

“Short Sale” Explanation and Considerations

A “short sale” is a situation where the Seller’s net proceeds, after payment of all applicable closing costs and other charges payable by the Seller from the sale of a property, are insufficient to pay all outstanding mortgages and other amounts secured by a lien against the property at closing. No one likes a “short sale.” There are situations, however, where a lender may be willing to accept less than it is owed (and still provide a release of the lien of its recorded mortgage or deed of trust) in order to allow a Seller to convey “clear title”.

To the lender, it is essentially a business decision. For the Seller (and Buyer) of a property in a potential “short sale” situation, there are a variety of matters to consider. They include (but are not limited to) the following:

Seller Concerns

- Many lenders would rather attempt to work with a delinquent borrower before resorting to the expense and hassle of a foreclosure.
- A foreclosure will seriously negatively impact your credit report scores for many years. Even in a “short sale” there may be adverse credit consequences. Just because a lender may agree to forgive a portion of the debt and allow the sale to occur does not mean it will not report you as “failing to pay as agreed” and showing a write-off.
- To gain your lender’s cooperation, it should be expected that you will need to provide evidence of “hardship”, including accurate records of your income (*e.g.*, tax returns) job history (*e.g.*, pay stubs) assets, liabilities and expenses (*e.g.*, bills/statements).
- You need to be honest and act in good faith. It may be problematic to get your lender’s cooperation (and possibly expose you to liability) if your original loan application information was not complete or accurate in all respects.
- You need to be realistic. “Short term” problems (*e.g.*, one-time expenses or temporary set-backs) are more likely capable of being resolved than are “long term” (*e.g.*, loss of employment) situations. Ultimately, there must be an ability to repay on terms that are at (or at least near) market rate.
- If you decide to proceed, your property will be advertised as a “short sale” or “pre-foreclosure property” in the MLS and other media (*i.e.*, this information will become public). You will also need to authorize your broker to contact your lender and its representatives to discuss and obtain relevant information regarding the status of your loan, and to share this information with potential buyers, other brokers and title companies in order to successfully close on the sale of your property.
- Economic aid and forbearance options are politically fluid and ever changing. Your broker will do his or her best to help, but ultimately you are responsible to take charge.
- Consult with your attorney, credit counselor or other professional assistance, including your tax advisor for possible tax implications due to forgiveness of debt and other financial implications. Capital gains taxes may also be due.

Other Possible Solutions

Depending on the number of payments missed, the size of the loan, financial outlook of the borrower and other considerations, a lender may offer a variety of potential solutions.

Repayment Plans – If you have not missed many payments, a lender may work with you to form a repayment plan that allows you to pay off past due amounts bit by bit (in addition to your regular loan payments).

Reinstatement – Should you be experiencing a temporary shortfall of cash, your lender may provide an extended period of time to pay off past due amounts. In most cases you will still be responsible for any late fees or penalties already incurred.

Forbearance – If you need temporary relief, a lender may offer a forbearance plan. A forbearance plan suspends or reduces your payments for a set period of time, with the unpaid amount to be paid later in either pieces or one lump sum.

Loan Modification – Longer term financial problems that affect overall income are sometimes solved by loan modification. Any loan term may be modified by a lender - the rate, payoff date and even the total amount owed. A lender may modify loan terms if you cannot make payments under the current agreement, but is reasonably sure that you will be able to consistently make future payments under new terms. Modifications are extreme measures used sparingly, but are an option for lenders who conclude that foreclosure would be more costly.

Other Options - Refinancing a loan with a different lender, filing bankruptcy, allowing a foreclosure to proceed or negotiating a deed in lieu of foreclosure are some (but not all) additional options that may be more appropriate. As always, you should consult with professional advisors to determine what may be best for your personal situation.

Buyer Concerns

- There can be no assurance that a Seller's lender(s) will agree to accept less money than what is currently outstanding under the Seller's loan(s). There can also be no assurance as to the timing of any decision by a lender in this regard.
- Naturally, a lender will be more likely to approve the proposed terms of any offer you may make if your offer does not contain multiple (or any) contingencies. On the other hand, absent appropriate contingency(ies) you may be exposed to the cost of paying for inspections, title searches and commitments, loan fees (and other possible costs) without assurance that the transaction will ever close.
- The MAR form "Short Sale Rider" (MSC-2015) requires a Seller's lender to provide written approval of the terms of the Contract ("Notice of Acceptance"). Except as described below with respect to the optional "Approval Deadline," that could occur as late as the scheduled Closing Date (*i.e.*, by providing a full release and satisfaction of the mortgage and/or other recorded lien at the Closing). Until such Notice of Acceptance is provided (or the Seller elects to waive this contingency) you may elect to terminate the Contract by giving written notice to the Seller.
- A Seller may elect to waive this contingency (and thereby eliminate your ability to terminate the Contract solely on account of this contingency) by notifying you in writing that the Seller is now able to perform without necessity of approval by its lender(s). If a Seller does so, but is thereafter unable to perform its obligations under the Contract (*e.g.*, deliver "clear title") any rights and remedies you may have against the Seller are expressly reserved. Nevertheless, you should consider how solvent the Seller may be, and the likelihood of actually being able to successfully recover damages in this regard.
- As an option, MSC-2015 allows a Buyer to provide that its "due diligence" time frames to obtain a loan commitment, review title and survey, and to conduct inspections will not begin until receipt of the "Notice of Acceptance" described above. This would not serve to extend the scheduled Closing Date, but an "Approval Deadline" may also be inserted in MSC-2015 by which to guarantee a minimum time period in advance of the scheduled Closing Date to allow you to conduct the due diligence activities mentioned above. If the Approval Deadline is not timely met, the Contract is to automatically terminate. While these optional provisions may provide a Buyer with additional protection, they may also serve to lessen the chances that your offer will be approved by the Seller's lender.
- Your broker will do his or her best to help, but ultimately you are responsible to decide the terms of any offer you are willing to make and the level of risk you are willing to accept in connection therewith. As always, you should consult with your attorney and other professional advisors for specific legal advice and other possible considerations.