicer may proceed to assess the parties' contract without first having to enter into a SSA with the borrower. The servicer must notify the borrower of approval or disapproval of the contract within *thirty calendar days* from receipt of the Alternative RASS.

### **Marketable Title**

Note that the SSA typically imposes upon the seller the obligation to convey marketable title to the investor or purchaser; thus, it is *incumbent upon the seller to negotiate with any junior lienholders concerning the release of their liens*, although the servicer is also permitted to negotiate with these junior lienholders on the borrower's behalf. Until recently, a servicer could agree to pay not more than a total of \$6,000 from the sale proceeds to junior lienholders in exchange for the voluntary release of their liens. However, before any payment may be made to these lienholders, *each must agree in writing not only to release the lien, but to **release the borrower from any claim or liability on the underlying debt***. As of an August 9, 2011 Supplemental Directive 11-08, this \$6,000 cap applies only to junior liens *secured by a mortgage* on the property. There is no cap regarding amounts the servicer may allow to be paid from the gross sale proceeds to non-mortgage junior liens (e.g., homeowner assessments, mechanics' liens, etc.) in exchange for the release of the of the lien and *full release of borrower liability*.

Until October 15, 2011, the investor who holds the note is eligible to receive an incentive payment from the U.S. Treasury equal to 33% of whatever amount it allows the servicer to pay to any junior lienholders, up to a cap of \$2,000. However, *as of October 15, 2011*, the investor will only be able to receive the *incentive payment for sale proceeds paid to subordinate mortgage lienholders* and they will not be reimbursed for any sale proceeds they allow to be paid to junior non-mortgage lienholders. Thus, if a servicer agreed to pay from the gross sale proceeds \$3000 to a second lienholder on a home equity line of credit and \$1500 to a third lienholder on a judgment lien in exchange for the written release by each of both the lien *and* any future liability of the borrower, then the servicer would be eligible for an incentive payment of \$1,485.00 (33% of \$4500) prior to October 15, 2011 and \$990 on or after October 15, 2011.

If the loan has mortgage insurance coverage, then the servicer must obtain mortgage insurer approval for HAFA foreclosure alternatives. If the mortgage insurer refuses to waive any claims against the borrower for any sums the insurer may pay, then the loan does not qualify for HAFA. Brokers should understand that the more junior liens there are, the more likely it is that the owner will need to hire an attorney to negotiate with each lienholder regarding the release of

the lien, as negotiating debt reduction and release with its attendant consequences is beyond the scope of one's broker license.

### **Incentive Compensation**

In addition to the maximum \$2000 reimbursement to the servicer for 33% of any sums the servicer allows to be paid to junior mortgage lienholders, HAFAs rules provide for two other incentive payments. Upon successfully concluding a short sale transaction, the seller-borrower is entitled to receive a relocation payment of \$3,000 that is paid at closing from the sale proceeds and is disclosed on the HUD-1 statement. The servicer is entitled to reimbursement of this \$3000 from the U.S. Treasury and also is entitled to receive a \$1500 payment for administrative and processing costs. As of October 15, 2011, the borrower may voluntarily apply the incentive payment towards the borrower's transaction costs, whether legal fees, overdue utility bills or minor repairs, but the borrower may *not* authorize any portion of the relocation fee to be paid to subordinate liens.

### **Foreclosure Proceedings, Administrative Fees and Escrow Monies**

*HAFAs does not prevent a servicer from initiating a foreclosure proceeding* while the servicer is evaluating a borrower's eligibility for HAMP or HAFAs or while the servicer and borrower are operating under an SSA. *However it does prohibit a servicer from completing or concluding a foreclosure action prior to determining the borrower's HAFAs eligibility or during the pendency of a SSA.* The servicer may not charge any administrative or processing fees to the borrower in connection with HAFAs. Rather, the servicer must pay all notarial, recording, title search and credit report fees, but may add these expenses to the outstanding debt in the event a short sale is not completed. The servicer also can require that the borrower waive reimbursement of any funds held in the borrower's escrow account and that these monies be paid to the investor instead.

### **Record Retention**

Servicers must retain all documents and information received during the process of determining borrower eligibility and qualification for HAFAs, as well as the evaluation outcome of various foreclosure alternatives, justifications for any denials, all SSAs, RASSs, etc., and reasons why a SSA is terminated or a HAFAs transaction expires without a completed short sale, for a period of *seven years* from the date of document collection.

Further, as of October 15, 2011, all servicers must post its HAFAs Policies on both the servicer's website and provide a copy to Fannie Mae, which is the Program Administrator. The U.S. Treasury will post the web location of each servicer's HAFAs matrix on [MakingHomesAffordable.gov](http://MakingHomesAffordable.gov). The matrix must identify each servicer's HAFAs eligibility criteria, program rules, any specific investor requirements or prohibitions and the servicer's process for periodically re-evaluating property value and reconciling any discrepancies between its value and market value data submitted by the borrower or the borrower's broker. Where a borrower qualifies under general HAFAs guidelines, then the servicer is to utilize HAFAs rather than a proprietary short sale or deed-in-lieu option unless prohibited by investor guidance, which investor restrictions or prohibitions must be documented and included in the file.

### **Debt Forgiveness**

A borrower-owner who successfully concludes a HAFA short sale may well walk away from the transaction free and clear of any debts that previously were secured by a lien on the property, whether for a purchase money mortgage, or a second mortgage, or a home equity line of credit, or a judgment lien or delinquent association dues or whatever. It depends. In order to receive any share of the sale proceeds, the junior lienholders must agree in writing to release the borrower-seller from any future liability on the underlying debt. Whether a junior lienholder may agree to release the lien, but decline to share in any proceeds in order to be able to pursue further collection efforts against the debtor-owner in the future is unclear.

Normally, forgiven debt is treated as taxable income to the debtor (in part because the IRS figures if someone had a loss, then someone else had a gain). However, due to the **Mortgage Forgiveness Debt Relief Act of 2007**, *a portion of the debt forgiven in a short sale may be excluded from the debtor-borrower's income if the loan balance was less than two million dollars*. Basically, the law provides that debt forgiven through mortgage restructuring, short sale, or foreclosure *may* be excluded from income **IF** the debt was used to buy, build or substantially improve the borrower's principal residence **and** was secured by the residence. Debt used to refinance qualifying debt is also eligible for the exclusion, but only up to the amount of the old mortgage principal just before refinancing. This tax relief applies to eligible debt forgiven in 2007, 2008, 2009, 2010, 2011 and 2012. The borrower should receive a Form 1099-C from the lender in the year of sale reflecting the amount of debt forgiven and the fair market value of the property sold or foreclosed. A borrower may claim this tax relief by filing Form 982.

It is entirely conceivable, however, that not all of the forgiven debt is excludable from income. For example, if \$10,000 of the home equity line of credit was used to purchase an automobile, rather than for improvements to the real property, that would not be excludable, or if in the refinance three years ago the owner borrowed \$20,000 more than the outstanding principal balance of the previous mortgage to pay off credit card and other debts, that would not be excludable from income. Further, *debt forgiven on second homes, rental property, business property, credit cards or car loans does not qualify for this tax relief — only debt secured by a borrower's principal residence which debt was used to purchase, build, or substantially improve the principal residence*. Because of the intricacies of these calculations and ever-changing tax laws, *real estate brokers should not attempt to advise seller-clients on any of these matters, but instead should recommend that the seller seek advice from a competent tax lawyer or accountant*.

### **Mortgage Assistance Relief Services Rule (MARS)**

In 2009 and 2010, the Federal Trade Commission (FTC) participated in three interagency nationwide sweeps targeting providers who claimed to arrange or provide mortgage relief for distressed homeowners. Lawsuits or administrative actions were initiated against more than 300 marketers of mortgage relief services. To address these widespread abuses, the FTC passed the **Mortgage Assistance Relief Services Rule (MARS)** that became effective December 29, 2010 (except the advance fee ban which became effective January 31, 2011). MARS may be found in volume 16 of the Code of Federal Regulations (CFR) Part 322. Jon Leibowitz, Chairman of the FTC, said:

At a time when many Americans are struggling to pay their mortgages, peddlers of so-called mortgage relief services have taken hundreds of millions of dollars

from hundreds of thousands of homeowners without ever delivering results. By banning providers of these services from collecting fees until the customer is satisfied with the results, this rule will protect consumers from being victimized by these scams.

Thus, while the *primary thrust of the Rule is directed at persons or entities who hold themselves out as being able to assist homeowners in negotiating and obtaining mortgage debt modification or reduction with the owner's lender/servicer, the definition of "mortgage assistance relief service" was sufficiently broad to encompass real estate brokers*, as it included any service to a consumer for compensation resulting from "negotiating, obtaining or arranging: (i) a short sale of a dwelling [or] (ii) A deed-in-lieu of foreclosure." [16 CFR §322.2(i)(6).]

### **Applicability of MARS to Real Estate Brokers**

The interim version of these Update materials covered in much greater depth the definitions and limitations imposed by the MARS rule, because at that time the Federal Trade Commission's interpretation was that it applied to real estate brokers assisting consumers in obtaining or arranging a short sale transaction. It was always clear, however, that *MARS does not apply to commercial property*, since it applies to the short sale of a *dwelling*, namely a residential structure, although not necessarily limited to the owner's primary residence. The comments clarify that, unlike HABA, MARS covers second homes and rental properties so long as they are used for residential purposes.

However, as a result of discussions between the National Association of REALTORS® and the FTC, the FTC issued an opinion on July 15, 2011 regarding its MARS enforcement policy as to real estate brokers. In essence, the FTC indicated that it would forbear enforcing MARS against real estate brokers who:

- 1) are licensed and remain in good standing pursuant to applicable state law requirements;
  - 2) operate in compliance with state laws governing the practices of real estate professionals;
- and
- 3) assist or attempt to assist a consumer in negotiating, obtaining or arranging a short sale of a dwelling in the course of securing the sale of the consumer's home.

The enforcement forbearance applies only to real estate brokers who assist consumers in negotiating or obtaining short sales and meet the above criteria, i.e., those who lawfully engage in and only provide brokerage services. However, the MARS provisions prohibiting 1) unfair and deceptive trade practices in or affecting commerce and 2) misrepresentations still apply to all brokers. If a broker engages in either, then s/he will be subject to all of the provisions of the Act, which include certain required disclosures and a prohibition against receiving any advance fees, among other things. Examples of acts the FTC may consider to be "misrepresentation" include:

- promising the consumer that the broker can obtain a certain price for the short sale, or
- claiming expertise in short sales when that is not true, or

- misrepresenting the results the broker may obtain, such as promising the borrower-owner that they will not have any deficiency from the sale when there is no basis for that assertion.

Prior to the issuance of the FTC's July 15, 2011 Stay on Enforcement announcement, the the FTC's Bureau of Consumer Protection issued an article, "Mortgage Assistance Relief Services Rule: A Compliance Guide for Business," which under the "How does the Rule apply to businesses in the mortgage industry?" stated:

The Rule covers real estate agents who promote their services as a way to help consumers to avoid foreclosure, for example, by getting a lender's approval for a short sale. However, the Rule doesn't cover real estate agents who don't promote their services this way, and *who only provide services to help people in buying or selling homes — like listing homes for sale, showing homes, or finding homes that meet buyers' needs.* (Italics added.)

The same article noted that:

It's illegal to provide "substantial assistance" to someone if you know — or consciously avoid knowing — that they're violating the Rule. What amounts to substantial assistance depends on the facts. Activities like procuring leads (the contact information of potential customers) for MARS providers, helping a MARS provider with its back-room operations, reviewing customer files, processing customers' payments, or contacting customers' servicers are just a few examples. If you work with MARS providers, review their policies, procedures, and operations to make sure they're complying with the Rule because willful ignorance on your part simply isn't a defense.

Thus, it would appear that *a broker who merely advertises his/her availability to assist consumers in residential sales transactions in general would not be subject to the Rule so long as the broker primarily provided brokerage services and did not attempt to negotiate acceptable terms with the owner's servicer or lender.* (Note that the broker would be free to counsel the seller on the merits of various offers and discuss possible terms of counteroffers to buyers, just as in normal residential sales transactions.) A broker may also be able to represent to the public that s/he possesses particular training or expertise in short sale transactions *so long as it is true* and if the broker limits his services to brokerage services and does not attempt to negotiate terms with the servicer, the broker may not be subject to the MARS rule.

Could a broker inform the seller of the HAFA program, encourage the seller to apply for consideration, and assist the seller in completing the necessary forms, but have no direct contact with the lender/servicer, without falling within the scope of the Rule? Good question, which again has no assured answer at present. While one might argue that the broker is merely educating his/her client and informing the client of one of several options, one should be cognizant of the comments to the Rule which state that it applies not only to third parties who contact servicers/lenders to obtain mortgage relief, "... but to instances in which a third party markets services to aid consumers who themselves work with lenders or servicers to obtain relief."

Clearly, if a real estate broker provides other forms of mortgage assistance relief services, then s/he will be subject to all of the MARS requirements. For example, a broker who offers short sale negotiation services in addition to his/her brokerage services will be subject to and must comply with all of the requirements of the MARS rule. Understand as well that a person who provides "...substantial assistance or support to any mortgage assistance relief service provider when that person knows or consciously avoids knowing that the provider is engaged in any act or practice that violates this rule" also violates the rule even though that person may not fall within the definition of a "provider."

Brokers who think they may fall within the scope of the MARS Rule obviously would be well advised to be thoroughly acquainted with its requirements. As of July 21, 2011 enforcement of this Rule transferred from the FTC to the newly created Consumer Financial Protection Bureau (CFPB). Both the CFPB and state Attorneys General have authority to enforce the MARS Rule. There is no private cause of action for consumers under the Rule.

### **Unauthorized Practice of Law**

A final factor in determining the services a real estate broker may provide in a short sale situation relates to a State Bar's position as to what constitutes the unauthorized practice of law. While Commission staff is not aware of any advisory or ethical opinions issued by the North Carolina State Bar related directly to short sale transactions, it may be that attempts to negotiate acceptable terms with servicers/lenders on behalf of the owner might be considered the practice of law. Certainly *to attempt to counsel the owner concerning the legal and tax implications and effects resulting from a short sale would be viewed as legal advice or services that should not be provided by someone who is not properly licensed as an attorney in North Carolina*. One might consider Authorized Practice Advisory Opinion 2002-1 issued by the State Bar January 24, 2003 as to whether a non-lawyer may handle a residential closing. The list of acts which if performed by a non-lawyer would constitute the unauthorized practice of law include:

- provides a legal opinion or advice in response to inquiries by any of the parties regarding legal rights or obligations created by a promissory note, the effect of a pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust;
- attempts to settle or resolve a dispute between the parties to the transaction that will have implications with respect to their respective legal rights or obligations;
- explains or recommends a course of action to a party to the transaction under circumstances that require the exercise of legal judgment or that have implications with respect to the party's legal rights or obligations.

A licensee who engages in the unauthorized practice of law violates Real Estate License Law (G.S. 93A-6(a)(11)) and may be subject to disciplinary action by the Real Estate Commission, in addition to possible criminal prosecution or investigation by the North Carolina State Bar.

## SHORT SALE FRAUD

The two areas most susceptible to fraud in a short sale situation are those in which 1) the owner-borrower has not experienced any particular hardship, but wishes to walk away from the property, despite their ability to make the monthly payments or 2) the prospective buyer engages in a practice known as “flopping.” The first practice is known in the mortgage industry as a strategic default and is neither well received nor explainable. The consequences for one who voluntarily walks away from a mortgage obligation by choice, rather than hardship, may be more severe than one who defaults because of a hardship event and lack of ability. For example, Fannie Mae recently announced that it is not willing to guarantee or purchase a loan for a person who has strategically defaulted on a loan within the preceding seven years, but it will consider guaranteeing or purchasing a loan as early as two or three years after a default arising from some hardship life event.

The default may be reflected on one’s credit history for up to ten years. Someone with a credit score in the low 700s may fall back into the high 500s after a mortgage default. Not only will the lower credit score make it more difficult to obtain credit, it may also influence future landlords’ willingness to rent and it may impact insurance rates as well, as most automobile insurance policies consider credit scores in setting premiums.

### “Flopping”

“Flopping” is similar to “flipping,” in that it involves a resale of the property within a few months after the purchaser has acquired title. It occurs when a buyer attempts to purchase property below what s/he believes the true fair market value is with the intent to sell it to another buyer for a higher price. The initial buyer may already have buyer #2 lined up, and the seller may or may not be complicit in the scheme. The problem is that no one tells the lender/servicer about buyer #2 who is willing to pay  $x$  dollars more than buyer #1, thereby lessening lender’s loss. Why would any lender approve a contract for  $x$  if it was aware that another person was willing to pay  $x + y$ ? Therein lies the loan fraud. A study released by CoreLogic in the Spring of 2011 estimated that the cost of flopping would exceed \$375 million in 2011, up 20% from 2010.

*Any broker* involved in a short sale transaction, whether as listing/seller agent or buyer agent, who becomes aware of such a scheme should exercise extreme caution if s/he attempts to stay in the transaction. All brokers, whether seller or buyer agents, minimally would be expected to alert the lender to the fact that there appears to be another buyer waiting in the wings and what the terms of the secondary contract between buyer#1 and buyer #2 are, if known to the broker. An agent who is approached by a buyer who outlines such a scheme would be wise to refuse to work with such buyer.

## CONCLUSION

As noted in an article in the May 2011 *Real Estate Bulletin* regarding short sales:

In summary, short sales involve significant risk to both sellers and buyers. Sellers may face many financial issues before, during and after the closing. The buyer must understand that not all short sales are bargains, that short sales generally are not short transactions, and just because the parties have signed a contract does not mean that the buyer will get the house. Brokers should be well versed on these types of transactions before engaging in a short sale and should fully disclose all potential issues to their clients.

Again, so long as brokers limit their services to brokerage activity, i.e., assisting the parties, namely, seller and buyer, in arriving at an agreement and acting as a conduit for the transfer of information, but not “negotiating” the terms of an acceptable contract with the seller’s lender, and certainly not attempting to advise the seller on the legal and tax consequences, then the broker most likely will not run afoul either of the North Carolina State Bar nor may that broker be subject to the Federal Trade Commission’s Mortgage Assistance Relief Services rule.

SHORT SALE ADDENDUM

Property: \_\_\_\_\_

Seller: \_\_\_\_\_

Buyer: \_\_\_\_\_

This Addendum is attached to and made a part of the Offer to Purchase and Contract ("Contract") between Seller and Buyer for the Property.

1. **Short Sale Defined:** For purposes of this Contract, a "Short Sale" is a sale where: (i) 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 Seller's closing costs and payment in full of all loans or debts secured by deeds of trust on the Property due and owing to one or more lender(s) and/or other lienholders ("Lienholders"), (ii) Seller does not have sufficient liquid assets to pay the costs of sale, and (iii) the Lienholders agree to release or discharge their liens upon payment of an amount less than the amount secured by their liens with or without the Seller being released from any further liability.

2. **Contingency:** This Contract is contingent upon Seller obtaining Short Sale approval from Lienholders effective through Closing ("Lienholders' Approval") in an amount which will enable Seller to close and convey title in accordance with the Contract. Seller shall use best efforts to obtain Lienholders' Approval and shall reasonably cooperate in the Short Sale process by providing such documentation as may be required. Buyer and Seller understand that Lienholders' Approval may take several weeks or months to obtain, and neither the Seller nor any real estate agent representing Seller or Buyer can guarantee the timeliness of Lienholders' review, approval or rejection. If Lienholders reject the Short Sale, then either party may terminate this Contract by written notice to the other party and the Earnest Money Deposit shall be refunded to Buyer.

3. **Notice of Lienholders' Approval and Buyer's Right to Terminate:** Seller agrees to provide Buyer with written notice of Lienholders' Approval. Buyer may terminate the Contract at any time prior to receipt of the Lienholders Approval by written notice to Seller, and, in such event the Earnest Money Deposit shall be refunded to Buyer.

4. **No Guarantee of Lienholders' Approval:** Buyer and Seller understand that:

- No Lienholder is required or obligated to accept a Short Sale
- Lienholders may require some terms of the Contract be amended in exchange for approval of a Short Sale, including acceleration of the Due Diligence Period and Settlement Date
- Buyer and Seller are not obligated to agree to any of Lienholders' proposed terms
- **NEITHER THE BUYER, THE SELLER, THE SETTLEMENT AGENT NOR THE BROKERS IN THIS TRANSACTION HAVE ANY CONTROL OVER LIENHOLDERS' APPROVAL, OR ANY ACT, OMISSION OR DECISION BY ANY LIENHOLDERS IN THE SHORT SALE PROCESS.**

5. **No Repairs:** Buyer acknowledges that Seller may not be financially able to make any repairs to the Property that Buyer may request. This acknowledgement shall not affect any rights that Buyer may have under the Contract to terminate the Contract as a result of any election Seller may make not to make repairs.

6. **Other Offers:** Buyer and Seller understand that additional offers may be received by the Seller's Agent, which must be presented to the Seller and to Lienholders pursuant to North Carolina law. Such offers may be accepted by the Seller as backup contracts and forwarded to Lienholders for review and approval. Buyer and Seller are advised to seek advice from an attorney to determine their rights and obligations.

7. **Foreclosure:** Seller represents that to the best of Seller's knowledge, a foreclosure proceeding  has not  has been filed with respect to the Property. Further, if during the Short Sale process a foreclosure proceeding is filed, the Seller shall disclose such foreclosure filing to the Buyer. Buyer and Seller understand that if Closing does not occur before the completion of a foreclosure of the Property, Seller will lose all rights and interest in the Property. In such event, the Contract shall be void, and the Earnest Money Deposit shall be refunded to Buyer. Seller and Buyer acknowledge that if a real estate agent involved in the transaction contemplated



This form jointly approved by:
North Carolina Bar Association
North Carolina Association of REALTORS®, Inc.



STANDARD FORM 2A14-T
Revised 7/2011
© 7/2011

Buyer initials \_\_\_\_\_ Seller initials \_\_\_\_\_

by the Contract knows or reasonably should know that a foreclosure proceeding with respect to the Property has been filed, the agent is required by law to disclose it to the Buyer as a material fact.

8. **Tax Consequences and Advice:** Seller is advised to seek advice from an attorney, a certified public accountant or other professional regarding the credit, legal and tax consequences of a Short Sale.

IN THE EVENT OF A CONFLICT BETWEEN THIS ADDENDUM AND THE CONTRACT, THIS ADDENDUM SHALL CONTROL, EXCEPT THAT IN THE CASE OF SUCH A CONFLICT AS TO THE DESCRIPTION OF THE PROPERTY OR THE IDENTITY OF THE BUYER OR SELLER, THE CONTRACT SHALL CONTROL.

THE NORTH CAROLINA ASSOCIATION OF REALTORS®, INC. AND THE NORTH CAROLINA BAR ASSOCIATION MAKE NO REPRESENTATION AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION OF THIS FORM IN ANY SPECIFIC TRANSACTION. IF YOU DO NOT UNDERSTAND THIS FORM OR FEEL THAT IT DOES NOT PROVIDE FOR YOUR LEGAL NEEDS, YOU SHOULD CONSULT A NORTH CAROLINA REAL ESTATE ATTORNEY BEFORE YOU SIGN IT.

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Buyer \_\_\_\_\_ (SEAL)

Seller \_\_\_\_\_ (SEAL)

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Buyer \_\_\_\_\_ (SEAL)

Seller \_\_\_\_\_ (SEAL)

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Buyer \_\_\_\_\_ (SEAL)

Seller \_\_\_\_\_ (SEAL)

## Contact Your Mortgage Company

Over one hundred mortgage companies have agreed to participate in the Home Affordable Modification Program SM (HAMP SM). Below is a list of companies who are participating and the contact information for submitting an application. In addition, all mortgage companies with loans owned by Fannie Mae and Freddie Mac are required to participate. Visit the Loan Look Up to determine if your loan is held by Fannie Mae or Freddie Mac.

If you have additional questions about the program, please call the Homeowner's HOPE™ Hotline at 1-888-995-HOPE (4673). If you need help working with your mortgage company, or believe that you have been wrongfully denied for a modification, please call the hotline and ask for "MHA Help."

### **Allstate Mortgage Loans & Investments**

866-351-0200  
P.O. 1201,  
Crystal River, FL 34423  
352-351-4557  
HAMP

### **Amarillo National Bank**

1-806-378-8000  
410 S. Taylor,  
Amarillo, TX 79101  
1-806-356-1449  
FHA-HAMP

### **American Eagle Federal Credit Union**

800-842-0145  
Attention: Loss Mitigation  
1 Corporate Drive  
Lake Zurich, IL 60047  
847-574-7658  
HAMP

### **American Financial Resources Inc.**

1-800-316-9508  
9 Sylvan Way,  
Parsippany, NJ 07054  
1-973-782-2573  
FHA-HAMP

### **American Home Mortgage Servicing, Inc.**

877-304-3100  
Attn: HAMP Processing  
1525 S. Belt Line Road  
Coppell, TX 75019  
866-452-1837  
HAMP

### **AMS Servicing, LLC**

866-919-5608  
3374 Walden Avenue  
Buffalo, NY 14043  
716-204-3875  
HAMP

### **Aurora Financial Group, Inc.**

1-800-648-0345  
9 Eves Drive  
Marlton, New Jersey 08053  
1-856-355-4765  
FHA-HAMP

### **Aurora Loan Services LLC**

800-550-0508  
P.O. Box 1706  
2617 College Park  
Scottsbluff, NE 69363-1706  
866-517-7975  
HAMP; FHA-HAMP

### **Banco Popular de Puerto Rico**

1-787-775-1100  
Calle Angel Buonomo 339,  
San Juan, PR 00918  
1-787-706-6121  
FHA-HAMP; RD-HAMP

### **Bank of America, N.A.**

MHA Escalations Unit  
PO Box 940070  
Simi Valley, CA  
866-382-0489; 800-720-3758  
HAMP; FHA-HAMP; RD-HAMP; 2MP; FHA-  
2LP

**Bank United**  
866-615-0662  
Attn: Modification Department  
Mail Code: DO4-RESALT-560  
7815 N.W. 148th Street  
Miami, FL 33016  
877-263-8930  
HAMP

**Bay Federal Credit Union**  
888-422-9333  
3333 Clares Street  
Capitola, CA 95010  
831-479-6027  
HAMP

**Bayview Loan Servicing, LLC**  
800-457-5105  
Attn: Specialized Asset Management  
4425 Ponce De Leon Blvd., 5TH Floor  
Coral Gables, FL 33146  
877-360-9593 or 305-646-9943  
HAMP; 2MP; FHA-2LP

**Bramble Savings Bank**  
1-513-248-1222  
954 State Route 28  
Cincinnati, Ohio 45150  
1-513-965-3953  
HAMP

**Capital International Financial, Inc.**  
1-305-442-1256  
395 Alhembra Circle, Suite 200  
Coral Gables, FL 33134  
1-305-442-2516  
FHA-HAMP

**Carrington Mortgage Services, LLC**  
888-267-2417  
Attention: Home Retention  
P.O. Box 54285  
Irvine, CA 92619-4285  
877-267-1331  
HAMP

**CCO Mortgage**  
877-745-7366  
10561 Telegraph Road

Glen Allen, VA 23059  
888-777-1631  
HAMP

**Central Florida Educators Federal Credit Union**  
800-771-9411  
P.O. Box 958471  
Lake Mary, Florida 32795-9814  
Attn: Real Estate - HAMP Team  
407-893-5727  
HAMP

**Chase Home Finance LLC**  
866-550-5705  
*Regular Mail*  
PO Box 469030  
Glendale, CO 80246  
*Overnight Mail*  
Attn: Chase Fulfillment Center  
4500 Cherry Creek Drive South  
Suite 410  
Glendale, CO 80246  
866-989-1356  
HAMP; FHA-HAMP; RD-HAMP; 2MP; FHA-2LP

**CitiMortgage, Inc.**  
866-915-9417  
Citi Ham Trial Agreements NTSB 1680,  
680 Colwell Blvd  
Irving, TX 75039  
HAMP; FHA-HAMP; 2MP; FHA-2LP

**Citizens 1st National Bank**  
800-311-7531  
606 S. Main Street  
Princeton, IL 61356  
815-872-0247  
HAMP

**Community Bank & Trust Company**  
125 N. State Street,  
Clarks Summit, PA 18411  
570-586-0177  
HAMP

**Community Credit Union of Florida**  
1-321-690-2328  
1030 South US Highway 1,

Rockledge, FL 32955  
1-321-636-3121  
HAMP; 2MP

**Countrywide Home Loans Servicing LP**  
800-720-3758  
PO Box 940070,  
Simi Valley, CA. 93094-0070  
866-382-0489  
HAMP; FHA-HAMP; RD-HAMP; 2MP; FHA-  
2LP

**CU Mortgage Services, Inc.**  
1-651-631-3111  
500 Main Street,  
New Brighton, MN 55112  
1-651-787-9536  
FHA-HAMP

**CUC Mortgage Corporation**  
800-342-4998  
P.O. Box 12670  
Albany, NY 12212  
HAMP

**DuPage Credit Union**  
800-323-2611  
Attn: Alternative Loan Solutions  
P O Box 3930  
Naperville, IL 60567  
630-305-6030  
HAMP

**Eaton National Bank & Trust Co**  
937-456-5544  
110 West Main Street,  
Eaton, OH 45320  
937-456-6847  
HAMP

**EMC Mortgage Corporation**  
800-723-3004  
*Regular Mail*  
Chase/EMC Fulfillment Center  
PO Box 293150  
Lewisville, TX 75029  
*Overnight Mail*  
Chase/EMC Fulfillment Center  
2780 Lake Vista Drive  
Lewisville, TX 75067

917-849-2677  
HAMP; FHA-HAMP; 2MP; FHA-2LP

**Farmers State Bank**  
800-350-2844  
11 S. Main St., P.O.Box 801,  
West Salem, OH 44287  
419-853-4730  
HAMP

**Fay Servicing, LLC**  
1-800-495-7166  
939 W. North Avenue  
Chicago, IL 60642  
1-312-278-2540  
HAMP

**Fidelity Homestead Savings Bank**  
504-569-3490  
201 St. Charles Ave, 20th Floor  
New Orleans, LA 70170  
504-569-3537  
HAMP

**First Bank**  
800-760-2265  
1 First Missouri Center  
St. Louis, MO 63141  
314-264-0220  
HAMP

**First Federal Bank of Florida**  
1-386-754-0090  
4705 West US Hwy 90,  
Lake City, FL 32056  
1-386-754-7161  
FHA-HAMP

**First Financial Bank, N.A.**  
1-812-238-6311  
1 First Financial Plaza  
Terre Haute, Indiana 47807  
1-812-238-6137  
HAMP

**First Keystone Bank**  
610-565-6210  
22 West State Street  
Media, PA 19063

610-892-5122  
HAMP

**First Mortgage Coporation**

1-800-395-4778  
3230 Fallow Field Drive,  
Diamond Bar, CA 91765  
1-909-869-6685  
FHA-HAMP

**Flagstar**

1-800-968-7700  
5151 Corporate Drive,  
Troy, MI 48098  
1-888-705-1596  
FHA-2LP

**Franklin Credit Management Corporation**

800-255-5897  
Attn: Loss Mitigation  
101 Hudson Street 25th Floor  
Jersey City, NJ 07302  
201-839-4545  
HAMP

**Franklin Savings**

1-513-469-8000  
4750 Ashwood Dr.,  
Cincinnati, OH 45241  
1-513-469-5360  
HAMP; FHA-HAMP

**Fresno County Federal Credit Union**

800-613-2328  
4979 E. University Ave  
Fresno, CA 93727  
559-451-2496  
HAMP

**Gateway Mortgage Group, LLC**

1-918-712-9000  
6910 E. 14th Street,  
Tulsa, OK 74112  
1-918-858-8354  
FHA-HAMP

**Glass City Federal Credit Union**

800-837-3595  
1340 Arrowhead Drive

Maumee, OH 43537  
419-887-1099 HAMP

**GMAC Mortgage LLC**

800-766-4622  
2711 North Haskell Ave, Suite 900  
Dallas, TX 75204  
866-709-4744  
HAMP; FHA-HAMP; 2MP; FHA-2LP

**Grafton Suburban Credit Union**

508-839-5493  
86 Worcester Street,  
North Grafton, MA 01536  
508-839-5750  
HAMP

**Great Lakes Credit Union**

800-442-3488  
HAMP

**Greater Nevada Mortgage Services**

800-421-6674  
4070 Silver Sage Drive  
Carson City, NV 89701  
775-884-7041  
HAMP

**Green Tree Servicing LLC**

800-643-0202  
7360 S Kyrene Road T214  
Tempe, AZ 85283  
877-265-9717  
HAMP; FHA-HAMP; 2MP; FHA-2LP

**Guaranty Bank**

1-800-235-4636  
345 Saint Peter Street,  
Saint Paul, MN 55102  
1-414-410-1400  
FHA-HAMP

**Hartford Savings Bank**

800-844-3812  
1400 Schauer Drive,  
Hartford, WI 53027  
262-673-0459  
HAMP

**Hillsdale County National Bank**

517-439-6121  
One South Howell Street  
Hillsdale, MI 49242  
517-437-3151  
HAMP

**Home Loan Services, Inc.**

800-622-5035  
Loan Services P.O. Box 1838  
Pittsburgh, PA 15230-1838  
412-499-3400  
HAMP; FHA-2LP

**HomEq Servicing**

877-867-7378  
P.O. Box 160248  
Sacramento, CA 95816-0248  
866- 554-5325  
HAMP

**HomeStar Bank and Financial Services**

815-468-2265  
3 Diversatech Dr.,  
Manteno, IL 60950  
815-468-2378  
HAMP

**Horicon Bank**

920-485-3080 ext.7310  
326 E Lake Street, PO 126  
Horicon, WI 53032  
920-485-3059  
HAMP; RD-HAMP

**Horizon Bank, NA**

888-873-2640  
515 Franklin Square  
Michigan City, IN 46360  
219-874-9374  
HAMP

**Iberiabank**

800-968-0801  
1680 Fruitville Rd.  
Sarasota, FL 34236  
941-556-5821  
HAMP

**IBM Lender Business Processing Services (LBPS)**

866-570-5277  
PO Box 4121  
Beaverton, OR 97076-4121  
877-649-0743  
HAMP

**IBM Southeast Employees' Federal Credit Union**

1-800-873-5100  
1000 NW 17th Ave.  
Delray Beach, FL 33445  
1-561-982-7713  
HAMP

**IC Federal Credit Union**

1-800-262-1001  
300 Bemis Road  
Fitchburg, MA 01420  
1-978-353-1375  
HAMP

**Idaho Housing and Finance Association**

1-208-331-4726  
565 W. Myrtle Street  
Boise, ID 83702  
1-208-331-4801  
HAMP

**iServe Residential Lending, LLC**

1-888-875-8326  
13520 Evening Creek Drive Suite 400  
San Diego, CA 92128  
1-480-614-6710  
HAMP; 2MP; FHA-HAMP

**iServe Servicing, Inc.**

1-888-858-7378  
222 W. Las Colinas Blvd. Ste. 1252E  
Irving, TX 75039  
1-214-496-9501  
HAMP; 2MP; FHA-HAMP

**J.P. Morgan Chase Bank, NA**

866-550-5705  
*Regular Mail*  
PO Box 469030  
Glendale, CO 80246

*Overnight Mail*

Attn: Chase Fulfillment Center  
4500 Cherry Creek Drive South  
Suite 410  
Glendale, CO 80246  
866-989-1356  
HAMP; FHA-HAMP; RD-HAMP  
2MP; FHA-2LP

**James B. Nutter & Company**

1-800-798-3946  
4153 Broadway  
Kansas City, MO 64111  
1-816-751-6971  
FHA-HAMP

**Lake City Bank**

888-522-2265  
ATTN: Candy Little  
PO BOX 1387  
Warsaw, IN 46581-1387  
574-267-9128  
HAMP

**Lake National Bank**

440-205-8100  
PO Box 1048  
Mentor, Ohio  
44061-1048  
HAMP

**Liberty Bank and Trust Co**

1-800-883-3943  
6600 Plaza Drive,  
Suite 601, New Orleans, LA 70127  
1-504-241-7433  
HAMP

**Litton Loan Servicing**

800-247-9727  
4828 Loop Central Drive  
Houston, TX 77081  
713-793-4923  
HAMP

**Los Alamos National Bank**

800-684-5262  
PO Box 60  
Los Alamos NM 87544  
505-663-4053 HAMP

**M&T Bank**

1-888-395-1010  
1100 Wehrie Drive,  
Buffalo, NY 14221  
1-716-848-7930  
FHA-HAMP

**Magna Bank**

1-800-553-0558  
6655 Poplar Ave #201,  
Germantown, TN 38138  
1-901-309-6705  
HAMP; RD-HAMP

**Marix Servicing, LLC**

866-406-2749  
1925 W. Pinnacle Peak Road  
Phoenix, AZ 85027  
623-249-2070  
HAMP; FHA-HAMP; RD-HAMP

**Marsh Associates, Inc.**

1-800-686-3600  
2448 Park Road,  
Charlotte, NC 28203  
1-704-347-5754  
FHA-HAMP

**Midland Mortgage Company**

1-800-552-3000  
999 NW Grand Blvd,  
Oklahoma City, OK  
1-405-767-5500  
HAMP; FHA-HAMP; RD-HAMP

**Midwest Bank and Trust Co.**

708-456-4700  
1606 N. Harlem Avenue  
Elmwood Park, IL  
708-456-9437  
HAMP

**Midwest Community Bank**

1-815-235-6137  
510 Polk Crest Drive  
Freeport, IL 61032  
1-815-235-1855  
HAMP

**Mission Federal Credit Union**

800-500-6328 x2074  
Attn: Loss Mitigation  
PO Box 919023  
San Diego, CA 92121  
858-546-2058  
HAMP

**MorEquity, Inc.**

800-441-3805  
1) PO Box 3788  
Evansville IN 47736-9984  
2) 601 NW Second Street,  
Evansville IN 47708  
812-475-7074  
HAMP

**Mortgage Center, LLC**

866-856-3750  
20300 Civic Center Dr, # 403  
Southfield, MI 48076  
248-799-8556  
HAMP

**National City Bank**

800-523-8654  
3232 Newmark Drive  
Miamisburg, OH 45342  
937-910-4009  
HAMP; FHA-HAMP; 2MP; FHA-2LP

**Nationstar Mortgage LLC**

888-850-9398  
Attn: HAMP  
350 Highland Drive  
Lewisville, TX 75067  
214-488-1993  
HAMP; FHA-HAMP; 2MP; FHA-2LP;  
RD-HAMP

**Navy Federal Credit Union**

1-888-842-6328  
3820 Follin Lane S.E  
Vienna, VA 22180  
703-255-7947  
HAMP

**Oakland Municipal Credit Union**

510-637-6600

250 Frank H. Ogawa Plaza Suite 6301  
Oakland , CA 94612  
510-238-5227  
HAMP

**Ocwen Financial Corporation, Inc.**

800-746-2936  
1661 Worthington Rd Ste 100  
West Palm Beach, FL 33409  
407-737-6174  
HAMP; FHA-HAMP

**OneWest Bank**

800-781-7399  
Indymac - 1, 2900 Esperanza Crossing  
Austin, TX 78758  
866-235-2366  
HAMP; 2MP

**ORNL Federal Credit Union**

800-676-5328  
Attn: Mortgage Modification Dept  
221 S. Rutgers Avenue  
Oak Ridge, TN 37830  
865-481-5810  
HAMP

**Park View Federal Savings Bank**

440-914-3900  
30000 Aurora Road  
Solon, OH 44139  
440-914-3656  
HAMP

**Pathfinder Bank**

1-315-343-0057  
214 West First Street  
Oswego, NY 13126  
1-315-207-8035  
HAMP

**PennyMac Loan Services, LLC**

866-545-9070  
Attn: Karen Denton  
27001 Aguora Road, Suite 350  
Calabasas, CA 91301  
818-224-7510  
HAMP; FHA-HAMP; 2MP

**PNC Bank, National Association**

800-523-8654  
3232 Newmark Drive  
Miamisburg, OH 45342  
937-910-4009  
HAMP; 2MP; FHA-2LP

**Purdue Employees Federal Credit Union**

800-627-3328  
P.O. Box 1950  
West Layette IN 47996-1950  
765-497-7477  
HAMP

**Q Lending, Inc.**

517-439-6121  
1 Corporate Drive, Suite 360  
Lake Zurich, IL 60047  
847-574-7658  
HAMP

**Quantum Servicing Corporation**

813-371-0270  
6302 E. MLK Blvd., Suite 300  
Tampa, FL 33619  
HAMP

**RBC Bank (USA)**

1-866-777-2179  
3201 Beechleaf Court  
Raleigh, NC 27604  
1-877-530-0765  
FHA-HAMP

**Residential Credit Solutions**

800-737-1192  
4282 North Freeway  
Fort Worth TX 76137  
888-775-7250  
HAMP; FHA-HAMP; 2MP; FHA-2LP

**RG Mortgage Corporation**

888-264-4674  
PO Box 362394  
San Juan, PR. 00936-2394  
787-756-2845  
HAMP

**RoundPoint Mortgage Servicing Corp.**

877-426-8805  
P.O. Box 19409  
Charlotte, NC 28219-9409  
888-364-5558  
HAMP

**Saxon Mortgage Services**

800-594-8422  
Attn:Home Preservation HMP Documentation  
4708 Mercantile Drive  
North Fort Worth, TX 76137  
888-240-1885  
HAMP; FHA-HAMP; FHA-2LP

**Schmidt Mortgage Company**

1-800-686-3600  
20545 Center Ridge Rd. 250,  
Rocky River, OH 44116  
1-440-895-2181  
FHA-HAMP

**Schools Financial Credit Union**

800-962-0990  
C/O Real Estate Department  
1485 Response Rd Suite 126  
Sacramento CA, 95815  
916-569-2047  
HAMP

**SEFCU**

866-733-2880  
700 Patroon Creek Blvd  
Albany, NY 12206  
518-464-5213  
HAMP

**Select Portfolio Servicing**

888-818-6032  
PO BOX:65250  
Salt Lake City, UT 84165-0250  
3815 S. West Temple  
Salt Lake City, UT 84107  
801-293-3936  
HAMP; FHA-HAMP; FHA-2LP

**Servis One Inc.,dba BSI Financial Services**

866-209-4178  
Attn: HAMP Department

P.O. Box 517, 314 S. Franklin Street,  
Titusville, PA 16354  
814-217-1366  
HAMP; FHA-HAMP; 2MP

**ShoreBank**

800-905-7725  
Attn: Kenisha Davis  
3401 South King Drive,  
Chicago, IL 60466  
773-420-4501  
HAMP

**Silver State Schools Credit Union**

800-357-9654  
1 Corporate Drive Suite 360  
Lake Zurich, IL 60047  
847-574-7658  
HAMP

**Specialized Loan Servicing, LLC**

800-315-4757  
8742 Lucent Blvd., Suite 300  
Highlands Ranch, CO 80129  
720-241-7526  
HAMP

**Sterling Savings Bank**

800-772-7791  
Attn: Tram Le  
111 N. Wall  
Spokane, WA 99201  
509-624-8038  
HAMP

**Stockman Bank of Montana**

1-406-234-8420  
700 Main Street  
Miles City, MT 59301  
1-406-234-8419  
FHA-HAMP

**Suburban Mortgage Co. of New Mexico**

1-505-298-7456  
3707 Eubank Blvd. N./E.  
Albuquerque, NM  
1-505-292-4915  
HAMP

**Technology Credit Union**

800-553-0880  
Attn: LAD  
2010 N First Street  
San Jose, CA 95131  
408-453-8742  
HAMP

**The Golden 1 Credit Union**

800-553-0880  
8945 Cal Center Drive  
Sacramento, CA 95826  
847-574-7658  
HAMP

**U.S. Bank National Association**

866-932-0462  
P.O. BOX 20005  
Owensboro, KY 42304-0005  
HAMP

**United Bank**

1-715-835-6865  
3625 Gateway Dr.  
Eau Claire, WI 54701  
715-835-6870  
HAMP

**United Bank Mortgage Corporation**

800-968-1990  
900 East Paris SE  
Grand Rapids MI 49546  
616-559-4631  
HAMP

**Vantium Capital, Inc.**

866-660-5804  
6500 International Parkway Suite 1500  
Plano, TX 75093  
972-444-3356  
HAMP

**Visit Financial Corp.**

1240 Broadcasting Rd.  
Wyomissing, PA 19605  
HAMP

**Wachovia Bank, NA**

800-922-4684  
1000 Blue Gentian Road, Suite 300  
Eagan, MN 55121  
866-359-7363  
HAMP

**Wachovia Mortgage, FSB**

800-922-4684  
866-359-7363  
HAMP

**Wealthbridge Mortgage Corp.**

866-702-4865  
15455 NW Greenbrier Pkwy, Ste 111, Beaverton,  
OR 97006  
503-597-7518  
HAMP

**Wells Fargo Bank, NA**

800-678-7986  
HAMP Application Documents  
1000 Blue Gentian Road  
Suite 300 X9999-01N  
Eagan, MN 55121

*Customer Service Correspondence*

PO Box 10335  
MAC: X2302-017  
Des Moines, IA 50306  
866-359-7363  
HAMP; FHA-HAMP; RD-HAMP; 2MP;  
FHA-2LP

**Wescom Central Credit Union**

888-493-7266  
5601 E. La Palma Avenue  
Anaheim, CA 92807  
626-535-1357  
HAMP

**Weststar Mortgage, Inc.**

1-703-497-3995  
3350 Commission Ct  
Woodbridge, VA 22192  
1-703-643-1002  
FHA-HAMP

**Wilshire Credit Corporation**

800-720-3758  
PO Box 8517  
Portland, OR 97207-8517  
866-382-0489  
HAMP

**Yadkin Valley Bank**

336-258-6252  
PO Box 96  
Pfafftown, NC 27040  
336-258-6252  
HAMP