

SHORT SALE GUIDANCE

A “short sale” is a term used to describe a transaction where the sale price of the property would not generate sufficient proceeds to pay off the existing mortgage or mortgages, and the lender(s) offers or agrees to accept less than full payoff.

There are two components to a short sale: (1) the negotiation of the reduced loan payoff amount (between the seller and his lender); and (2) the real property conveyance transaction (between the seller and a buyer). The Department of Finance regulates loan modification activities, including negotiation of reduced loan payoffs. The real property transaction falls under the jurisdiction of the Real Estate Commission.

The Department of Finance and Real Estate Commission recognize that to be successful, a short sale transaction may be a complex and lengthy process involving specialized knowledge and expertise. The purpose of this document is to aid persons in understanding when a license to conduct certain activities is required under either the Residential Mortgage Practices Act or the Real Estate License Law, and to provide additional information to mortgage broker and real estate licensees who participate in short sale activity.

If you have additional questions, please feel free to submit them to:

Department of Finance
finance@finance.idaho.gov

Subject Line: Loan Modification FAQ's

Real Estate Commission
irec-licensing@dopl.gov

Subject Line: Short Sale FAQ's

GUIDANCE FROM THE IDAHO DEPARTMENT OF FINANCE

Third-Party Mortgage Loan Modification Providers, Including Short Sale Negotiators

The Department of Finance has seen growth in the number of persons in Idaho offering to assist homeowners with modifications of their mortgage loans, either by obtaining a lender's agreement to modify the terms of a loan for the purpose of achieving affordable payments, enabling a homeowner to remain in his or her home, or by obtaining an adjustment of an existing residential mortgage loan in a settlement transaction, such as a deed in lieu of foreclosure or a short sale.

Pursuant to the Idaho Residential Mortgage Practices Act, Idaho Code § 26-31-101, *et seq.*, (Act), a loan modification, is defined as, “...an adjustment or compromise of an existing residential mortgage loan. The term “loan modification” does not include a refinancing transaction” (Idaho Code §26-31-201(2)). One particular activity that falls within the definition of a loan modification is the practice of representing a homeowner in obtaining an adjustment or compromise of his or her residential mortgage loan for compensation or gain, or in the expectation of such, pursuant to a short sale or pre-foreclosure sale negotiation.

Entities that engage in, or offer to engage in, affecting loan modifications in Idaho for

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compensation or gain, or in the expectation of such, must obtain a mortgage broker's license under the Act, and the individuals who conduct loan modification activity on behalf of such entities must obtain a mortgage loan originator's license. Many short sale transactions do not implicate these licensing requirements because the negotiation for the compromise or adjustment of the residential mortgage loan is conducted as part of the negotiation of a real estate transaction by an Idaho licensed real estate agent. When conducting this activity, individuals licensed by the Real Estate Commission are excluded from the licensing requirements of the Act, unless the real estate agent is paid by the lender, or the lender's agent, for the loan negotiation services (as opposed to getting paid a commission on the real estate transaction).

That means a real estate licensee can help her customers or clients negotiate a loan modification as long as the licensee is performing activities that require a real estate license (see Idaho Code 54-2004(39) and (40) for a list of those activities). However, this does not extend to unlicensed assistants.

Any purchase or sale of real property for an active real estate licensee's own benefit becomes a regulated real estate transaction pursuant to Idaho Code 54-2003(2) and Idaho Code 54-20551: In addition, a real estate licensee who is buying or selling property on his own behalf can have himself as a client or customer. Therefore, the SAFE Act exclusion for real estate licensees also applies for a real estate licensee's personal transactions, and a real estate licensee can negotiate with a lender to purchase a short sale property for his own use.

Remember, the SAFE Act exclusion for real estate licensees does not apply to real estate agents who act solely as third-party short sale negotiators. Negotiating short sales for a fee is not an activity that requires a real estate license; therefore, a loan originator license from the Department of Finance is required if that is the only service the real estate agent provides. A licensed real estate agent assisting another licensed real estate agent with a short sale transaction at the same real estate brokerage is permissible.

There is a simple test to determine whether the SAFE Act exclusion for real estate licensees applies to short sale negotiations conducted by real estate licensees: If the fee or compensation for negotiating or assisting with a short sale is paid through the real estate brokerage by the licensee's designated broker, then the activity is excluded from loan originator licensing requirements. If the fee or compensation for negotiation activity is paid by a lender, or the lender's agent, then the exclusion does not apply, and a loan originator license is required.

GUIDANCE FROM THE IDAHO REAL ESTATE COMMISSION *Real Estate Brokers and Salespersons*

A. The Real Estate Commission is charged with administering Title 54, Chapter 20 of the Idaho Code (the "license law"), pertaining to real estate brokerage. A real estate license may be required to participate in a short sale purchase, if the buyer or investor is:

- Brokering real estate deals for others, but using property deeds, powers of attorney, and trusts to evade the requirement of licensure; or

¹ Please note the requirement to disclose licensed status in Idaho Code 54-2055(2)

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- Acting as a “Dealer in options.”

The license law requires anyone performing real estate brokerage activities to hold an active real estate license. Under Idaho Code 54-2004(39) and 54-2004(40), a real estate license is required for:

(a)...[A]ny person...who, directly or indirectly, while acting for another, for compensation or a promise or an expectation thereof, engages in any of the following: sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others:

...

(c) Any person who represents to the public that the person is engaged in any of the above activities;

(d) Any person who directly or indirectly engages in, directs, or takes any part in the procuring of prospects, or in the negotiating or closing of any transaction which does or is calculated to result in any of the acts above set forth;

(e) A dealer in options as defined in this section.

(For more information on “dealer in options,” see Idaho Code 54-2004(19) and Idaho Real Estate Commission Guideline 18.)

Idaho Code 54-2003(4) states, “Exceptions to licensure shall not be used in any way to evade the purposes of this chapter. Any such attempt to evade this chapter shall be considered the unlicensed and unlawful practice of real estate.”

Taking title to property through deeds, powers of attorney, and trusts. There are several exceptions to licensure (Idaho Code 54-2003) that allow persons to conduct real property transactions without the need for a real estate license, including:

- For sale by owner, or buying property for one’s own account or use (including regular employees of the owner or purchaser when the employee is acting within the scope of his employment)
- An attorney in fact acting under a Power of Attorney when it is granted to consummate a single conveyance transaction
- A trustee in bankruptcy, personal representative of an estate, legal guardian or conservator, or anyone selling pursuant to the default provisions of a deed of trust
- An attorney, in connection with client representation, if the attorney is not regularly engaged in the conduct or business of real estate broker or salesperson

These exceptions to the license law occur legitimately in Idaho every day. However, the Commission sees many cases where these exceptions are being used as a “business model” in order to evade the requirements of the license law.

For Sale by Owner. Under the statute’s exceptions, a person who owns real property may market it for sale to buyers without having to hold a real estate license. However, if a person obtains a deed from the property owner with the intent of finding another buyer before completing the

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transaction with the original property owner, i.e., before paying off the owner's mortgage, the person is really putting deals together *for others*, with the expectation of a profit for himself. This activity amounts to "brokering," and the person must be licensed.

Often, an unlicensed person obtains a deed or power of attorney for a distressed property (or has the homeowner convey it into a trust) under the guise of "saving" the property from foreclosure. The documents accompanying the conveyance state that the unlicensed person will market the property and use the sale proceeds to pay off the mortgage. Sometimes the conveyance instruments are recorded, and sometimes not. In almost every case, the mortgage remains in the distressed homeowner's name. Occasionally, the lender has already determined a short sale payoff price it would accept. More often, the person who obtained the deed or power of attorney attempts to negotiate a short sale payoff with the lender, while at the same time marketing the property for sale at a higher price. The Commission has observed this type of activity and has taken action against the perpetrators for unlicensed practice. Although the unlicensed person may purport to fit within an exception to the licensing requirement, the Commission considers the misuse of the exemption as an attempt to evade the license law.

Dealing in Options. The Commission has seen many instances where an unlicensed person obtains "options" to buy property from sellers and then markets those properties for resale. However, an option does not convey any kind of ownership interest in or title to a property. Therefore, it is usually impossible for an option holder to qualify for the "for sale by owner" exception to licensure. Typically, the "option agreement" is the functional equivalent of a listing agreement, and the unlicensed person's expected compensation is the profit made upon the sale.

Similarly, the license law specifically defines dealing in options as brokering activity for which a license is required. The option holder may not list, sell, negotiate, procure buyers for, or otherwise broker that property unless he has a license. The Commission has jurisdiction and considers an unlicensed "dealer in options" to be engaging in unlicensed practice. **NOTE:** A real estate licensee should use caution and consult his designated broker (if applicable) when asked to take a listing for an "option" property.

B. An active Idaho real estate licensee must comply with the license law in all of his personal real estate transactions.

Licensees are required to conduct their personal real estate transactions through their brokerage pursuant to Idaho Code 54-2055(3). This does not mean a licensee is required to "list" his property or sign a representation agreement with the brokerage. It does mean the licensee must provide copies of the transaction documents to his broker so the broker can review the contracts and ensure the correctness of the closing statements. Failure to disclose personal transactions and conduct them through the brokerage will subject a licensee to disciplinary action.

Real estate licensees owe certain duties to their clients and customers. A "client" is a buyer or seller with whom the licensee has a written representation agreement. Licensees who have client relationships with buyers and sellers have enhanced duties that are specified in Idaho Code 54-2087. A "customer" is any buyer or seller to the transaction who is not represented by the licensee's brokerage. That means a licensee buying an unlisted property on his own behalf owes the seller all the "customer" duties identified in Idaho Code 54-2086 for that transaction.

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Usually, a seller who is upside down on his mortgage or who can't make the payments just wants to get out from under his mortgage. Unfortunately, the seller may not have all the information he needs to make a good decision about selling his property. There are some client and customer obligations that should be considered when working short sales. For example:

- Forgiven debt is considered income in the eyes of the IRS; some sellers may be liable for income taxes on the difference between what is owed and what a lender will accept as a short payoff.
- A seller may be required to sign a promissory note with the lender for the amount of a deficiency, i.e., the lender releases the lien, but not the debt. In this case, the seller still owes the money, but the security interest is simply released so the property can be sold.
- A transfer made to keep property out of a creditor's hands could be considered a "Fraudulent Conveyance."
- Some mortgage contracts contain "Due on Sale" clauses.

It is important for a licensee to make sure he is fulfilling his duties to a seller under the license law, whether the seller is a client or a customer. In the case of a client, that means promoting the best interests of the client in good faith, honesty, and fair dealing, and disclosing adverse material facts. It also means a licensee must, when appropriate, advise a client to seek appropriate tax, legal and other professional advice or counsel. Licensees are also required to disclose adverse material facts to customers and to perform ministerial acts with honesty, good faith, and reasonable skill and care.

It is a violation of the license law for a licensee to engage in dishonest or dishonorable dealings (including double contracts), make fraudulent misrepresentations, or act in a grossly negligent or reckless manner. There have been cases where distressed sellers were misled or subjected to predatory practices by erstwhile "buyers." Unfortunately, some of those "buyers" were licensees.

The Commission has seen cases where licensees had sellers sign blank deeds, powers of attorney, purchase and sale agreements, and other contracts. Licensees have also encouraged sellers to execute conveyance documents to the property (often conveying legal title to the licensees), while promising to "prevent" or "rescue" the sellers from foreclosure. These arrangements do not stop a foreclosure! In fact, such activity usually makes it more difficult for the seller to close a sale to a legitimate buyer.

Unfortunately, there have been instances where a licensee prepared and presented a "phantom offer" to a lender to start the short sale process, when in fact there was no legitimate offer to purchase the property. Typically, the offer price was quite low, and other legitimate (higher) offers were withheld from the lender. This is dishonest and dishonorable activity at the very least – and the Commission has had some success proving fraud in these situations.

When a lender agrees to a short payoff, that agreement often comes with certain conditions or requirements. A real estate licensee who fails to make required disclosures or purposely hides information from a lender may be disciplined. Sellers may be required to sign affidavits or other disclosures verifying these requirements were fulfilled. Some commonly-seen criteria include:

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1. The seller cannot receive any proceeds from the transaction.
2. The mortgage holder may not approve a short sale if it involves a “flip” transaction.
3. When a lender approves a short sale, the lender expects the property to have been marketed at a fair price.
4. The mortgage holder wants to see all the offers to make an informed decision on what is best for its mortgage investors.

1. The seller cannot receive any proceeds from the transaction.

This includes a sales commission, a negotiator’s fee, or any sum that is not disclosed to the lender. We have seen cases where the seller is paid a minimal amount for a deed to the property to “prevent” a foreclosure. This is a sale, and the seller got something! A real estate licensee who acquires title to a property in this manner must conduct the transaction through his/her brokerage, and all license laws must be followed (including the customer or client duties owed to the seller).

In some cases, the real estate licensee is the distressed seller. There have been situations where a seller/licensee arranged for another licensee in the same office to “list” the property. The agent named on the listing received a small portion of the total commission, and the seller/licensee obtained the bulk of the commission for himself. The seller received money from the transaction!

In one case the seller/licensee filed an entity with the Secretary of State that was a short sale negotiation company. The company was paid a “loss mitigation fee” for the transaction, and the seller/licensee pocketed the money. It was the only transaction this “company” ever negotiated. Again, the seller received money from the transaction.

Sellers have liability under their mortgage contracts. A mortgage holder has the right to sue if it feels it was ripped off. In the case above, the lender actually sued the seller/licensee to recover over \$20,000.00.

2. The mortgage holders may not approve a short sale if it involves a “flip” transaction.

A lender is entitled to every cent of the lien it holds. If a property can be flipped for a profit, it might be to the mortgage holder’s advantage wait for a better offer, or even take the property back, sell it, and make that profit for itself. In order for a mortgage holder to make an informed decision, it is important that all terms of the transaction are disclosed.

Many lenders have established “seasoning” requirements for deeds, requiring the property to have been titled to the seller for a certain length of time, typically 90 days. A legitimate buyer trying to purchase a short sale property may not be able to obtain a new mortgage if the deed is not “seasoned,” which harms both the buyer and the distressed seller. The “seasoning” requirement is not absolute and can be waived, and there are legitimate reasons for doing simultaneous closings, but many lenders have chosen to enforce this requirement.

One case involved a real estate licensee whose business model was to make an offer on a distressed property (in the name of a company he owned) and then negotiate a short sale payoff with the

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seller's mortgage holder. Once the licensee knew what the lender would accept as a short payoff, he began marketing the property as the seller at a higher price. If he could find a buyer who would pay more than the short sale payoff, he arranged a simultaneous closing. If he could not find a new buyer, the licensee walked away from the transaction and let the property go into foreclosure. The licensee said he never intended to close on the original purchase transaction unless he could make money on the "flip." The planned "flip" was never disclosed to either the short sale mortgage holder or the lender for a subsequent buyer.

Commission staff has interviewed many mortgage holders about this very idea during the course of investigations. In every single case, mortgage holders said they would cancel a transaction if they knew it was part of a "flip."

In the cases investigated, great effort was expended to keep the mortgage holders from finding out about subsequent flip transactions. This is the kind of effort that can lead to a fraud charge.

Likewise, a real estate licensee who has a property flipper for a client is not required to participate in a violation of the license law at the client's request. On the contrary, the licensee should consider advising the flipper of potential violations and even terminating the relationship if the flipper continues to pursue illegal behavior.

3. When a lender approves a short sale, the lender expects the property to have been marketed at a fair price.

Sometimes short sale properties are listed for double and even triple the fair market value to discourage buyers from presenting an offer. The representation is made to the mortgage holder that after 3 months of hard marketing, there was not a single offer. Then, at the last minute, a real estate licensee or a favored client makes the only offer, based on the payoff data, which is public information.

Often, the opposite occurs, and the properties are listed for far less than fair market value or the amount owed on the mortgage to encourage "lowball" offers, and a representation is made to the mortgage holder that the property won't sell for more. We have heard of still other situations where a representation was made to the mortgage holder that a property was on the market, but the property was never entered into the MLS, no ads were placed, and no signage was put up.

Many times, the "buyers" in these transactions are either actively seeking or already have subsequent buyers lined up for undisclosed "flips." In all these situations, the mortgage holder is misled about the status of the market and may accept an offer in reliance on these misrepresentations.

4. The mortgage holder wants to see all the offers to make an informed decision on what is best for its mortgage investors.

The mortgage holder agrees to consider a short sale in exchange for the right to consider all offers on the property, **not just the offer that is the most favorable to the licensee or flipper.** The seller is asking for a favor, and the mortgage holder must be satisfied before granting that favor.

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At closing, the seller may be required to sign an affidavit or other disclosure stating all offers were presented to the mortgage holder. The seller would have liability if the lender learned there were other undisclosed offers on the property. If the property could have sold for more money, the mortgage holder and its investors may have a claim for money damages and/or fraud.

A real estate licensee could be subject to disciplinary action for suggesting that his customer or client withhold offers from the lender. If the seller is licensee's client, the licensee has a duty to represent the seller's best interests. Subjecting the seller to a lawsuit, allowing him to commit perjury, or implicating him in a fraudulent transaction is not in the seller's best interest.

Keep in mind that when the ultimate buyer comes along, he will likely want to finance the purchase. A new mortgage lender may not finance a property that is part of a flip. Failure to disclose this information to a new lender could result in a double contract. Full disclosure is the best safety measure a licensee can take. Don't put yourself into the position of determining what an underwriter doesn't need or want to know.

C. There are legitimate ways to profit from short sales.

Unfortunately, many questionable practices have been reported in the short sale realm, involving both real estate licensees and unlicensed participants. It is important for Idaho real estate licensees to keep their designated brokers in the loop on all transactions and report questionable activity. The Real Estate Commission is also available as a resource, although the Commission does not approve or recommend business models.

1. Buy a short sale property on the competitive market. Allow the mortgage holder to consider all offers.
2. Close the transaction. Record the deed and take possession of your property.
3. What you do from here is your business. You may want to spruce the place up a bit, allow six months for deed seasoning, and resell it. The point is: **don't market it until you actually own it.**
4. Disclose, disclose, disclose. Tell all parties, especially the mortgage holder, exactly what is being done and what the intentions are. Put all disclosures in writing in the Purchase and Sale Agreement, so the mortgage holder is sure to see them. It's also a good idea to keep proof that you made these disclosures. If the mortgage holder wants to go through with the deal, at least they made an informed decision. A licensee is only responsible for fair dealings.

Frequently Asked Questions

For Individuals Purchasing or Selling Properties Subject to a Short Sale Approval

1. What triggers a licensing requirement under the Idaho Residential Mortgage Practices Act for an individual or company when dealing with a residential real property that may be subject to a short sale approval from a lender?

A license from the Idaho Department of Finance is required when, in a third-party capacity for compensation or gain or in expectation of such, a person offers or undertakes to affect a compromise or an adjustment of a homeowner's residential mortgage loan. The following are

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examples of activities that require a license:

1. A person who is not an Idaho real estate licensee communicates with the homeowner's lender, in a representative capacity for the homeowner, for the purpose of affecting a compromise or adjustment of the homeowner's residential mortgage loan.
2. A person who is not an Idaho real estate licensee obtains personal financial information from a homeowner and, in a representative capacity for the homeowner, communicates that information to the homeowner's lender for the purpose of obtaining a compromise or adjustment of the homeowner's residential mortgage loan.
3. A person who is not an Idaho real estate licensee obtains authorization from a homeowner for the release of personal, private, financial information and uses such authorization and information in a representative capacity for the homeowner to negotiate, (i) a release of the lender's lien on property in consideration of the payment of less than the amount owed by the homeowner pursuant to a residential mortgage loan; (ii) a waiver by the lender of any amounts to be paid pursuant to a residential mortgage loan; or, (iii) the settlement of an existing residential mortgage loan on terms which differ from the original terms of the loan.

2. Does a person need to obtain a license from the Department of Finance solely for the act of purchasing or selling a residential property that is subject to a short sale approval?

No. When **not** acting as a representative of a homeowner/seller to affect an adjustment or compromise of the homeowner's/seller's mortgage loan, an individual or company that purchases a residential real property subject to a short sale approval by a lender, does not need a license from the Department to make such a purchase or to resell the property.

3. I read the default notices in the paper or search through courthouse records to identify distressed properties. I have a homeowner deed his home to me (or place the property in a trust, or give me a power of attorney) to stop the foreclosure. Then I attempt to sell the home for a profit. The mortgage is still in place against the property, however, and the distressed homeowner is still liable on the mortgage. Do I need a real estate license?

Yes. Although every situation is fact specific, this appears to be a business model where you are engaging in unlicensed real estate brokerage because you are attempting to procure buyers and sellers for compensation. It is also likely the Commission would consider you to be in violation of the license law for using an exception to licensure to circumvent the requirement that you be licensed to conduct brokerage activities.

4. I have an Option to purchase a specific property, and I want to market it for sale. When I find a buyer, I will exercise my Option rights and do a simultaneous closing with the second buyer. Do I need a real estate license?

Yes. Your rights as an Option holder do not give you an ownership interest in the property. Dealers in options are required to hold an active Idaho real estate license. You should also note that, to be enforceable, an option to purchase must meet the statute of frauds requirements.

5. I make offers to buy distressed properties. Then I go to the seller's mortgage holder and negotiate a short payoff of the loan. Once I get a payoff number, I market the property to a

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new buyer. This helps the seller avoid foreclosure. I keep the money I make on the sale to the new buyer. Since I'm buying these properties for myself, I don't need a real estate license, right?

Wrong! If you do not intend to close on the purchases unless you procure new buyers for resale, you are likely engaging in real estate brokerage activity and using the offers to purchase as a way to circumvent the real estate license law.

For Real Estate Agents

6. Is a real estate licensee required to obtain a license from the Idaho Department of Finance if he negotiates with a lender to obtain a short sale approval on behalf of his client or customer?

No, unless the real estate licensee is paid by the lender or his agent for such negotiation services (as opposed to receiving a commission on the real estate transaction). Otherwise, a real estate licensee, whether directly representing a homeowner in a real estate transaction or representing other parties in a real estate transaction, is excluded from licensure for the activities of negotiating a short sale approval with a lender or the lender's agent on behalf of a homeowner.

7. If a real estate licensee forms a company that conducts the activities subject to licensure by the Department of Finance, is the company also excluded from licensing by the Department based on the real estate agent's exclusion?

No. If a real estate licensee forms a company whose business activities include offering or undertaking, in a third-party representative capacity, to affect compromises or adjustments of homeowners' residential mortgage loans for compensation or gain, or in expectation of such, the company is subject to licensure as a mortgage broker under the Idaho Residential Mortgage Practices Act.

8. I'm a licensed real estate agent who buys properties subject to a short sale. If I also negotiate the short sale approval with the lender or the lender's agent on behalf of the homeowner/seller, is a license required from the Idaho Department of Finance?

No. The Idaho Department of Finance recognizes that when a licensed real estate agent is a party to a purchase or sales transaction, his or her act of negotiating an adjustment or compromise to the homeowner's residential mortgage loan is authorized under his or her real estate license and excluded from the licensing requirements of the Idaho Residential Mortgage Practices Act.

9. I am an Idaho real estate licensee who negotiates short sale approvals with lenders or their agents on behalf of my clients. My assistant does much of my clerical work, faxing documents or making document submissions on my behalf. Does he or she need any special license?

No. As long as an assistant performs only clerical or administrative functions, and does not engage directly or indirectly in negotiations with a lender, or lender's agent, no license is required from the Department of Finance.

10. I am a real estate licensee who negotiates short sale approvals with lenders or their agents on behalf of my clients. I also want to offer assistance to consumers in obtaining modifications to the repayment terms of their existing loans without the modification resulting in a real estate transaction, such as a short sale. Do I need a license from the Department of Finance?

Yes, if such modification activity is conducted for compensation or gain or in the expectation of

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compensation or gain, and is not an activity for which a real estate license is required. However, an Idaho licensed real estate agent, or anyone else, may offer mortgage loan modification services without the need for licensure so long as such services are provided for no direct or indirect compensation or gain.

11. What if a homeowner utilizes a licensed real estate agent to negotiate a compromise of the terms of the homeowner's mortgage loan in a short-sale transaction after the homeowner has failed to qualify for a mortgage loan modification? Does the real estate agent need a license from the Department of Finance where the real estate agent receives no compensation from the lender or the lender's agent?

No. A real estate agent may engage in negotiating a short sale approval as a real estate agent representing a buyer or a seller under the scope of the agent's real estate license without the requirement of a license from the Department of Finance, so long as the real estate agent is not compensated by the lender, or lender's agent, for the agent's negotiation activities.

12. I obtained a Warranty Deed to a property where the seller is behind on his mortgage payments to stop his foreclosure. Next, I immediately made an offer and forwarded it to the seller's mortgage holder to start the short sale process while I try to find a buyer for the property. I told my broker what I'm doing. He told me to ask if it is OK for me to put this property on the MLS?

Hmmm... Why would you need to make an offer on a property that you already hold a deed to? In addition, most lenders do not appreciate having property in which they hold a security interest conveyed to someone else without their consent or knowledge. If you do not intend to go through with the purchase unless you find a new buyer, and you don't make full disclosure to the mortgage holder regarding your plans, you may be subject to disciplinary action by the Real Estate Commission.

13. Can I have sellers sign blank Purchase and Sales Agreements that I will fill out once I know what the mortgage holder will accept?

No. Under Idaho's Consumer Protection Act, having consumers sign blank documents is illegal. The Attorney General's office is charged with enforcing the Consumer Protection Act, and they could get involved. The Real Estate Commission will pursue a violation of Dishonest and Dishonorable Dealing for any licensee involved with this activity. If it is illegal, it is certainly dishonest.

14. A client of mine just bought and closed on a property where the seller had to have the mortgage holder take a short payoff. He wants me to list it for him and wants to make a \$20,000 profit. Is this legal?

Yes. Once a person has actually paid money for and closed on a property (including recording of the deed), what he does with the property is his own business. You may have some problems reselling quickly, however, because a new lender may want more "seasoning" on the deed. You should research several lenders to see if this is a roadblock to selling the property. It should not be a concern after six months in any case.

15. I have been approached by a short sale investor to list several properties he is in the process of purchasing. I need the business, but I want to make sure I operate within the law.

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The investor assured me the Idaho Real Estate Commission has reviewed and approved his program, so I don't need to worry about jeopardizing my license, right?

Wrong. The Idaho Real Estate Commission does not approve business plans or investment models. When in doubt, check it out. Call the Enforcement Department of the Real Estate Commission.

16. I am a Designated Broker. I know one of my licensees just went through a messy divorce, and she is trying to sell the house as part of the divorce process. She needs to get her mortgage holder to agree to a short sale. She referred herself to another agent in the office who is now her listing agent. The listing agent asked me to pay a referral fee to the seller. Is this OK?

Mortgage holders typically include a restriction in the short sale payoff letter that precludes a seller, no matter the personal problems, from receiving anything from a short sale transaction.

For Mortgage Brokers/Lenders and Loan Originators

17. Does my existing license allow me to conduct loan modification activities, including short sale negotiations in a third-party representative capacity with a homeowner's lender or the lender's agent?

Yes. Third-party loan modification activities, including short sale negotiations, are mortgage brokering activities for purposes of the Idaho Residential Mortgage Practices Act. A company that has obtained a license as a mortgage broker has the necessary licensure to engage in these activities and its licensed loan originators may conduct the activities on the company's behalf. A mortgage broker/lender licensee must submit to the Department of Finance an amendment to its license application filing to show that it will be engaging in such activities along with the forms it will use to conduct the activities, and a description of its business activities along with a description of upfront fees, if any, it intends to charge.

18. If I have a loan originator license, may I conduct short sale negotiations with a lender or the lender's agent on behalf of a homeowner/seller even though I am not employed by a mortgage broker?

No. A mortgage loan originator licensee who conducts short sale negotiations with a lender or the lender's agent on behalf of a homeowner/seller may only do so on behalf of either a licensed mortgage broker/lender or an exempt entity. Under the provisions of the Idaho Residential Mortgage Practices Act, individuals who wish to conduct these activities as a sole proprietor must obtain a license as a mortgage broker for their sole proprietorship and an individual license as a loan originator.

19. I have applied for a loan originator license, and I want to negotiate with a lender or the lender's agent on behalf of a homeowner/seller for the purpose of affecting a compromise or an adjustment of the homeowner's/seller's residential mortgage loan. Do I need to be supervised by someone with experience doing mortgage modifications, including short sales?

In order to conduct business as a loan originator, an individual must obtain a license and work for a licensed mortgage broker/lender or an exempt entity. A mortgage broker/lender must demonstrate that it has a qualified person in charge of its operations who has at least three years experience in residential mortgage lending or brokering. This experience does not have to be specific solely to activities leading to compromises or adjustments of homeowner's/seller's residential mortgage loans.

This guideline is not a new law but is an agency interpretation of existing law.

For more information on this guideline, please contact:

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