

# Distressed Property Law 2009 (Act 66)

Frequently Asked Questions – May 29, 2009

The information provided in these FAQs was developed by the Hawai'i Association of REALTORS®. You are advised to seek the advice of your own legal counsel in determining your approach to compliance with the law. The following are some of the frequently asked questions.

## **I understand that the Governor recently signed a law that amended Act 137. What does the new law do?**

On May 20, 2009, Governor Linda Lingle signed a new law (Act 66) which amended Act 137 in two important ways. First, licensed real estate brokers and salespersons acting within the scope of their licenses are exempt from the definition of "distressed property consultant."

Second, to qualify for this exemption the listing agent cannot acquire an ownership interest in the distressed property, directly or indirectly, within 365 days after a listing agreement for the same distressed property has expired or is terminated.

Assuming the listing agent does not acquire an interest in the property for a year, a listing agent with short sale and/or distressed property expertise can now contact lenders and negotiate terms and conditions that can result in a successful closing. A cautionary note: Act 66 does not exempt unlicensed staff. Only real estate licensees are exempt. Therefore, all contact between lenders and the brokerage firm should be restricted to licensees.

## **When does the law take effect?**

The law is effective immediately.

## **Does the new law mean that Act 137 no longer applies to real estate transactions?**

No. The exemption described above does not mean that Act 137 has been repealed. It has merely been amended to exempt real estate licensees from the definition of "distressed property consultant." Practitioners must understand that, to the extent a Distressed Property and a Distressed Property Consultant (someone other than the licensee, an attorney or CPA) provide any of the services described in Act 137, then all Act 137 provisions are imposed upon the transaction, including all notice, rescission, documentation and recordation requirements.

Therefore, real estate brokers and salespersons must monitor their transactions closely and be able to recognize whether Act 137 applies in their transaction and insure that the purchase is properly documented in compliance with all applicable laws, including Act 137. If you have any questions regarding the applicability of the new exemption, you should consult with your broker and firm attorney.

## **What can I do to ensure that my seller tells me that he/she is working with a distressed property consultant?**

HAR has developed addendum forms for both the Exclusive Right to Sell Listing Agreement and the Purchase Contract that should be used in short sale and distressed property situations. These addenda require the seller to notify the brokerage firm immediately if the property in question becomes distressed and the seller is using a distressed property consultant, even if the property was not distressed at the time of the listing. To the extent you are unsure whether to use any of these forms in your transaction; you should consult with your broker and firm attorney.

## **I have a question regarding the scope of the exemption provided by Act 66. The new law refers to the exemption applying to, "any distressed property that is listed with the licensee." Under Hawai'i law, Hawai'i Revised Statutes Chapter 467, all listings are held by the principal broker. Does that mean that all agents with a particular firm must refrain from buying the distressed property for a year?**

Act 66 is intended to prevent situations in which licensees are capitalizing on the financial situation of their clients by buying distressed property, either directly or through a straw purchaser such as subsidiary, an affiliate, or coworker. The prohibition lasts for a year so that the licensee cannot terminate the listing agreement and then turn around and purchase the property, directly or indirectly.

There is no clear answer whether the one year restriction on purchasing a distressed property listing would extend to all agents in a given brokerage firm. Please consult with your broker to adopt policies and procedures with regard to distressed properties to ensure that violations of the new section do not occur.

## **Are real estate licensees restricted from purchasing any distressed property, even distressed property not listed with their firm?**

Act 66 bars licensees from purchasing, "any distressed property that is listed with the licensee." No reference is made regarding non-firm listings. While it appears that non-firm listings may be purchased by licensees, agents should not make any assumptions on their own concerning the application of Act 137 or the exemption provided by Act 66. Again, please consult with your broker, your firm policies and procedures, and your firm attorney for guidance.

**Stay tuned for a video webcast in early June 2009.**

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