

## Submission of Offers on Short Sales



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### MEMORANDUM

**To:** MNAR, 89-1-011C

**From:** Donald D. Smith and Brad J. Boyd, Legal Counsel to the Minnesota Association of REALTORS®

**Date:** June 16, 2009

**Subject:** Submission of Offers on Short Sales

A practice has developed involving short sales whereby the lender is insisting that all purchase agreements tendered on behalf of buyers be submitted directly to the lender without first securing the signature of the seller. You have asked for a response on this practice.

First of all, it is difficult to understand why a lender is insisting on such a practice. If the seller does not sign, no contract has been formed, which means the lender has no assurance the transaction will move forward to closing. Therefore, one would think it is in the lender's interests as well as the seller and buyer to have the seller sign the agreement and indicate his willingness to proceed with the transaction as submitted by the buyer.

Without the seller's signature on the purchase agreement when submitted to the lender, a number of foreseen and unforeseen consequences can occur. The buyer has no binding agreement with the seller while the offer is going through the slow process of being approved by the lender. Therefore, buyers and buyers' agent should be concerned about this process and insist that the seller sign the document before it is submitted to the lender.

Secondly, the seller runs the risk that the buyer circumvent the seller and go to the lender directly and try to negotiate a transaction with the lender to be effectuated after the redemption period expires. Thus, if the seller finds the purchase agreement acceptable as tendered, the seller should want to agree to it, making the agreement subject to the lender's approval.

With respect to the lender, the buyer is not obligated on the purchase agreement until the seller signs it and then of course it is subject to the lender's approval. Without the seller's signature, if the buyer finds a better property, the buyer can withdraw the offer because it

has not been accepted by the seller. This could occur even after the lender approves the offer, as no contract is formed until seller has signed. If in fact the seller had signed, the buyer cannot withdraw the offer because it is binding and enforceable at that point in time subject only to the contingency for lender's approval.

It is our understanding that on transactions as described in this Memo, many times the listing agent does not even submit the purchase agreement to the seller until the lender has approved the purchase agreement. This would violate Commerce Department rules in that all purchase agreements must be submitted to sellers. The listing agent may then be in violation of Chapter 82 and subject to Commerce Department scrutiny, by submitting the purchase agreement to the lender without first submitting it to the seller.

Based on the reasons set forth in this Memo, we would recommend that this practice not be followed by listing brokers/agents and the listing broker/agent use every effort they can to dissuade the lender from insisting in this practice.