



---

---

COMMISSIONER OF FINANCIAL REGULATION  
**ADVISORY NOTICE**  
JUNE 5, 2013

---

---



**GUIDANCE FOR INDIVIDUALS PROVIDING  
SHORT SALE NEGOTIATION SERVICES**

Following the housing market downturn and the foreclosure crisis that has followed, short sales have become increasingly prevalent in Maryland and around the nation. A “short sale” is a real estate transaction where the proceeds of the sale will not generate sufficient funds to pay the debt(s) secured by the property (and the seller is unable to pay the difference) and therefore, any creditor(s) with a security interest in the property must consent to receiving less than they are owed in return for releasing any lien on the property. The fact that a creditor may release its lien to allow the property to be sold does not mean that the creditor has or will forgive the deficiency.

As short sales have become more prevalent, questions have arisen as to which parties may provide assistance in executing short sales and how those parties may be compensated. Under current Maryland Law, the negotiation of short sales generally requires licensing under the Maryland Credit Services Businesses Act (MCSBA).<sup>1</sup>

During the 2013 legislative session, the Maryland General Assembly passed the Maryland Mortgage Assistance Relief Services Act (the Md. MARS Act).<sup>2</sup> Mortgage Assistance Relief Services is defined as a service, plan, or program that is represented, expressly or by implication, to help homeowners prevent or postpone foreclosure or help them get other kinds of relief, like loan modifications, forbearance agreements, **short sales**, deeds-in-lieu of foreclosure, or extensions of time to cure defaults or reinstate loans. The legislation enacting the Md. MARS Act also amended the MCSBA to specifically exclude Mortgage Assistance Relief Service providers after the Md. MARS Act goes into effect on July 1, 2013.

As such, the providers of these services will no longer require a Credit Services Business License. Instead, the Commissioner of Financial Regulation and the Office of the Attorney General are authorized to enforce to the Md. MARS Act, which include disclosure requirements, prohibitions against misrepresentation of services and, as under the MCSBA, a ban on up-front fees.

In light of these changes, the Commissioner of Financial Regulation is issuing guidance to persons engaged in short sale activities previously covered by the MCSBA.

**Relevant Law**

***Prior to July 1, 2013***

---

<sup>1</sup> The MCSBA is codified in the Annotated Code of Maryland, Commercial Law Article, § 14-1901 *et seq.*

<sup>2</sup> The Md. MARS Act is codified in the Annotated Code of Maryland, Real Property Article, § 7-501 *et seq.* The General Assembly enacted the Md. MARS Act as part of House Bill 291 in the 2013 Legislative Session. That bill amended the MCSBA and enacted the Md. MARS Act.

Prior to July 1, 2013, persons engaged in short sale negotiations are subject to the Commissioner's regulatory authority under the Maryland Credit Services Businesses Act (MCSBA). The MCSBA requires that any person negotiating a short sale with a lender be licensed as a Credit Services Business unless otherwise exempt. The limited exemption for a person licensed as a Maryland real estate broker under the MCSBA does not apply in the context of short sale negotiations. As such, licensed real estate brokers are prohibited from engaging in short sale discussions and negotiations with lenders unless they are also licensed as Credit Services Businesses under the MCSBA.<sup>3</sup>

### *After July 1, 2013*

Beginning July 1, 2013, providers of short sale negotiation services and other forms of Mortgage Assistance Relief Services will be governed by the Md. MARS Act, which incorporates by reference the Federal Mortgage Assistant Relief Services Rule, originally promulgated by the Federal Trade Commission (FTC) and then issued as an interim final rule, known as Regulation O, by the Consumer Financial Protection Bureau (CFPB).<sup>4</sup>

As noted, providers of short sale negotiation services and other forms of Mortgage Assistance Relief Services are required to comply with all provisions of Regulation O and are subject to the Commissioner's regulatory enforcement authority. Regulation O prohibits short sale negotiators from making false or misleading representations, requires specific disclosures to consumers, prohibits upfront fees, and sets forth specific record keeping requirements for mortgage assistance relief service providers.

For detailed information on the Federal Mortgage Assistance Relief Services Rule and its implications for businesses, a detailed compliance guide is available online at <http://business.ftc.gov/documents/bus76-mortgage-assistance-relief-services-rule>.

### *Specific Industries*

- Attorneys: Subject to a few specific conditions found at 12 C.F.R. §1015.7 attorneys are exempt from the provisions of Regulation O. However, under the Md. MARS Act, the exemptions found in Regulation O apply only to attorneys admitted to practice law in Maryland who provide mortgage assistance relief services as part of their regular practice of law.

Additional information about Regulation O and the implications for attorneys is available from the FTC online at <http://business.ftc.gov/documents/bus77-mortgage-assistance-relief-services-rule-lawyers>.

- Real Estate Agents and Brokers: Regulation O and the MARS Act do not provide a specific exemption for real estate licensees. The Commissioner does not intend to enforce the MARS Act against real estate licensees who are acting within the scope of their license. The Commissioner is working with the Real Estate Commission to issue joint guidance specific to real estate brokers, associate brokers, and salespeople.

---

<sup>3</sup> The Maryland Real Estate Commission issued an advisory to its licensees in November 2012 explaining that real estate licensees engaged in short sale negotiations with a lender are required to be licensed under the MCSBA. That advisory can be found at: <http://www.dlrr.state.md.us/license/mrec/mrecshortsales.shtml>.

<sup>4</sup> The text of Regulation O may be found at:

[http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title12/12cfr1015\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title12/12cfr1015_main_02.tpl)

NOTE Mortgage Assistance Relief Service Providers must also comply with the Protection of Homeowners in Foreclosure Act (PHIFA)<sup>5</sup> when dealing with a consumer who is more than 60 days in default on their residential mortgage loan.

### **Settlement Procedures and Disclosure of Short Sale Fees**

Because both the MCSBA and the Md. MARS Act prohibit up-front fees, short sale negotiators are generally paid at settlement. Since the vast majority of settlements will require compliance with the Real Estate Settlement Procedures Act (RESPA)<sup>6</sup>, short sale negotiators are expected to comply with RESPA as well.

Under RESPA, the buyer has the exclusive right to choose the title company that conducts settlement. Short sale negotiators may not exercise influence over the selection or activities of the title or settlement companies involved with the closing of a short sale. Further, any fees payable to a short-sale negotiator at settlement must meet the following criteria:

- The fees must be for services that were actually performed;
- The fees must be ones that short-sale negotiators are legally permitted both to perform and to report on the HUD-1 based on their business licenses and other considerations;
- The fees must be accurately and clearly reported pursuant to the HUD-1 settlement sheet; and
- Pursuant to Regulation O, the nomenclature used for the fees should not give the impression that the short-sale negotiator is “affiliated with, endorsed or approved by, or otherwise associated with” any “Federal, State, or Local government agency, unit, or department.”<sup>7</sup>

Failure to properly identify and disclose short sale negotiation fees on a HUD-1 settlement statement or any preliminary settlement statements produced during the course of negotiations<sup>8</sup>, and/or causing such fees to be improperly reported, constitutes a misleading, unfair, or deceptive practice under the Md. MARS Act. Additionally, such practices may also constitute a violation of the Maryland Mortgage Fraud Prevention Act (the MMFPA)<sup>9</sup>.

---

<sup>5</sup> PHIFA is codified in the Annotated Code of Maryland, Real Property Article, § 7-301 *et seq.* Past guidance on the requirements of PHIFA can be found at: <http://www.dllr.state.md.us/finance/advisories/advisory9-08.shtml>

<sup>6</sup> RESPA is codified in the United States Code, Title 12, § 2601 *et seq.*

<sup>7</sup> See 12 C.F.R. § 1015.3 governing prohibited representations by Mortgage Assistance Relief Service Providers.

<sup>8</sup> This guidance is not limited to HUD-1 settlement statements. Any document that purports to disclose or summarize the charges or fees in the transaction that is transmitted to any party to the transaction must properly disclose the short sale negotiator’s fees in a way that is not misleading or deceptive. Further information on the placement of fees on a HUD-1 can be found in RESPA’s Appendix A at: [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_23688.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_23688.pdf)

<sup>9</sup> The MMFPA is codified in the Annotated Code of Maryland, Real Property Article, § 7-401 *et seq.*