

by Ilyce_Glink

Q: I'm wondering about something. Let's say a seller lists his home under market value and a buyer offers to pay more than the asking price. Can the parties agree to have the seller pay the difference between the listing price and the true market price to the buyer? If the buyer is an investor (who won't live in the property), must he inform his lender of this arrangement, since he's already prequalified? Since this would be a separate signed agreement between seller and buyer, does the lender even need to be notified? Some people have suggested this would constitute illegal lending activity. I've inquired and reviewed documents, including Truth-in-Lending forms and have found nothing to prohibit such a transaction. How can I find more information? A: A buyer and seller can agree on one price in a contract, and also agree that the seller will credit or pay the buyer money back at settlement. For example, if a homeowner is willing to sell for \$100,000 and a buyer is willing to pay \$110,000, the contract can state that the seller will credit the buyer \$10,000 at settlement. Keep in mind that for all practical purposes in this transaction, the seller sold for \$100,000 and the buyer purchased the property for \$100,000. The seller and buyer may have additional closing costs due to the increased purchase price, and this scenario would not be recommended. The reason some people might suggest such a transaction is illegal is because there is a lender involved. The Department of Housing and Urban Development (HUD) oversees all residential real estate transactions with federally-regulated mortgage loans. You may be familiar with a settlement statement called a HUD-1, sometimes called the "RESPA statement" because it's required under the Real Estate Settlement Procedures Act. HUD's rules provide for the HUD-1 to be used in every real estate transaction, and you probably have signed at least one in the course of your real estate dealings. The HUD-1 clearly states that it's illegal to knowingly make false statements. Any false statement can be punishable by a fine and imprisonment under Title 18 US Code Section 1001 and Section 1010. Further, the form states that the HUD-1 has been signed and is a true and accurate account of the funds received and disbursements made in the transaction contemplated. You also need to keep in mind that it also includes whether you falsify, conceal, or cover up by any trick, scheme, or device a material fact. In essence, you are put on notice that all relevant facts relating to the transaction are reflected in the HUD-1. That's only part one. If you're dealing with a residential lender, just about all of them require the buyer to sign documents stating that the buyer and seller have no side deals between them, and that the settlement statement accurately reflects the transaction. Lenders will allow some money to flow from the seller to the buyer at closing, but the nature of those funds must be disclosed to the lender. In some cases, sellers can pay several points toward the buyer's closing costs, toward special assessments due to a homeowner's association, toward lender fees and costs, and even toward lender points (a point is one percent of the loan amount). Other permissible payments are rental credits for rent and security deposit paid by a tenant. When properly disclosed and documented, most lenders will allow these kinds of payments. In the transaction you describe, you would be hiding the payment from the lender. The lender is willing to loan to you the lesser of the contract purchase price and the appraised value of the home. The lender determines how much it's willing to lend you on the basis of these facts, your credit history and other factors. The under-the-table payment of money from seller to buyer changes the lender's criteria. If the lender is only willing to lend you 80 percent of the purchase price, the lender expects you to put 20 percent into the deal. If the buyer is refunding money to you, you aren't putting in 20 percent, but rather misrepresenting the transaction to the lender. People who said your plan was fraudulent were correct. Not only that, but some states, counties and municipalities have real estate transfer taxes. When you complete these forms, you're certifying that the purchase price is accurate. In your situation, the purchase price would not be accurate. There may not be a legitimate reason for the payment from the seller other than to put less money down on the purchase of the home and hide information from the lender. If this is the purpose, you should not do it. Finally, HUD does not regulate commercial deals. If you're financing the purchase of the property with a commercial mortgage lender, and the property will be used for business purposes, these HUD rules don't apply. However, the lender's rules still apply. You'll find that in the commercial lender's loan package, there will be various representations as to the transaction, and any attempt to get money from the seller would violate any covenants you sign with the commercial lender. © 2006 by Ilyce R. Glink and Samuel J. Tamkin. Distributed by Tribune Media Services.

