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HOUSE BILL 657

**47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005**

INTRODUCED BY

Al Park

AN ACT

RELATING TO REAL PROPERTY; AMENDING, REPEALING AND ENACTING  
CERTAIN SECTIONS OF THE DEED OF TRUST ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 48-10-1 NMSA 1978 (being Laws 1987,  
Chapter 61, Section 1) is amended to read:

"48-10-1. SHORT TITLE.--~~[Sections 1 through 21 of this  
act]~~ Chapter 48, Article 10 NMSA 1978 may be cited as the "Deed  
of Trust Act"."

Section 2. Section 48-10-3 NMSA 1978 (being Laws 1987,  
Chapter 61, Section 3, as amended) is amended to read:

"48-10-3. DEFINITIONS.--As used in the Deed of Trust Act,  
unless the context otherwise requires:

A. "beneficiary" means the person named or  
otherwise designated in a deed of trust as the person for whose

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1 benefit a deed of trust is given or his successor in interest;

2 ~~[B. "qualified construction project" means a~~  
3 ~~low-income housing project of a regional, county or municipal~~  
4 ~~housing authority or a qualified nonprofit organization;~~

5 ~~C. "qualified nonprofit organization" means an~~  
6 ~~organization that is certified by the state housing authority~~  
7 ~~as having been granted exemption from federal income tax~~  
8 ~~pursuant to Section 501(c)(3) or (4) of the Internal Revenue~~  
9 ~~Code of 1986, as amended, and that includes as one of its~~  
10 ~~exempt purposes the fostering of low-income housing;~~

11 ~~D.]~~ B. "contract" means an agreement between or  
12 among two or more persons, including, without limitation, a  
13 note, promissory note, guarantee or the terms of any deed of  
14 trust;

15 ~~[E.]~~ C. "credit bid" means a bid made by the  
16 beneficiary in full or partial satisfaction of the contract  
17 that is secured by the deed of trust. A credit bid may only  
18 include an amount owing on a contract with interest secured by  
19 liens, mortgages, deeds of trust or encumbrances that are  
20 superior in priority to the deed of trust and which liens,  
21 mortgages or encumbrances, whether recourse or nonrecourse, are  
22 outstanding as provided in the contract or as provided in the  
23 deed of trust, together with the amount of other obligations  
24 provided in or secured by the deed of trust and the costs of  
25 exercising the power of sale and the trustee's sale, including

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1 the fees of the trustee and reasonable attorney fees actually  
2 incurred by the trustee and the beneficiary;

3 [F-] D. "parent corporation" means a corporation  
4 that owns eighty percent or more of each class of the issued  
5 and outstanding stock of another corporation or, in the case of  
6 a savings and loan association, eighty percent or more of the  
7 issued and outstanding guaranty capital of the savings and loan  
8 association;

9 [G-] E. "person" means an individual or  
10 organization;

11 [H-] F. "deed of trust" means a document by way of  
12 mortgage in substance executed in conformity with the Deed of  
13 Trust Act and in conformity with Section 47-1-39 NMSA 1978  
14 granting or mortgaging trust real estate to a trustee qualified  
15 under the Deed of Trust Act to secure the performance of a  
16 contract [~~but does not include a deed of trust that encumbers~~  
17 ~~in whole or in part trust real estate located in New Mexico and~~  
18 ~~in one or more other states~~];

19 [I-] G. "junior encumbrancer" means a person  
20 holding a lien, mortgage or other encumbrance of record  
21 evidencing an interest in the trust real estate that is  
22 subordinate in priority to the deed of trust and includes a  
23 lienholder, a mortgagee, a seller and a purchaser as provided  
24 in a real estate contract and, where the context is applicable,  
25 escrow agents as provided in a real estate contract;

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1           ~~[J. "low-income household" means a household that~~  
2 ~~the state housing authority certifies is a household with~~  
3 ~~income at or below eighty percent of the state's median~~  
4 ~~household income;~~

5           ~~K. "low-income housing project" means a housing~~  
6 ~~project that the state housing authority certifies is housing~~  
7 ~~for low-income households;~~

8           ~~L. "state housing authority" means the New Mexico~~  
9 ~~mortgage finance authority;~~

10           ~~M.]~~ H. "trust real estate" means any legal,  
11 equitable, leasehold or other interest in real estate,  
12 including the term "real estate" as defined in Section 47-1-1  
13 NMSA 1978 and any improvements and fixtures, which is capable  
14 of being transferred whether or not the interest is subject to  
15 any prior mortgages, deeds of trust, contracts for conveyance  
16 of real estate, real estate contracts or other liens or  
17 encumbrances; provided, however, trust real estate shall not  
18 include:

19                   ~~[(1) any dwelling and the underlying real~~  
20 ~~estate designed for occupancy by one to four families,~~  
21 ~~including mobile homes and condominiums, except when occupancy~~  
22 ~~is designed for low-income households;~~

23                   ~~(2)]~~ (1) any real estate used by the trustor  
24 for farming operations, including farming, tillage of the soil,  
25 dairy farming, ranching, production or raising of crops,

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1 poultry or livestock, and production of poultry or livestock  
2 products in an unmanufactured state; or

3 [~~(3)~~] (2) oil and other liquid hydrocarbons,  
4 or gas, including casinghead gas, condensates and other gaseous  
5 petroleum substances, or coal or other minerals in, on or under  
6 real estate, including patented and unpatented mining claims,  
7 unless such minerals have not been severed from and are  
8 included with the surface estate.

9 The character of trust real estate shall be determined as  
10 of the date of the deed of trust covering the trust real  
11 estate;

12 [~~N.~~] I. "trustee" means a person qualified as  
13 provided in the Deed of Trust Act. The obligations of a  
14 trustee to the trustor, beneficiary and other persons are as  
15 provided in the Deed of Trust Act, together with any other  
16 obligations specified in the deed of trust. Both the  
17 beneficiary and the trustee have all the powers of a mortgagee  
18 as provided by law; and

19 [~~0.~~] J. "trustor" means the person or his successor  
20 in interest granting or mortgaging trust real estate by a deed  
21 of trust as security for the performance of a contract and is  
22 the same as a mortgagor granting or mortgaging real estate by  
23 way of mortgage as provided by law."

24 Section 3. Section 48-10-7 NMSA 1978 (being Laws 1987,  
25 Chapter 61, Section 7) is amended to read:

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1 "48-10-7. APPOINTMENT OF SUCCESSOR TRUSTEE BY  
2 BENEFICIARY.--

3 A. If a person appointed as trustee fails to  
4 qualify, is unwilling, unqualified or unable to serve or  
5 resigns as trustee, the beneficiary may appoint a successor  
6 trustee and the appointment shall constitute a substitution of  
7 trustee.

8 B. The beneficiary may remove a trustee at any time  
9 for any reason or cause and appoint a successor trustee and  
10 [~~such~~] the appointment shall constitute a substitution of  
11 trustee.

12 C. Substitutions shall be made by recording notice  
13 of the substitution in the office of the county clerk of each  
14 county in which all or any part of the trust real estate is  
15 situated at the time of the substitution. The beneficiary  
16 shall give written notice through registered or certified mail,  
17 postage prepaid, to the trustor, the trustee and the successor  
18 trustee. A notice of substitution of trustee shall be  
19 sufficient if acknowledged by all beneficiaries as provided in  
20 the deed of trust and prepared in substantially the following  
21 form:

22 NOTICE OF SUBSTITUTION OF TRUSTEE

23 The undersigned beneficiary hereby appoints \_\_\_\_\_  
24 \_\_\_\_\_ successor trustee  
25 under the deed of trust executed by \_\_\_\_\_

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1 as trustor, in which \_\_\_\_\_ is named  
2 beneficiary and \_\_\_\_\_ as  
3 trustee, and recorded \_\_\_\_\_, [~~19~~\_\_\_\_\_] 20\_\_\_\_\_, in  
4 \_\_\_\_\_ County, New Mexico, in book \_\_\_\_\_, page  
5 \_\_\_\_\_, and legally describing the trust real estate as:

6 (legal description of trust real estate)

7 Dated this \_\_\_\_\_ day of \_\_\_\_\_, [~~19~~\_\_\_\_\_] 20\_\_\_\_\_.  
8 \_\_\_\_\_

9 \_\_\_\_\_  
10 Signature

11 (Here add Acknowledgment).

12 D. A notice of substitution is effective  
13 immediately on execution.

14 [~~D.~~] E. A person appointed as a trustee under a  
15 deed of trust may resign as trustee at any time. The  
16 resignation shall be without liability, provided the person has  
17 not agreed in writing to be appointed trustee or he has not  
18 acted in the capacity of trustee. The trustee may only resign  
19 as provided in the deed of trust and the Deed of Trust Act. If  
20 a trustee fails to qualify or is unwilling or unable to serve  
21 or resigns, the validity of the deed of trust shall not be  
22 affected, except that no action required to be performed by the  
23 trustee as provided in the Deed of Trust Act or as provided in  
24 the deed of trust may be taken until a successor trustee is  
25 appointed by the beneficiary as provided in this section. If

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1 the beneficiary fails or refuses to appoint a successor  
2 trustee, the terms of Section 47-1-42 NMSA 1978 shall be  
3 applicable. Resignation by a trustee is made by recordation of  
4 a notice of resignation in the office of the county clerk of  
5 each county in which all or any part of the trust real estate  
6 is situated at the time of the resignation. Written notice  
7 shall be given through registered or certified mail, postage  
8 prepaid, to the trustor and the beneficiary. A notice of  
9 resignation of trustee is sufficient if acknowledged by the  
10 trustee and prepared in substantially the following form:

11 NOTICE OF RESIGNATION OF TRUSTEE

12 The undersigned trustee hereby resigns as trustee under the  
13 deed of trust executed by \_\_\_\_\_, as  
14 trustor, in which \_\_\_\_\_ is named  
15 beneficiary, and recorded \_\_\_\_\_, [~~19~~]  
16 20, in \_\_\_\_\_ County, New  
17 Mexico, in book \_\_\_\_\_, page \_\_\_\_\_, and  
18 legally describing the trust real estate as:

19 (legal description of trust real estate)

20 Dated this \_\_\_\_\_ day of \_\_\_\_\_,  
21 [~~19~~] 20.

22 \_\_\_\_\_  
23 Signature

24 (Here add Acknowledgment)."

25 Section 4. Section 48-10-10 NMSA 1978 (being Laws 1987,

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1 Chapter 61, Section 10, as amended) is amended to read:

2 "48-10-10. SALE OF TRUST REAL ESTATE--POWER OF  
3 TRUSTEE--FORECLOSURE OF DEED OF TRUST.--

4 A. By virtue of his position, a power of sale is  
5 conferred upon the trustee of a deed of trust under which the  
6 trust real estate may be sold as provided in the Deed of Trust  
7 Act after a breach or default in performance of the contract  
8 for which the trust real estate is granted or mortgaged as  
9 security or a breach or default in performance of the deed of  
10 trust. Except as specifically provided in the Deed of Trust  
11 Act, the trustee shall not delegate the duties of the trustee  
12 as provided in the Deed of Trust Act. At the option of the  
13 beneficiary, a deed of trust may be foreclosed in the manner  
14 provided by law for the foreclosure of mortgages on real  
15 estate. Either the beneficiary or the trustee shall constitute  
16 the proper and complete party plaintiff in any action to  
17 foreclose a deed of trust.

18 B. The trustee or beneficiary may commence an  
19 action to foreclose a deed of trust at any time before the  
20 trust real estate has been sold as provided in the power of  
21 sale. A sale of trust real estate as provided in a power of  
22 sale in a deed of trust shall not be held after an action to  
23 foreclose the deed of trust has been commenced unless the  
24 foreclosure action has been dismissed.

25 C. The power of sale of trust real estate conferred

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1 upon the trustee [~~as to trust real estate for commercial or~~  
2 ~~business loans~~] shall not be exercised before the expiration of  
3 [~~one hundred eighty~~] ninety days from the recording of the  
4 notice of the sale. [~~The power of sale of trust real estate~~  
5 ~~conferred upon the trustee as to low-income household loans~~  
6 ~~shall not be exercised before the expiration of forty-five days~~  
7 ~~from the recording of the notice of the sale.~~]

8 D. The trustee need only be joined as a party in  
9 separate civil actions pertaining to a breach of an obligation  
10 of a trustee as provided in the Deed of Trust Act or as  
11 provided in the deed of trust. Any order of the court entered  
12 against the beneficiary is binding upon the trustee with  
13 respect to any actions that the trustee is authorized to take  
14 by the deed of trust or by the Deed of Trust Act. If the  
15 trustee is joined as a party in any other separate civil  
16 action, other than an action in which the trustee is an  
17 indispensable or necessary party, the trustee is entitled to be  
18 immediately dismissed and to recover the costs and reasonable  
19 [~~attorneys'~~] attorney fees actually incurred by the trustee  
20 from the person joining the trustee and from the beneficiary,  
21 jointly and severally."

22 Section 5. Section 48-10-11 NMSA 1978 (being Laws 1987,  
23 Chapter 61, Section 11) is amended to read:

24 "48-10-11. NOTICE OF TRUSTEE'S SALE.--

25 A. The trustee shall give written notice of the

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1 time and place of sale, legally describing the trust real  
2 estate to be sold, by each of the following methods:

3 (1) publication of the notice [~~shall be~~] as  
4 provided by law for foreclosure of mortgages on real estate;

5 [~~(2) posting of the notice at least twenty~~  
6 ~~days before the date of sale in some conspicuous place on the~~  
7 ~~trust real estate to be sold, if such can be accomplished~~  
8 ~~without a breach of the peace, and at one of the places~~  
9 ~~provided for posting public notices at the courthouse of the~~  
10 ~~county in which the trust real estate is to be sold;~~

11 ~~(3)]~~ (2) recording of the notice in the office  
12 of the clerk of each county in which the trust real estate is  
13 situated; and

14 [~~(4)]~~ (3) giving notice as provided in Section  
15 [~~12 of the Deed of Trust Act]~~ 48-10-12 NMSA 1978 to the extent  
16 applicable.

17 B. The sale shall be held at the time and place  
18 designated in the notice of sale on a day other than a  
19 Saturday, Sunday, legal holiday or nonbanking day and at the  
20 time provided by law for the foreclosure sale of real estate  
21 under real estate mortgages on the front steps of the  
22 courthouse of the county in which the trust real estate is  
23 located [~~or~~]. If the trust real estate is located in more than  
24 one county, the sale may be held in any county in which part of  
25 the trust real estate is located.

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1 C. The notice of sale shall contain the street  
2 address, if any, or identifiable location as well as the legal  
3 description of the trust real estate. Failure to accurately  
4 describe within the notice either the street address or the  
5 identifiable location of the trust real estate to be sold shall  
6 not be grounds for invalidating the sale if the correct legal  
7 description of the trust real estate to be sold was contained  
8 in the notice of sale. The notice of sale shall be sufficient  
9 if made in substantially the following form:

10 NOTICE OF TRUSTEE'S SALE

11 The following legally described trust real estate will be sold,  
12 pursuant to the power of sale as provided in the deed of trust  
13 recorded in book \_\_\_\_\_ at page \_\_\_\_\_,  
14 \_\_\_\_\_ County, New Mexico records, at public  
15 auction to the highest bidder on the front steps of the county  
16 courthouse in \_\_\_\_\_ County, New Mexico, in or  
17 near \_\_\_\_\_, New Mexico, on  
18 \_\_\_\_\_, [19\_\_\_\_\_] 20\_\_\_\_\_, at \_\_\_\_\_  
19 o'clock \_\_\_m. of that day:

20 (street address, if any, or identifiable location  
21 of trust real estate and legal description of  
22 trust real estate)

23 Dated this \_\_\_\_\_ day of \_\_\_\_\_,  
24 [19\_\_\_\_\_] 20\_\_\_\_\_.  
25 \_\_\_\_\_

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(Name of Trustor)

(Name of Trustee)

\_\_\_\_\_

Signature

(Here add Acknowledgment)."

Section 6. Section 48-10-13 NMSA 1978 (being Laws 1987, Chapter 61, Section 13) is amended to read:

"48-10-13. SALE BY PUBLIC AUCTION--POSTPONEMENT OF SALE.--

A. On the date and at the time and place designated in the notice of sale, the trustee shall sell the trust real estate at public auction for cash to the highest bidder. To determine the highest bidder, the trustor or beneficiary present at the sale may suggest the then existing and legally described and established lots, blocks, tracts or parcels of the trust real estate in which the trust real estate may be sold. The trustee shall ascertain all such suggestions, shall conditionally sell the trust real estate under each suggestion and, in addition, shall sell the trust real estate as a whole. The trustee shall determine which conditional sale results in the highest total price bid for all of the trust real estate. The lawyer for the trustee may conduct the sale and may act at the sale as the auctioneer for the trustee. Any person, including the trustee or beneficiary, may bid at the sale. Only the beneficiary may make a credit bid, instead of cash, at the sale. A junior encumbrancer may bid the amount or value of

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1 the obligation secured by the lien, mortgage, encumbrance or  
2 real estate contract, as the case may be, owed to the junior  
3 encumbrancer, less the amount or value of any prior deeds of  
4 trust, mortgages, liens, encumbrances or real estate contracts,  
5 if any, instead of cash, at the sale. In appropriate  
6 circumstances, the trustee may sell the trust real estate  
7 subject to prior deeds of trust, mortgages, liens, encumbrances  
8 or real estate contracts which are not being foreclosed. Every  
9 bid shall be deemed an irrevocable offer until the sale is  
10 completed and the sale shall not be deemed completed until the  
11 purchaser pays the price bid in immediately collectible or  
12 available federal funds. If the purchaser fails to pay the  
13 amount bid by the purchaser for the trust real estate struck  
14 off to the purchaser at the sale as provided in the Deed of  
15 Trust Act, the trustee may accept the next highest bid or  
16 proceed with the sale of the trust real estate to the highest  
17 bidder. The person who fails to make the payment shall be  
18 liable to any person who suffers loss or expenses, including  
19 reasonable ~~[attorneys']~~ attorney fees actually incurred by the  
20 trustee and beneficiary occasioned by the failure, and the  
21 trustee may subsequently in any postponed or continued sale of  
22 the trust real estate reject any bid of the person failing to  
23 pay the amount bid.

24 B. The person conducting the sale may, for the  
25 purpose of verifying the proper amount to be paid or the

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1 availability of immediately collectible federal funds, postpone  
2 or continue the sale for a reasonable period by giving notice  
3 of the new time by public declaration at the time and place  
4 last appointed for the sale. No other notice of the postponed  
5 or continued sale is required.

6 C. A sale shall not be complete if the sale as held  
7 is contrary to or in violation of any federal statute in effect  
8 because of an unknown or undisclosed bankruptcy. A sale so  
9 held shall be deemed to be continued to a date, time and place  
10 announced by the trustee at the sale and shall comply with  
11 Subsection B of this section or, if not announced, shall be  
12 continued to the same place and time twenty-eight days later,  
13 unless the twenty-eighth day falls on a legal holiday, in which  
14 event it shall be continued to the first business day  
15 thereafter. In the event a sale is continued because of an  
16 unknown or undisclosed bankruptcy, the trustee shall notify, by  
17 registered or certified mail, all bidders who provide their  
18 names, addresses and telephone numbers in writing to the party  
19 conducting the sale or the continuation of the sale."

20 Section 7. A new section of the Deed of Trust Act,  
21 Section 48-10-16.1 NMSA 1978, is enacted to read:

22 "48-10-16.1. [NEW MATERIAL] REDEMPTION.--

23 A. Except as provided in Subsection B of this  
24 section, after the sale of trust real estate pursuant to  
25 Section 48-10-13 NMSA 1978, the trust real estate may be

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1 redeemed by the beneficiary, or by any junior encumbrancer, by  
2 paying the purchaser at any time within nine months from the  
3 date of the sale, the amount paid with interest from the date  
4 of purchase at the rate of ten percent a year, together with  
5 all taxes, and interest and penalties thereon, and all payments  
6 made to satisfy in whole or in part any prior lien or mortgage  
7 not foreclosed, paid by the purchaser, with interest on such  
8 taxes, interest, penalties and payments made on liens or  
9 mortgages at the rate of ten percent a year from the date of  
10 payment.

11 B. The parties may, in the deed of trust, shorten  
12 the redemption period to not less than one month."

13 Section 8. Section 48-10-17 NMSA 1978 (being Laws 1987,  
14 Chapter 61, Section 17, as amended) is amended to read:

15 "48-10-17. ACTION TO RECOVER BALANCE AFTER SALE OR  
16 FORECLOSURE ON TRUST REAL ESTATE AS PROVIDED IN DEED OF  
17 TRUST--ACTION TO RECOVER BALANCE PROHIBITED ON LOANS SECURED BY  
18 LOW-INCOME HOUSEHOLDS.--

19 A. Except as provided in Subsections D and E of  
20 this section, [~~within twelve months after the date of sale of~~  
21 ~~trust real estate under a deed of trust as provided in the Deed~~  
22 ~~of Trust Act,~~] a separate civil action may be commenced to  
23 recover a deficiency judgment for the balance due on the  
24 contract for which the deed of trust was given as security.  
25 The deficiency judgment shall be for an amount equal to the sum

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1 of the total amount owing the beneficiary as of the date of the  
2 sale, as determined by the court, and, if applicable, the  
3 amount owing on all prior mortgages, deeds of trust, liens and  
4 encumbrances and real estate contracts with interest less the  
5 sale price at the sale by the trustee of the trust real estate.  
6 Any deficiency judgment recovered shall include interest on the  
7 amount of the deficiency from the date of the sale at the rate  
8 provided in the deed of trust or contract, together with any  
9 costs of the action.

10 B. If no action is commenced for a deficiency  
11 judgment as provided in Subsection A of this section, the  
12 proceeds of the sale, regardless of amount, shall be deemed to  
13 be in full satisfaction of the debt and no right to recover a  
14 deficiency in any separate civil action shall exist.

15 C. Except as provided in Subsections D and E of  
16 this section, the Deed of Trust Act does not preclude a  
17 beneficiary or a trustee from foreclosing a deed of trust in  
18 the same manner provided by law for the foreclosure of  
19 mortgages on real estate.

20 D. A deed of trust not encumbering real estate  
21 occupied by a low-income household may, by express language,  
22 validly prohibit the recovery of any balance due after the  
23 trust real estate is sold or after the deed of trust is  
24 foreclosed in the manner provided by law for the foreclosure of  
25 mortgages on real estate.

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1           E. No deficiency judgment shall be sought or  
2 obtained under any deed of trust encumbering real estate  
3 occupied by a low-income household. A deed of trust  
4 encumbering real estate occupied by a low-income household  
5 shall expressly prohibit the recovery of any balance due after  
6 the trust real estate is sold or after the deed of trust is  
7 foreclosed in the manner provided by law for the foreclosure of  
8 mortgages on real estate.

9           F. No deficiency in recovery of any balance due  
10 after the sale of trust real estate encumbering real estate  
11 occupied by a low-income household shall be reported to any  
12 credit reporting agencies or disclosed to any person, other  
13 than the trustor, unless the disclosure is required by law or  
14 regulation.

15           G. As used in this section, "low-income household"  
16 means a household that the New Mexico mortgage finance  
17 authority certifies as low income at the time of the closing of  
18 the contract."

19           Section 9. REPEAL.--Sections 48-10-2, 48-10-4 and  
20 48-10-16 NMSA 1978 (being Laws 1987, Chapter 61, Sections 2, 4  
21 and 16, as amended) are repealed.