

**\*\*\*These questions and answers represent a majority of the specific issues contained in the questions that were collected at the Fraud Symposium. The answers are a collaborative effort from DOJ, DCBS and OREA. These questions and answers will be posted on OREA's web page.\*\*\***

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**Frequently Asked Questions**  
**Short Sale Negotiators & Foreclosure Consultants**

**The Oregon Real Estate Agency (OREA), Department of Justice (DOJ) and the Department of Consumer and Business Services (DCBS) cannot give legal advice, interpret real estate terms, or provide strategy for real estate transactions. It is the responsibility of the licensee to ensure that his or her behavior complies with Oregon Real Estate Statutes, Rules, the Unlawful Trade Practices Act and all other applicable laws**

**\*\*\*The following FAQ's are meant to provide general information to licensees and the public. These FAQ's do not address specific situations as every real estate transaction is unique. All licensees and professionals should seek independent legal counsel if any of the pertinent rules or statutes are unclear.\*\*\***

**\*\*\*In order to have a complete understanding of short sale negotiators and foreclosure consultants, you should read the entire list of FAQ's.\*\*\***

**1. What is a short sale?**

A "short sale" is a term to describe a transaction where the sale price of the property will not be sufficient to generate proceeds to pay off the existing mortgage or mortgages, and where the lender(s) agrees to accept less than full payoff. It is a type of loan modification.

**2. What is a short sale negotiator?**

A short sale negotiator is someone who provides assistance in negotiating with the lender on the seller's behalf. The goal is to convince the lender to accept less than the debt amount on the mortgage(s). There are currently several variations of the term "short sale negotiator." These are just a few of the terms which exist and are not inclusive: "debt negotiator", "debt resolution experts", "loss mitigation practitioners", "foreclosure rescue negotiators", "short sale processors", "short sale coordinators" and "short sale expeditors."

**3. May a real estate licensee act as a short sale negotiator within the state of Oregon?**

Yes, but there are strict requirements that a licensee must follow. An Oregon real estate broker may handle a short sale if he or she does NOT charge any special fees related to the short sale. The handling of the short sale under this method is viewed as being incidental and is provided as a free service. If a licensee engages in short sale negotiations and charges a fee beyond a normal real estate commission, the licensee MUST be registered with DCBS.

As with any important business decision, you should probably speak to your legal counsel about the license or registration that is appropriate.

(For additional information on licensees acting as short sale negotiators, see Question # 10)

#### **4. Do short sale negotiators need to be licensed with the state of Oregon?**

Generally, yes. In 2009, the legislature enacted two bills related to short sales and loan modifications. House Bill 2191 created a registration requirement for persons who provide debt management services and House Bill 2189 created a licensing requirement for persons doing mortgage loan origination. The Department of Consumer and Business Services (DCBS) is responsible for both programs.

A person or company offering short sales / loan modifications in Oregon may legally do so with:

- 1) A debt management company registration;
- 2) A mortgage loan originator license; or
- 3) A real estate broker license if they do NOT charge any special fees related to short sales.

(\*Note: Banks, credit unions, and licensed consumer finance companies are also exempt.)

#### **5. Are there any additional requirements that a short sale negotiator or a debt management company must follow in Oregon?**

This applies to debt settlement companies, loan modifiers, and “short sale negotiators.” Loan modification is defined as modifying or offering to modify terms and conditions of an existing loan or obligation. The law requires debt management companies to provide consumers with specified disclosures and written contracts, honor a three-day right of cancellation, evaluate whether the proposed services will benefit the consumer, and post a \$25,000 surety bond. The bill also prohibits misleading advertising and limits the fees that may be charged -- for short sales and all other types of debt management services.

#### **6. Are real estate licensees required to register as debt service provider or a debt management service provider when handling a short sale?**

An Oregon real estate licensee is only exempt from registering as a debt management service provider if they only receive a fee that is “usual and customary” for their services - in other words, a typical real estate commission (see OAR 441-910-0005).

[http://arcweb.sos.state.or.us/rules/OARS\\_400/OAR\\_441/441\\_910.html](http://arcweb.sos.state.or.us/rules/OARS_400/OAR_441/441_910.html)

As with any important business decision, you should probably speak to your legal counsel about the license or registration that is appropriate.

#### **7. How can I determine if a short sale negotiator is authorized to provide these services in Oregon?**

First, a company must be registered to do business through the State of Oregon Central Business Registry in the Secretary of State’s Office at <https://secure.sos.state.or.us/ABNWeb/> or 503-986-2200. Secondly, they must be registered with DCBS as a debt management company, licensed as a mortgage loan originator, or licensed as an Oregon real estate broker. If an Oregon real estate broker is handling the negotiation, he or she MUST be registered with DCBS if they are charging an additional or separate fee in addition to their base broker commission. No registration with DCBS is required if the licensee is handling the short sale negotiation as a courtesy, at no charge, to the buyer or seller.

Find registered debt management companies at:

[www.cbs.state.or.us/external/dfcs/debt\\_mgmt.html](http://www.cbs.state.or.us/external/dfcs/debt_mgmt.html)

Or call 1-866-814-9710

## **8. What are the obligations of foreclosure consultants under HB 3630?**

The legislature passed the Mortgage Rescue Fraud Protection Act (House Bill 3630) during the 2008 Special Session (see ORS 646A.700 – 646A.760). <http://www.leg.state.or.us/ors/646a.html> The law is also intended to protect consumers from fraudulent mortgage rescue schemes. It protects consumers at risk of foreclosure by regulating “consultants” offering to help homeowners avoid foreclosure. (The law also regulates the activities of an “equity purchaser” who acquires a financial interest in the property.)

The law includes the following provisions:

- Requires foreclosure consultants to provide a written contract to the homeowner, in the language spoken by the homeowner, with explicit disclosures and a full description of services and total costs. See ORS 646A.710.
- Prohibits advance fees, e.g., charging or receiving *any* fees before full performance of all services.
- Provides the homeowner the right to cancel the contract, and method of doing so.
- Prohibits consultants from acquiring any interest in the home in foreclosure.
- Prohibits consultants from taking power of attorney.
- Other provisions designed to protect the homeowner.

The act excludes from the definition of “foreclosure consultant” the following: mortgage bankers, mortgage brokers, and real estate brokers properly licensed by DCBS or REA and working within the scope of their respective license, and attorneys licensed in Oregon performing legal services for a client. [ORS 646A.705\(1\) to \(12\)](#)

The Department of Justice is responsible for investigating and enforcing the Mortgage Rescue Fraud Protection Act. Instructions for filing a complaint are available here:

<http://www.doj.state.or.us/finfraud/engexplanation.shtml>

## **9. How is a short sale negotiator different from a foreclosure consultant?**

Foreclosure consultants help a person stay in their home, typically by working with the lender to lower monthly mortgage payments. Short sale negotiators engage in activities intended to result in the sale of the home. Helping a consumer stay in their home, with changes to their mortgage, is not a professional real estate activity and such activities must comply with the requirements of HB 3630. If a foreclosure consultant decides a short sale is the best resolution for the consumer, the consultant may not participate in the short sale negotiations or transactions unless they are properly licensed as a mortgage banker, a mortgage broker, or a real estate broker

### **10. Can a buyer's agent negotiate with the seller's lender in the short sale transaction?**

Consumers who are selling their home are, by the very nature of their ownership interest, able to negotiate with the lender as a matter of right. However, a seller may not be comfortable with negotiating the transaction and may want to have someone with more knowledge and experience performing these functions. Most lenders will negotiate with someone other than the seller if there has been a signed, written authorization for release of information. Ideally, one person should be the contact for the negotiation phase.

While the seller's agent has more information regarding the seller's overall financial condition, it's possible that the buyer's agent may have more experience in handling short sale negotiations compared to the seller's agent. If that's the case, and the seller does not object, a buyer's agent, with the proper written authorization for the release of information, may negotiate with the lender(s). The seller's agent still has the ultimate responsibility in protecting the interests of his or her client.

As a practical matter, a buyer's agent should proceed with extra caution when negotiating on a seller's behalf. Negotiation of a short sale may involve many areas outside any licensee's expertise which include, among other things, ultimate liability for the debt amount reduced along with possible tax consequences for the seller regarding any debt forgiveness. The ramifications of a short sale can be far reaching and long lasting for a seller.

### **11. Is there a limit on the fee that can be charged for handling a short sale?**

If a person or company is registered as a debt management company, they may only charge an initial fee of no more than \$50 and a fee of no more than \$50 within the first 120 days of the signing of the contract for an initial counseling or education class. In addition, if the debt management company negotiates a short sale that qualifies as reduction in a consumer's debt, they may also charge a "settlement" fee. This 7.5 percent fee is based on the difference between the principal debt amount a consumer owes on their home (at the time the debt management contract is signed) and the reduced amount that is owed per the short sale. For example, the maximum settlement fee would be \$3,750 if a mortgage was reduced by \$50,000.

### **12. Who should pay the short sale fee?**

A short sale fee can be paid by any party to the transaction, or it can be split accordingly. However, the amount of the fee **MUST** be disclosed up front. For instance, the disclosure should appear on the public portion of an MLS listing. There must be complete disclosure as to who is paying the fee and the amount.

### **13. Does the short sale negotiation fee need to appear on the HUD statement?**

Any money that changes hands at closing or during escrow must appear on the HUD statement. The fee cannot be paid outside of escrow.

### **14. Can OREA require lenders to use an appraisal instead of a Broker Price Opinion (BPO)?**

OREA does not have regulatory authority over lending institutions. It is ultimately up to a lender whether or not a BPO will be used.

**15. Do real estate licensees have any responsibilities regarding lenders or banks in a short sale situation?**

Real estate licensees must always be aware of their duties regarding disclosure. In addition, there are both state and federal rules regarding loan fraud which could impact the transaction and involve the real estate licensee. The real estate licensee should be aware of both the state and federal rules of lending.

**16. Can OREA require banks or lending institutions to respond to offers or inquiries in a timely manner when submitted by a licensee?**

OREA does not have regulatory authority over lending institutions. If a licensee is dealing with matters beyond his or her expertise, he or she should seek legal counsel.

**17. What sort of precautions should a real estate licensee take when handling a short sale transaction?**

A short sale is not a normal real estate transaction. Customary timelines for offer and acceptance associated with regular sales vary from lender to lender when dealing with short sales. Lenders have their own procedures that they follow. It's up to the licensee to be familiar with the unique procedures of the particular lender in the transaction.

Aside from some of the aspects mentioned here, several matters must be addressed to properly protect the interests of both sides of the transaction. For example, a real estate licensee should ensure that all parties know who will ultimately be responsible for paying the short sale fee, if any. Another important detail is making it clear to all involved parties that securing creditor consent to the sale is a necessary contingency. In some instances, even if the short sale was approved, the seller could still be sued by the lender or bank for the money that was "forgiven." Additionally, the amount that was not paid back could be considered a form of "debt forgiveness" and may be taxed by tax agencies for the "forgiven" amount. If there are other lenders or lien holders in a 2<sup>nd</sup> or 3<sup>rd</sup> position, these subordinate lien holders may file a deficiency judgment in civil court against the seller.

A real estate licensee should always direct his or her seller to seek advice from an attorney and accountant when appropriate.

**18. Will a seller be responsible for paying the amount of debt forgiven?**

Some elements of the short sale, if not properly addressed BEFORE closing, can survive the transaction. One such crucial item is the ultimate responsibility for the debt that is forgiven. In some instances, the lender could pursue a deficiency judgment if forgiveness of the debt and all recourse was not negotiated prior to closing. Also, there may be tax consequences for the seller. If the agent and/or seller are uncertain as to the outcome, they should seek professional advice. If a debt management registrant is negotiating the short sale, they must disclose that they cannot give tax, accounting, or legal advice, and provide a warning that a consumer's credit could be damaged and creditors could still file lawsuits against the consumer to collect money.

### **19. How can I write up a short sale offer to protect my client?**

No two real estate transactions are alike. This is especially true with short sales. Oregon Real Estate Forms, LLC (OREF) provides standardized, up to date, legally reviewed realty forms for use by Oregon real estate licensees. OREF has developed a comprehensive short sale addendum form to be used for short sales. This form details many of the unique aspects associated with a short sale. As with any real estate transaction, a real estate attorney should handle legal questions from a seller or buyer.

### **20. If a fellow licensee appears to be acting in a fraudulent manner, may I report the licensee to OREA?**

Because the complaint process can take some time, the Real Estate Agency recommends that you discuss your concerns with the licensee first. If the licensee is an affiliated licensee, you may also try communicating with the licensee's principal broker. Regardless, you may file a complaint with the Agency at any time.

If you believe a real estate licensee may have acted improperly, you can file a complaint simply by writing a letter to the Real Estate Agency, or using the Agency's [complaint form](#). Please include copies of any relevant documents you may have. Also, it is helpful if your submission includes a list of other parties that have knowledge of the facts surrounding your complaint. Please include their contact information

While open investigations are confidential, your name will be part of the OREA investigation record, and may be disclosed as needed in the course of the Agency's investigation. The report, along with your name, becomes a public record after the investigation is closed. OREA rarely allows anonymous complaints. Since anonymous complaints lack the identification of a complaining party, the claim may be difficult to substantiate because the Agency can't contact the complaining party for further information.

#### **Additional Links**

Learn how to protect yourself from illegal debt management companies.

[http://www.cbs.state.or.us/external/dfcs/debt\\_mgmt.html](http://www.cbs.state.or.us/external/dfcs/debt_mgmt.html)

Tips on how to avoid a mortgage or foreclosure scam.

[http://www.doj.state.or.us/finfraud/mortgage\\_fraud.shtml](http://www.doj.state.or.us/finfraud/mortgage_fraud.shtml)