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**SHORT SALES**  
**Part 1**

**The Listing Agent's**  
**Perspective:**  
**Before you get the listing**

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What is a short sale?

- The real property is encumbered for more than it's value  
and
- The seller does not have the assets to pay the difference between the value and the debt.

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**Short Sale Truths**

- Seller may take nothing from the transaction.
- First position lender calls all the shots and "fairness" is not a factor.
- Junior lenders can defeat a short sale and "fairness" is not a factor.

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**What is the deficiency?**

- The deficiency is the difference between the debt recorded against the property and the proceeds generated from the sale of the property.

(The deficiency should not be confused with a "deficiency judgment" which can only be taken following a judicial foreclosure.)

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**Most Important Rules For Listing Short Sales**

- #1 – Be prepared to decline the listing
- #2 – A short sale is not the best option for all sellers who are upside down or in default.

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Discussion Topics For  
Listing Presentation

- What is a short sale and do you fit?
- What are the alternatives to selling short?
- Is a short sale the best alternative for you?
- Short sale risks
- Contact information for lender and written permission to contact lender.
- Permission to order preliminary commitment for title - - cancellation fee.

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When a short sale may not  
be the best option

- Seller's lender will not agree to discharge the deficiency.
- Seller's debt is the result of a large equity refinance where the equity was not used to improve the home.
- More than one lien holder encumbers the property.

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When a short sale may not  
be the best option

- There is insufficient time prior to foreclosure.
- Seller indicates an unrelenting requirement to exit the transaction with cash.
- Seller's debt unrelated to the house exceeds seller's ability to repay.

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Alternatives to Short Sales

- Refinance
- Loan modification or lender workout
- Deed in lieu of foreclosure
- Foreclosure
- Bankruptcy

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Refinance

- Typically only available if seller is not already in default.
- Debt is no more than 105% of value of property.
- Existing mortgage owned or backed by Fannie Mae or Freddie Mac.
- Borrower has sufficient income to support new mortgage payments.

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Loan Modification or Lender Workout

- Work with existing lender to create new loan terms that make repayment possible
- Possibly convert ARM to fixed rate
- Possibly extend repayment term to lower payments
- Possibly allow temporarily reduced or skipped payments

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**Critical Reminder: Do not exceed the scope of your licensing!**

- A real estate agent is not licensed to assist a debtor with a refinance or a loan modification.
- In both cases, agent must refer debtor to a licensed mortgage broker, a lender, a certified credit counselor or a lawyer.

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**Deed in lieu of foreclosure**

- Lender agrees to take title to the property and to forgive entire balance owing on the debt.
- Lender takes title to the property in the same condition as seller held title.
- Probably only available if seller has just one lien recorded against the property.

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**Foreclosure (non-judicial)**

- Foreclosing lender takes title to the property following notice and a trustee's sale (no lawsuit).
- Entire balance owing on foreclosed lien is eliminated.
- Junior liens are not discharged if sale of property fails to generate funds sufficient to repay junior liens.

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**Foreclosure (judicial)**

- Lender files lawsuit against debtor for remedy of foreclosure.
- Property is ultimately sold at foreclosure sale.
- If proceeds of sale are insufficient to repay foreclosed lien, lender will take a "deficiency judgment" against debtor.
- Debtor has one year right of redemption.
- Necessary for agricultural property.

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**Bankruptcy**

- Judicial proceeding.
- Debtor surrenders all assets to bankruptcy court for payment of repayable debts and discharge of all others.

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**Critical Reminder: Do not exceed the scope of your licensing!**

- If a seller wants to consider a deed in lieu, foreclosure or bankruptcy, you should immediately advise them to seek legal counsel.
- Agent is not licensed to give advice with regard to any of these options.

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### Short Sale Risks

Personal liability for the deficiency

Tax consequences

Credit rating damage

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### Personal Liability For Deficiency

- When seller took loan, signed note and deed of trust
- With short sale, deed of trust is released
- Note still exists unless specifically discharged

*\*\*\* Short sale agreement between seller and lender must discharge sellers obligation under the note or the obligation arguably remains*

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### Tax Consequences

- If non-owner occupied, seller pays income tax on any debt that is released and discharged
- If owner occupied:
  - No income tax if purchase money mortgage, rate and terms refinance or equity refinance with all equity reinvested in property improvements
  - Income tax on discharged deficiency if equity refinance and equity not reinvested in property improvements.

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### Credit Rating Protection

Foreclosure	Deed in Lieu	Bankruptcy	Short Sale
<ul style="list-style-type: none"><li>• FNMA: 5yrs</li><li>• Exten: 3ys</li><li>• FHA: 3yrs</li><li>• VA: 2yrs</li></ul>	<ul style="list-style-type: none"><li>• FNMA: 4yrs</li><li>• Exten: 2ys</li><li>• FHA: 3yrs</li><li>• VA: 2yrs</li></ul>	<ul style="list-style-type: none"><li>• FNMA: 2-5y</li><li>• FHA: 1-2yrs</li><li>• VA: 1-2yrs</li></ul>	<ul style="list-style-type: none"><li>• FNMA: 2yrs</li><li>• FHA: ?</li><li>• VA: ?</li></ul>

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### Credit Rating Protection

- All VA and FHA time estimates assume no default on federal debt.
- Extenuating Circumstances: nonrecurring events beyond applicant's control resulting in sudden, significant, prolonged reduction in income or increase in financial obligations
- Time estimates assume re-established credit and compliance with loan criteria
- Short sale combined with default may be different

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### SHORT SALES, Part 2

**The Listing Agent's Perspective:**

**Once you get the listing**

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**Seller Chooses to List as Short Sale**

**First** – Advise seller to seek legal, tax and credit advice. Help seller to understand the limits of your license.

**Second** – Warn of foreclosure scams and caution sellers to be alert.

**Third** – Discuss Short Sale Negotiators and the limited role that some short sale negotiators are licensed to play . . . Hire carefully!

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**Beware of Potential Fraud**

- If “seller” is not title owner but rather, the buyer under an approved but not yet closed purchase agreement and “seller” is looking for a new buyer to whom “seller” will assign buyer’s interest in purchase agreement in exchange for a purchase price premium, that is probably fraud.

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**What Can Listing Agent Do?**

- Order preliminary title commitment
  - Confirm # and identity of creditors
- Contact lender’s loss mitigation department (written authorization)
  - Determine willingness to entertain short sale
  - Will lender discharge deficiency
  - Determine lender’s process
  - Obtain any paperwork that lender will send
- Provide seller with CMA
  - Continued

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**What Can Listing Agent Do?**

- With seller, establish list price
  - MLS rules may prohibit artificially low pricing
- List property in MLS
  - Disclose short sale
  - Material fact: substantially adversely affects seller's ability to complete transaction
  - FNMA commission policy
    - continued

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**What Can Listing Agent Do?**

- Attract buyer
- Negotiate purchase agreement
  - ALWAYS use 22ss
  - Absent unusual circumstances, do not agree that seller will not accept competing offers
- Present all offers to lender along with complete short sale package

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**What is Required in Short Sale Package?**

- Short Sale Proposal Letter
  - Seller's signed short sale application or other documentation from lender
  - Seller's hardship letter
    - Supporting documentation
  - Seller's financial information
    - Supporting documentation
- continued

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**What is Required in Short Sale Package?**

- CMA with supporting documentation
- Marketing history, showings and feedback
- Fully executed purchase agreement
- Proof of buyer's ability to complete purchase
- Preliminary title report
- Estimate of closing costs, from escrow
- Anticipated repair estimates

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**Lender Approval Arrives**

- Don't Celebrate Yet!
- Refer to legal counsel
- Do not give any advice relative to short sale agreement
  - Do not review short sale agreement
  - Require written statement from seller that seller acknowledges no advice from agent regarding short sale agreement, additional referral to legal counsel

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**If there are Junior Lienholders**

- Confirm junior lienholders willingness to accept payoff
  - Discharge of deficiency
  - Refer to legal counsel
- Confirm sufficient funds to pay all seller closing costs
  - commissions

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**Lender Documentation**

- You will likely be asked to sign documentation from seller's lender warranting:
  - All offers were presented
  - Seller received no proceeds from transaction
  - All transaction proceeds were accounted for on HUD-1
  - You believe the sale price to represent the fair market value of property
- Every lender's documentation is different

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**SHORT SALES, Part 3**

**Short Sales:**

**The Buyer Agent's Perspective**

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**A Good Transaction Starts With Reasonable Expectations**

Buyer's agent should have a candid discussion with buyer to determine if buyer is a good candidate for purchase of a short sale property.

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**Reasonable Expectations**

- The transaction will take longer than usual.
- Buyer will not receive immediate answers.
- Buyer is likely to compete with other buyers who enter the bidding process after buyer
- Buyer may be challenged to increase bid after offer accepted by seller
- Seller's lender will make final decision terms

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**Reasonable Expectations**

- Buyer may be required to act quickly once sale is approved
  - Must buyer sell another house before purchasing
  - Financing availability
  - Flexibility on rate and terms
  - Should buyer consider conducting inspection before approval?
- Buyer agency agreement and compensation to buyer's agent

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**Making an Offer**

- Always use 22SS!
- Creates binding purchase agreement
- Mutual acceptance adjusts only for computation of time
  - EM not due until lender approval
  - Contingencies do not run until lender approval
- Should buyer ask seller to decline new offers?

*continued*

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### Making an Offer

- Retain the ability to terminate?
- Is seller represented in transaction? If not, use 22fsbo to determine if seller is distressed.
- If seller is distressed, address 20 day rule and post closing possession.

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### Beware!

- Requests for buyer to compensate junior lienholders or seller outside escrow.
- Requests for buyer to compensate short sale negotiator, often outside escrow.
- Requests for buyer to take assignment from "seller" who is actually a buyer.

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### Considerations

- As buyer awaits approval, continue to monitor market to be assured of value of property.
- Stay aware of the condition of the property.
- If buyer retained the ability to terminate, determine if buyer expects you to continue seeking additional properties

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**Seller's Lender  
Documentation**

- If buyer is asked to sign any documentation from seller's lender, advise buyer to seek legal counsel.
- If buyer's agent is required to sign any documentation from seller's lender, buyer's agent should consult broker and potentially, legal counsel.

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**Celebrate!**

If buyer's agent and listing agent bring their clients to the closing of a short sale, with both agents meeting their standard of care throughout the transaction, THAT is worthy of a celebration!

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