

SHORT SALE...NEGOTIATORS AND OTHER QUESTIONS

The phone is certainly ringing at ADRE around many different Short Sale Scenarios. In this article, we will attempt to present just a few questions/answers, hoping to clarify some of the issues.

First, it is necessary to clarify that the ADRE Regulations published on February 15, 2011 are not a part of the Federal Trade Commission (FTC) "Mortgage Assistance Relief Services" (MARS) Rule. ADRE does not attempt to interpret the MARS Rule.

Q. To act as a 3rd party negotiator to a short sale transaction on an Arizona property, is an Arizona Real Estate License required?

A. Yes, an Arizona Real Estate License is required to negotiate with a short sale lender on an Arizona property. A Loan Originator License may also be required. A real estate license is required for any act, in consideration or expectation of compensation, which is included in the definition of a real estate broker, whether the act is an incidental part of a transaction, or the entire transaction, it requires a real estate license. ARS 32-212 (D) "Real estate brokerage activity" means any activity that involves offering or providing real estate brokerage services to the public, including... Negotiating on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental or exchange of real property, other than in connection with providing financing with respect to any transaction; (d) Engaging in any activity for which a person is required to be licensed as a real estate salesperson or real estate broker under title 32, chapter 20.

Q. Must an out-of-state short sale negotiator be licensed in Arizona to negotiate a short sale for compensation on behalf of an Arizona seller?

A. Yes, they should generally follow the same licensing regulations as Arizona-based short sale negotiators.

Q. I am taking a listing for a short sale seller, and am offering my real estate services package to include me negotiating with the short sale Lender. I am not charging a higher compensation, because the listing is a short sale, than I would charge for a "non-short sale" listing. Do I need a Loan Originator license??

A. No, the definition of a real estate broker includes a person who "incident to the sale of real estate....negotiates or offers, attempts or agrees, to negotiate a loan secured or to be secured by any mortgage or other encumbrance upon or transfer of real estate..." A.R.S. 32-2101(48)(k).

Q. Two licensees work as a "team" under a single employing real estate broker. The employing real estate broker does not charge an additional fee for a short sale transaction. When the Designated Broker's team are the listing agents of a short sale, licensee "A" handles the listing and sale of the property and licensee "B" handles the short sale negotiations with the lender. At close of escrow, the employing real estate broker receives the commission from the seller and pays licensee "A" and "B" according to their independent contractor's agreement. Is licensee "B" required to obtain a loan originator's license and be employed and paid by a licensed mortgage broker, banker, or consumer lender?

A. Since the only service that licensee "B" is providing is the negotiation of the short sale with the lender, Licensee "B" is receiving compensation by way of a portion of the real estate commission for that service only. Since licensee "B" is performing none of the services relating to the listing and sale of the property, licensee "B" is not performing "only" real estate brokerage activities and is not performing these services "incident to the sale of real estate." Therefore, the exemption in the loan originator statute for a person who only performs real estate brokerage activities does not apply and licensee "B" is required to be licensed as a loan originator and employed and paid by a licensed mortgage broker, mortgage banker or consumer lender. However, if licensee "B" is employed/authorized by the Seller to perform, and does perform listing and sale services and is authorized by the seller to, and does, negotiate the short sale with the lender in addition to the real estate services (for no additional fee), licensee "B" is not required to be licensed as a loan originator to receive a portion of the commission from the employing real estate broker.

Q. This scenario is a Team, with a leader who is perceived by a short sale seller to be the individual the employment agreement is being signed with, and to whom the seller gives authorization to negotiate with the short sale lender. The team has multiple members, each delegated a specific role in the listing and sale of the property, with a team member being assigned to do nothing other than interact and negotiate with the short sale lender. The negotiator team member is paid for

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their activities in the loan negotiation. Should this negotiator team member have a Loan Originator License? Are there other risky issues to address?
A. Probably yes, a Loan Originator License is required. The issue of "who is authorized by the Seller/ Homeowner to negotiate on their behalf with the short sale lender should also be addressed. Also, who does the Seller perceive is representing them?"

Q. If a transaction coordinator is licensed with an employing broker and conducting any acts that are defined as real estate activity, including interacting and negotiating with a short sale lender, can the transaction coordinator offer their services to other brokerages' brokers/agents for compensation.

A. A licensee may work for only one Designated Broker. A licensee may receive compensation only from the employing broker to which they are licensed. Compensation is defined as any fee, commission, salary, money or other valuable consideration for services rendered.

Q. A sales contract, being reviewed/approved by the Designated Broker, shows the buyer is purchasing a short sale listing as "or assignee". Could this indicate any red flags to the Broker?

A. Yes, especially if the buyer is a real estate salesperson/ associate broker, or LLC, which could indicate there is a "property flopping" taking place. Are all disclosures and addendums in file, and reviewed by the Broker? Have all required disclosures been made, and agreed to in writing by all parties to the transaction? Will the short sale lender receive all documents, including addendums? A licensee must protect and promote the client's interests and exercise reasonable care in obtaining information material to a client's interest and every licensed principal in the transaction (particularly in double escrow transactions) must be identified, and all compensation and disbursements must appear in the HUD-1 or other final settlement statements (R4-28I-802(C);R4-28-1101). A licensee cannot accept compensation from or represent more than one party in a transaction without prior written acknowledgment of all parties (R4-28-1101(F)).

Q. Seller's senior creditor agrees to a short sale, contingent on the junior creditor's payoff agreement to seller for less than owed. The junior creditor tells a licensee an agreement is possible only if the buyer pays the remaining balance "outside of escrow". Should licensees participate in this scenario?

A. No, Licensees should not participate in knowing about any payments outside of escrow. Undisclosed payments outside of escrow are not allowed. All financial transactions related to the contract (s) appurtenant to the transfer of an interest in real property must appear on the HUD-1, or other final settlement statement. (ARS 32-2153-(A)(10), (B)(10), AAC R4-28-802(c). Commissioner' SPS No.2808.06). Licensees Broker should be notified immediately.

Q. What should a licensee do, when the HUD-1 is reviewed and indicates a payment of compensation, for the other side, to a real estate licensee, other than the licensee's Employing Broker? Or to an LLC other than that Employing Broker?

A. Bring it to the attention of all parties to the transaction, as well as, escrow and the Designated Brokers involved. File a complaint with ADRE. A real estate licensee may not accept compensation for licensed activity except from the licensee's Employing Broker, and no one may lawfully pay the licensee for such activity except the licensee's Employing Broker (ARS 32-2153(A)(7), 32-2155(B)(C). A licensee cannot receive compensation without the client's prior written acknowledgement of the compensation and the services rendered must be commensurate with industry standards (AAC R4-28-1101(G)(H)).

Q. The licensee is told to have the escrow company release monies to parties other than the seller, lenders, or real estate agents involved with the transaction, without agreement of parties and written instructions.

A. An escrow company may pay only licensed real estate brokers, or by written instructions from the parties to the transaction, including the licensed Designated Broker for that Broker's licensed agents, and the Broker must maintain a complete record of the transaction. (ARS 32-2153(A)(6)(7)(8)(10)(18), 32-2155(A)(B), AAC R4-28-802(C)).

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Q. A property is placed in MLS by a listing agent, while a pending sale shows on the same property.

A. Interested parties should ask, who is selling the property? And, who owns the property on the deed?

A licensee may not place a sign offering a property for sale unless the licensee has the written authorization of the property owner (ARS 32-2153(A)(12)). A licensee must deal fairly with other parties in the transaction and disclose in writing material information that may affect the consideration to be paid. (AAC R4-28-1101(A)(B)).

Q. A Buyer's Agent finds that the Seller signing on their Purchase Agreement is not the recorded owner. What to do?

A. Inquire if the Seller signing on the contract owns the property, and to produce documents substantiating ownership; also, contact the recorded owner to verify the information regarding the prospective Seller's position in property. A licensee may not offer a property for sale without the property owner's authorization (ARS 32-2153(A)(12)). A licensee cannot accept compensation from or represent more than one party in a transaction without prior written acknowledgement of all parties. (ACCR4-28-1101(F)).

Q. What about an Escrow Company who collects the documents and interacts/negotiates with a Lender for a negotiated payoff of the loan? Does the Escrow agent need a real estate license?

A. Yes, in most instances. A.R.S.32-2121 (A)(16) provides an exemption from the real estate licensure requirements as follows: "An escrow agent in the performance of the escrow agent's duties as an escrow agent, a title insurer in the performance of the title insurer's duties as a title insurer or a title insurance agent in the performance of the title insurance agent's duties as a title insurance agent. Nothing in this paragraph shall be construed to allow an escrow agent, a title insurer or title insurance agent to otherwise engage in acts requiring a license." Negotiating with a short Sale Lender on an Arizona property requires an Arizona real estate license. Thus, the Escrow agent negotiating with a Short Sale Lender must have an Arizona real estate license, and if a Salesperson's license, that license must be held by an Employing Broker.

REMEMBER: A licensed real estate broker may not employ an unlicensed person to negotiate the sale or exchange of a property interest, or to assist in the negotiation of the loan secured by real property. A licensee shall accept employment and compensation as a licensee only from the legally licensed Employing Broker to whom the licensee is licensed. A licensee cannot receive compensation without the client's prior written acknowledgement of the compensation and the services rendered must be commensurate with industry standards.

(ARS6-991.02, 32-2101(47)©,(j)&(k), 32-2153(A)(10), 32-2155(B)(C); R4-28-1101(G)(H))

agents of the Employing Broker, and the Employing Broker is responsible for all acts of its agents. (R4-28-1103(C)&(D)).business days of execution (ARS 32-2151.01(G); the review is not contingent on any action by any Lender. The tolling date for the review is solely contingent on when the

REMEMBER: "Compensation" is defined as any fee, commission, salary, money or other valuable consideration for services rendered. ARS 32-2153(A) states a licensee may receive compensation only from the Employing Broker to which they are licensed.

REMEMBER: The Designated Broker must supervise the the agents of the Employing Broker, and the Employing Broker is responsible for all acts of its agents. (R4-28-1103(C)(D)).

REMEMBER: The Designated Broker must initial and date the Broker's review of every listing agreement and Purchase Contract (with all Addendums) within 10 business days of execution (ARS 32-2151-01(G)); the review is not contingent on any action by any Lender. The tolling date for the review is solely contingent on when the contract was executive by the Buyer and the Seller.

REMEMBER: The Employing Broker must maintain all fully executed contracts for a period of five years, after contract is executed, including the earnest money receipt, escrow instructions, closing statement, and copies of applicable employment agreements (ARS 32-2151.01(A))

REMEMBER: * A licensee must disclose all information material to the consideration to be paid (R4-28-1101(B)). *The licensee must be honest, truthful and of good character, and not engage in fraud (ARS 32-2153(B)). * A licensee may not pursue a course of misrepresentation in the role of a licensee, or as a principal in a transaction (ARS 32-2153(A)). * A licensee should not pursue a course of misrepresentation or distribute misleading information. * A licensee may not violate any federal or state law dealing with real estate fraud. * A licensee must provide services that conform to industry standards recognized in the professional community. *A licensee cannot provide services outside of the licensee's expertise, unless the client receives the client's signed written acknowledgment of the licensee's lack of experience and the client thereafter hires the licensee anyway. *The Seller's agent may have an obligation to submit ALL offers to the Seller, unless otherwise directed in writing. (Remember, in a short sale, the Seller is the homeowner, not the Lender

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LICENSING
ACTIVE-INACTIVE-GRACE PERIOD

Active License – Means a current license issued by the Department to a Broker or Salesperson that states the name of the Broker that employs the Broker or Salesperson, and the location at which the Salesperson or Broker is employed. If referring to an Employing Broker, it means a currently licensed Employing Broker, with a currently licensed Designated Broker of Record.

Inactive License – Means a current license issued by the Department to a Broker or Salesperson that indicates the License is not held by a Designated Broker or Entity. An inactive license must be renewed every 2 years as inactive, including the Continuing Education (CE) requirement. How long may a licensee remain in an inactive status? Licensees may remain in an inactive status indefinitely, as long as they comply with all requirements pursuant to Arizona Revised Statutes, Title 32; including, but not limited to: fulfilling and uploading all continuing education requirements within the specified renewal period, disclosing any convictions/sanctions, etc. if applicable, and renewing/paying for their license renewal. When a license is inactive, the ADRE website www.azre.gov will indicate that the license is inactive, and that it is not held by a Broker. An inactive licensee is not allowed to perform any real estate services, nor receive payment for any real estate service.

Grace Period – Means the one year period after a license expires, during which the Licensee can renew the license. Should the licensee wait more than that year, the licensee must pass the licensing exam, and if the pre licensing education was taken over 10 years prior to application, the 90 hours of in classroom pre licensing instruction is required, as well as all other requirements of licensing.

INACTIVE LICENSE Vs. REFERRAL COMPANY

Many Licensees are under the false impression that when their license is held by a Referral Company, that their license is inactive. This is not true. A Referral Company is an active company, licensed in Arizona with an active licensed Designated Broker/Entity. The license is active and the 24 hours of Continuing Education (CE) every twenty four (24) months is required. Having a license in a Referral Company allows a licensee to be paid for real estate services rendered.

Every Licensee is responsible for their real estate license, and should know the status of the License, and should monitor the expiration date.

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