

**UPDATE on the Short Sale Negotiator Regulations**  
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*By*  
*Arizona Department of Real Estate (“ADRE”) Commissioner Judy Lowe*

**NOTE:** This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This article does not replace the need for each licensee to become familiar with the laws pertaining to short sales to ensure their business practices comply with all applicable laws.

Numerous regulations have recently been enacted governing short sale negotiations. The following are answers to frequently asked questions regarding short sale negotiators.

**1. What licenses are required to negotiate a short sale?**

A real estate license and/or a loan originator license may be required for individuals who assist homeowners in negotiating with lenders to accept less than the full amount of the mortgage loan, as part of a short sale transaction.<sup>1</sup> The particular license that is needed depends on the nature of the transaction, what licenses the person or entity holds already, the scope of services offered and whether or not a fee is charged for the service, as explained more below.

**2. Is a real estate broker/salesperson acting outside the scope of their real estate license by assisting a seller in negotiations with the lender or servicer to facilitate a short sale?**

No. The scope of a real estate license encompasses assisting in the “negotiation of any transaction calculated or intended to result in the sale . . . of real estate.”  
A.R.S. § 32-2101(48)(j).

**3. May a real estate broker/salesperson receive additional compensation for negotiating a short sale in addition to receiving a commission on the sale?**

Yes, if the real estate licensee is also licensed by the Arizona Department of Financial Institutions (“DFI”) under Title 6, Chapter 9 (covering loan originators<sup>2</sup>, mortgage brokers and mortgage bankers) and other requirements are met.<sup>3</sup> The general rule is that additional compensation requires an additional license. If a real estate broker/salesperson assists the seller in negotiating with the lender or servicer to accept the short sale price as a customer service and does not charge or expect additional compensation (including an increased commission), the real estate broker/salesperson does not need a separate license from DFI.

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<sup>1</sup> Arizona law defines “short sales” as “real estate transactions in which the sales price is insufficient to pay the loan encumbering the property in addition to the costs of sale and the seller is unable to pay the difference.” A.R.S. § 32-2130 (A).

<sup>2</sup> “Loan originator” is defined as “a natural person who for compensation or gain or in the expectation of compensation or gain... (i) Takes a residential mortgage loan application; (ii) Offers or negotiates terms of a residential mortgage loan; and (iii) On behalf of a borrower, negotiates with a lender or note holder to obtain a temporary or permanent modification in an existing residential mortgage loan agreement. A.R.S. § 6-991(12). Also, a loan originator must be employed by a mortgage broker. A.R.S. § 6-991.02(13) and § 6-991-04.

<sup>3</sup> A real estate broker/salesperson cannot collect compensation for negotiating loans unless: (1) they are licensed pursuant to Title 6, Chapter 9 (A.R.S. § 6-901, *et. seq*); 2) they have disclosed to the person from whom the compensation is collected that they are receiving compensation for both real estate and mortgage services; and 3) the compensation does not violate any other state or federal law. A.R.S. § 32-2155(C).

**4. Should a broker/salesperson negotiating a short sale with a lender or servicer on behalf of the seller comply with the Federal Trade Commission’s Mortgage Assistance Relief Services (“MARS”) Rule?**

Yes. The MARS Rule applies to any person that provides, offers to provide, or arranges for others to provide any “mortgage assistance relief service.” Title 16, Code of Federal Regulations (CFR), Part 322. A “mortgage assistance relief service” includes any service, plan, or program, offered or provided to the consumer in exchange for consideration to assist or attempt to assist the consumer with negotiating, obtaining or arranging a short sale. 16 CFR 322.2(i).

To review the MARS Rule in its entirety, including disclosure and other requirements, go to [www.ftc.gov/opa/2010/11/mars.shtm](http://www.ftc.gov/opa/2010/11/mars.shtm).

**5. May a listing broker/salesperson charge the seller a non-refundable retainer fee in a short sale transaction?**

No. Any fee, refundable or non-refundable, that a broker/salesperson requests or receives from a consumer to negotiate, obtain or arrange a short sale, in advance of an executed agreement between the consumer and his or her lender or servicer that incorporates the final terms that the lender or servicer will agree to, violates the advance fee ban described in section 322.5 of the Federal Trade Commission’s MARS Rule.

**6. 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?**

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

**7. If a real estate broker/salesperson receives a real estate commission in connection with a short sale, regardless of the how the commission is described on the HUD-1, must the commission be paid through the employing broker?**

Yes. A.R.S. §32-2155(A) requires that a real estate salesperson “accept employment and compensation as a licensee only from the legally licensed broker to whom the licensee is licensed.” Compensation is defined as “any fee, commission, salary, money or other valuable consideration for services rendered or to be rendered, as well as the promise of consideration, whether contingent or not”. Thus, a real estate salesperson/broker may not receive compensation as a real estate licensee from any person or through any entity, other than the employing real estate broker to which the real estate salesperson is licensed.

**8. Are there any additional licensing restrictions that apply to FHA loans regulated by the U.S. Department of Housing (HUD)?**

Yes. Loan originators must be employed by a licensed mortgage broker who is responsible for the supervision of the loan originator. Under HUD rules, a mortgage broker who handles FHA loans is prohibited from employing staff who are also employed in the real estate field. For further information about HUD’s requirements, visit [www.hud.gov](http://www.hud.gov).

**9. Where can I get information about DFI’s licensing requirements?**

Information on obtaining a loan originator and other licenses is available on the DFI website at [www.dfi.gov](http://www.dfi.gov).

## **Conclusion**

There are a myriad of other issues relating to short sales. Before engaging in short sale activities make sure that you are on solid legal ground by consulting your broker, manager or independent legal counsel. The following websites may contain additional information on this subject and links to other resources:

Arizona Department of Real Estate, [www.azre.gov](http://www.azre.gov)

Arizona Department of Financial Institutions, [www.azdfi.gov](http://www.azdfi.gov)

Federal Trade Commission, [www.ftc.gov](http://www.ftc.gov)

Arizona Association of Realtors, [www.aaronline.com](http://www.aaronline.com)

Arizona State Legislature, [www.azleg.gov](http://www.azleg.gov)

*Judy Lowe was appointed Commissioner for the Arizona Department of Real Estate by Governor Jan Brewer in May 2009 after a long and distinguished career in the real estate industry.*

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