

TITLE RESOURCES GUARANTY COMPANY
NATIONAL UNDERWRITING MEMO 2009-1



DATE: April 8, 2009
FROM: Richard D. Worsham, Assistant Vice-President
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TO: All Agents
RE: Short Sales

With the tight real estate market and large numbers of foreclosures, many lenders are embracing short sales. A short sale is any sale where the payoff lender agrees to take less than the balance due on the mortgage and release the lien. The payoff lender does this in order to avoid the costs of foreclosure and reselling the property, or when the lender contemplates recovering from foreclosure less than the balance owed due to a decline in property value. Short sales are usually negotiated with the lender by the realtor or a short sale consultant.

The Short Sale Agreement

The most important document in a short sale is the short sale letter or short sale agreement. While this is normally in a letter form, it sometimes comes as a formal payoff or a contractual agreement. This is a document from the lender stating that they will accept less than the balance owed as payment of the note secured by the lien. Like any payoff, the short sale agreement should contain the amount that will be accepted, the time period that it is good for, and any conditions required by the lender. It MUST state that the lender agrees to release the lien upon compliance with the terms of the short sale agreement.

The closer must be able to meet each and every requirement set forth in the short sale agreement in order to close. If the closer sees a provision he or she does not think they can comply with, the lender should be requested to issue a new short sale letter without that provision, or with a substitute provision that the closer can comply with.

Oral Confirmation with Payoff Lender

On rare occasions we have seen people forge correspondence with the lender. It is always important to orally confirm the short sale letter by telephone with the lender, preferably the person who signed it.

File Copies Required

You must keep a copy of the short sale agreement in your file to evidence this agreement. Without the short sale agreement in your file, and oral confirmation of its validity, you have no evidence that the lender agreed to take a lesser sum.

Common Provisions

While each short sale agreement contains different terms, and should be read carefully, some of the more likely provisions are as follows:

1. A limitation on the amount that the seller may receive out of the closing, which is usually zero.

2. A limitation on the amount that other lien holders may receive out of the closing. This sometimes requires the realtor or short sale specialist to negotiate short sale agreements with holders of second liens in order to complete the sale.
3. A limitation on closing costs, which may be a limitation on the aggregate closing costs, but often includes limitations on payment of broker fees, payment of buyer's closing costs, and fees to the short sale specialist. Many lenders *require* reductions in realtor commissions.
4. Review and approval of the HUD-1 settlement statement by the payoff lender prior to closing. Whether or not this provision is in the short sale agreement, the closer should require faxed confirmation from the lender that the lender approved the HUD-1 prior to closing. Do not rely on oral approval.
5. A general requirement that the lender approve of the terms and provisions of the sale contract. Such approval should be obtained in writing via facsimile.
6. The payoff lender may require that the seller execute at closing an unsecured promissory note to pay the balance due on the loan, over and above the amount the lender agreed to accept to release the lien. There may also be financial affidavits and other sworn documentation required by the payoff lender. While these documents are not part of the insured transaction, getting them properly executed and delivered to the payoff lender is usually a condition to the lender releasing the lien.

Conditional Lender Payoff Statements Prohibited

Some major lenders have been issuing conditional payoffs in connection with short sales. These state the payoff is only good if there is no fraud on the part of Sellers or Buyers, or prohibit flips within 30-days, and further state that the note and lien shall remain in "full force and effect" if it is *subsequently* determined that such events occurred. TRGC agents should not accept any payoff from any lender which contains a contingency that the lien could remain enforceable following lender's receipt of payment of the amount demanded in the payoff. If the payoff lender will not remove such provision, the agent is prohibited from underwriting the transaction on TRGC.

Properties in Foreclosure

Often the property subject to the short sale has been listed for foreclosure. The lender has no obligation to stop the foreclosure process to accommodate the shortsale unless that agreement is in writing. The lender may proceed with foreclosure right up until the time they receive payment under the Short Sale Agreement. TRGC requires that the transaction close and fund at least 2 full business days prior to any scheduled foreclosure date so that the closer has time to get the proceeds to the lender prior to the foreclosure. Texas closers should also review *Texas Underwriting Memo 2007-1*, entitled *Closing Property Pending Foreclosure*.

Powers of Attorneys

Because the payoff lender may require the seller to execute documents in connection with closing, seller should not be allowed to act through a power of attorney without the payoff lender's written approval. All Powers of Attorney used in a short sale should be reviewed by underwriting counsel.

No Flips After Short Sales

Occasionally you will see a situation where the buyer wishes to immediately flip the property purchased at short sale to another buyer in a separate transaction on a separate HUD, at a marked up price. You should not close this type of flip transaction even if both sales are for cash.

cannot close until you have a release of lien!