

SHORT SALES AND REAL ESTATE LICENSEES

Increasingly, real estate licensees are involved in short sales, where the sales price agreed upon is less than that owed to lenders by the seller. The listing agent is often called upon to communicate between the lender/servicer and the seller regarding financial obligations. Licensees need to be fully aware of the Maryland laws that regulate the activities of those who assist homeowners under these circumstances, laws beyond those that govern real estate brokerage activities.

The Credit Services Businesses Act (MCSBA) requires that a person who advises a consumer with regard to the extension of credit must be licensed by the Commissioner of Financial Regulation. There is a licensing exemption for a person licensed as a Maryland real estate broker where that person is acting within the course and scope of that license. Since the scope of a real estate license is limited by definition to assisting in the purchase or sale of property, the exemption would not extend to negotiation of a deficiency note that is independent of the sale of the property.

The Protection of Homeowners in Foreclosure Act (PHFIA) applies where a homeowner's mortgage is at least 60 days in default. The law sets forth the activities that constitute foreclosure consulting services offered to a homeowner in that situation. An individual who engages in those activities must follow specific requirements regarding written agreements with the consumer. PHIFA provides an exemption (or "safe harbor") for real estate licensees where they are engaged in an activity for which they are licensed by the Real Estate Commission. For example, one of the activities defined in the PHIFA law as a foreclosure consulting service is "arranging or facilitating the purchase of a homeowner's equity of redemption or legal or equitable title." This activity is one included in the definition of the provision of real estate brokerage services, and therefore may be provided by a real estate licensee without the need for compliance with PHIFA (or additional licensing under MCSBA).

The PHIFA law requires, among other provisions, that:

- The homeowner and the foreclosure consultant enter into a foreclosure consulting contract that includes all the specific terms set out in Section 7-306 of the Real Property Article.
- The foreclosure consultant refrain from engaging in any of the prohibited activities set forth in Section 7-307, including charging or collecting any compensation until all the foreclosure consulting services have been performed.
- A real estate licensee who provides real estate brokerage services under a foreclosure consultant license present the homeowner with a copy of the real estate license no later than when the foreclosure consulting contract is signed.
- The foreclosure consultant may not receive a commission, regardless of how it is described, for the sale of a residence in default that exceeds 8% of the sales price.

The difficulty arises when the licensee is called upon to be the go-between for the lender and the seller, and/or where the transaction results in a new debt being incurred by the seller in the form of a deficiency note. If one or both of these circumstances arises, the licensee must take great care in not crossing the line between the provision of real estate brokerage services and activities that would require additional licensing.

At a minimum, in order to qualify for the statutory “safe harbor” protection under PHIFA, the licensee must ensure that the residence in default is (1) listed in the multiple list service, and (2) is sold or transferred through a settlement, including the conveyance or transfer of deed, title, or establishment of equitable interest.

If those basic requirements are met, a licensee may work with a seller under a valid listing agreement to request a short sale or other foreclosure alternative from a lender or servicer under PHIFA. The seller must voluntarily sign the appropriate authorization for the lender, indicating that the listing agent may submit the required short sale or loss mitigation documentation on the seller’s behalf. With that authorization, the agent may transmit documentation by computer in a format specified by the lender (i.e. “platforms” or “loan portals” such as Equator or ResNet or HOPE loan portal.

Beyond submitting the requested documentation to the lender or services, the licensee’s conduct must meet the following standards in order to comply with the applicable laws.

DO

A real estate licensee:

- May conduct a Comparative Market Analysis (CMA), which an out-of-state lender/servicer may refer to as a Broker’s Price Opinion (BPO).
- Must refer a client to an individual licensed under the Credit Services Businesses Act, or otherwise exempt under that law, to negotiate on issues such as deficiencies and relocation allowances as soon as those issues arise. The licensee may serve as a conduit of information from the MCSBA licensed individual to the seller, but may not negotiate on those issues with the lender/servicer.
- Must refer a client to an accountant to explain to the seller the potential income tax consequences of a short sale and the applicability of the Mortgage Forgiveness Debt Relief Act of 2007.
- Must refer a client to a housing counselor for discussions about alternatives available to avoid foreclosure. Free housing counseling is available through the Maryland HOPE Program at 1-877-462-7555.
- Must refer any requests from the lender/servicer for reductions in real estate brokerage commissions on a short sale to the licensee’s broker.

DON’T

A real estate licensee may not:

- Collect any monies in addition to the real estate brokerage services commission from a client unless the licensee holds an additional license under the MCSBA.

- Assist a seller in negotiating with the lender/servicer to obtain a loan modification or a promissory note for the deficiency amount, or to otherwise prevent foreclosure.
- Use direct mail solicitations or advertisements targeted to a homeowner in default (or imminent default or “underwater” on the mortgage) that indicate that the licensee (1) can assist in preventing foreclosure; (2) is an “expert” in short sales; (3) can arrange refinancing; or (4) will contact creditors on the owner’s behalf.
- Make representations to a homeowner that the licensee can save the owner’s home, stop foreclosure, or obtain a short sale.
- Provide advice to a homeowner regarding the benefits of a strategic default.
- Predict or suggest credit score consequences of one loss mitigation strategy over another.
- Make any predictions with regard to the likelihood of the waiver of deficiency judgments or the payment of relocation costs in a short sale.

A licensee who serves as more than a conduit of information between the seller and the lender/servicer regarding deficiencies, or who engages in any of the “Don’t” activities, no longer has the protection of the “safe harbor” provision, and must follow the strict terms of the PHIFA law, if the mortgage is in default, as well as obtain a license from the Commissioner of Financial Regulation under the MCSBA.

9/6/12