

SENATE BILL NO. 383
INTRODUCED BY J. LASLOVICH

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING REQUIREMENTS FOR DEEDS OF TRUST FOR FINANCING PROPERTY TRANSACTIONS; PROVIDING FOR PROCEDURES FOR RECORDING DEEDS OF TRUST; PROVIDING FOR FORECLOSURE ON DEEDS OF TRUST; AMENDING SECTION 71-1-321, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 26] may be cited as the "Montana Deed of Trust Law".

NEW SECTION. **Section 2. Policy.** Because the financing of homes, agricultural operations, and business expansion has been restricted by the laws relating to mortgages of real property and by the Small Tract Financing Act of Montana and because more financing of homes, agricultural operations, and business expansion is available if the parties can use security instruments and procedures not subject to all of the provisions of the mortgage laws or of the Small Tract Financing Act of Montana, it is the public policy of the state of Montana to permit the use of deeds of trust for estates in real property, without limitation as to acreage, as provided in [sections 1 through 26].

NEW SECTION. **Section 3. Definitions.** As used in [sections 1 through 26], unless the context requires otherwise, the following definitions apply:

(1) "Beneficiary" means the person named or otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given or the person's successor in interest, who may not be the trustee.

(2) "Deed of trust" means an instrument executed in conformity with [sections 1 through 26] and conveying real property to a trustee in trust to secure a performance of an obligation of the trustor or other person named in the instrument to a beneficiary.

(3) "Foreclosure" includes enforcement of a deed of trust upon default, including both sale and subsequent delivery of possession of real property, by either of the following methods:

(a) exercise of a private power of sale, as provided in [sections 1 through 26], without the necessity of

any judicial action; or

(b) foreclosure by a judicial proceeding to foreclose the deed of trust.

(4) "Paid" and "fully paid" include full performance under an obligation that requires any sort of performance other than the payment of money.

(5) "Person" means an individual, a corporation, a partnership, a limited liability company, an organization, or another legal entity.

(6) "Servicer" means a person who collects loan payments on behalf of a beneficiary.

(7) (a) "Title insurance producer" means a person who holds a valid title insurance producer's license and is authorized in writing by a title insurer to:

(i) solicit title insurance business;

(ii) collect rates;

(iii) determine insurability in accordance with underwriting rules and standards of the insurer; or

(iv) issue policies of the title insurer.

(b) The term does not include an attorney approved by a title insurer.

(8) "Title insurer" means an insurer formed and authorized under the laws of this state to transact the business of title insurance in this state or a foreign or alien insurer authorized to transact title insurance business in this state.

(9) "Trustee" means a person to whom the legal title to real property is conveyed by a deed of trust or the person's successor in interest. Any obligation imposed on a trustee under [sections 1 through 26] may be performed by an attorney or agent of the trustee designated in writing by the trustee.

(10) "Trustor" means the person conveying real property by a deed of trust as security for the performance of an obligation.

NEW SECTION. Section 4. Deed of trust -- writing required. A deed of trust can be created, renewed, or extended only by a writing, executed and acknowledged before a notary, with the formalities required in the case of a grant of real property.

NEW SECTION. Section 5. Deed of trust authorized -- power of sale by trustee for breach. (1) A transfer by deed of trust of an interest in real property may be made to secure the performance of an obligation of the trustor or of any other person named in the underlying obligation or in the deed of trust to a beneficiary. However, a deed of trust may not be substituted for a mortgage that was in existence on [the effective date of this

act] or for a trust indenture under the Small Tract Financing Act of Montana that was in existence on [the effective date of this act].

(2) When a transfer of an interest in real property is made by a deed of trust to secure the performance of an obligation referred to in subsection (1), a power of sale is automatically conferred upon the trustee without any requirement that the power of sale be referred to in the deed of trust. The power of sale may be exercised after a breach of the underlying obligation for which the deed of trust is security or for a breach of an obligation stated in the deed of trust.

(3) (a) A deed of trust executed in conformity with [sections 1 through 26] may be foreclosed either by:

(i) exercise of the private power of sale in the manner provided in this part; or

(ii) at the option of the beneficiary, by a judicial proceeding as provided by law for the foreclosure of mortgages on real property.

(b) The power of sale may be exercised by the trustee without any express provision for the power in the deed of trust.

(4) A deed of trust as authorized by [sections 1 through 26] may be made with respect to a real property of any size, without restriction as to the acreage contained in the real property subject to the deed of trust.

NEW SECTION. Section 6. Request for notice -- provision required to be contained in deed of trust -- incorporation by reference. (1) Each deed of trust made in accordance with [sections 1 through 26] must contain the following request for notice on the part of the trustor:

"Request is made that a copy of any notice of default and a copy of any notice of sale under the deed of trust recorded on _____ 20____, in the book _____, page _____, records of _____ County, (or recorded with recorder's instrument number _____), in _____ County, Montana, executed by _____ as trustor, in which _____ is named as beneficiary and _____ as trustee be mailed to: _____

Name

at: _____

Address

NOTICE: A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

SIGNATURE: _____"

(2) (a) In order to reduce the volume of recorded instruments, a trustee, a title insurance company, or

an institutional lender may record in each county of this state in which the trustee does business or expects to do business a form of fictitious deed of trust, which fictitious deed of trust may be incorporated by reference into any deed of trust by referring to the recording data for the fictitious deed of trust. A fictitious deed of trust may include standard items that would otherwise be included in the body of the deed of trust, including but not limited to the obligation of the trustor to pay real property taxes and insurance on the subject real property, the obligation of the trustor to not commit waste, and provisions for payment of the proceeds of any insured casualty, any condemnation, or any transfer in lieu of condemnation.

(b) Subsection (2)(a) may not be construed as a limitation on the items that may be included in the fictitious deed of trust. A deed of trust to be recorded in any county of this state may incorporate only a fictitious deed of trust that has been previously recorded in the same county.

NEW SECTION. Section 7. Request for copies of notice of default or sale by a person other than trustor. Any person other than the original trustor who desires a copy of any notice of default and of any notice of sale under any deed of trust upon real property may, at any time after the recording of the deed of trust and before recording of a notice of default under the deed of trust, record in the office of the clerk and recorder of any county in which any part of the real property is situated a duly acknowledged request for a copy of the notice of default and notice of sale. This request must be signed and acknowledged by the person making the request, specifying the name and address of the person to whom the notice is to be mailed, and must identify the deed of trust by stating the names of the parties to the deed of trust, the date of recording of the deed of trust, and the book and page where the deed of trust is recorded or the recorder's instrument number and must be in substantially the same form as that provided in [section 6(1)].

NEW SECTION. Section 8. Qualifications of trustee -- successor trustee. (1) The trustee of a deed of trust under [sections 1 through 26] must be:

- (a) an attorney who is licensed to practice law in Montana;
- (b) a bank, trust company, or savings and loan association authorized to do business in Montana under the laws of Montana or the United States; or
- (c) a title insurer or title insurance company producer authorized to do business in Montana under the laws of Montana.

(2) The beneficiary may appoint a successor trustee at any time by recording in the office of the clerk and recorder of each county in which the trust real property or some part of the trust real property is situated a

substitution of trustee. The substitution must identify the deed of trust by stating the name of the original parties to the deed of trust, the date of recording, the book and page where the information is recorded, and the name and mailing address of the new trustee, and the substitution must be executed and acknowledged by all of the beneficiaries designated in the deed of trust or their successors in interest. From the time the substitution is recorded, the new trustee is vested with all the powers, duties, authority, and title of the trustee named in the deed of trust and of any successor trustee.

NEW SECTION. Section 9. Reconveyance upon full performance -- liability for failure to reconvey.

(1) Upon full performance of the obligation secured by the deed of trust, the trustee, upon written request of the beneficiary or servicer, shall reconvey the interest in real property described in the deed of trust to the trustor or the trustor's successor in interest. If the obligation has been fully performed and the beneficiary or servicer refuses to request reconveyance or the trustee refuses to reconvey the property within 90 days of the request, the beneficiary, servicer, or trustee who refuses is liable to the trustor or the trustor's successor in interest for the sum of \$500 and all actual damages resulting from the refusal to reconvey.

(2) If a beneficiary or servicer has received a notice of intent to reconvey pursuant to [section 10] and has not requested a reconveyance or has not objected to the reconveyance within the 90-day period established in [section 10], the beneficiary or servicer is liable to the title insurer or title insurance producer for the sum of \$500 and all damages resulting from the failure.

(3) In an action by a trustor, successor in interest to trustor, title insurer, or title insurance producer to collect any sums due under this section, the court shall award reasonable attorney fees and costs to the prevailing party.

NEW SECTION. Section 10. Reconveyance of deed of trust -- forms -- objections to reconveyance. (1) A title insurer or title insurance producer may reconvey a deed of trust in accordance with the provisions of this section if:

(a) the obligation secured by the deed of trust has been fully paid by the title insurer or title insurance producer; or

(b) the obligation secured by the deed of trust was fully paid by a former title insurer, title insurance producer, or predecessor of the title insurer or title insurance producer.

(2) A title insurer or title insurance producer may reconvey a deed of trust regardless of whether the title insurer or title insurance producer is named as a trustee under the deed of trust if the obligation secured by the

deed of trust has been fully paid.

(3) At the time that the obligation secured by the deed of trust has been fully paid or at any time after full payment, the title insurer or title insurance producer shall deliver by certified mail a notice of intent to reconvey and a copy of the reconveyance to be recorded to the beneficiary or servicer at:

(a) the address specified in the deed of trust;

(b) any address for the beneficiary or servicer specified in the last recorded assignment of the deed of trust;

(c) any address for the beneficiary or servicer specified in a request for notice recorded under [section 7]; or

(d) the address shown on any payoff statement or payoff demand received by the title insurer or title insurance producer from the beneficiary or servicer.

(4) (a) The notice of intent to reconvey must contain the name of the beneficiary and the name of the servicer if loan payments on the deed of trust are collected by a servicer, the name of the title insurer or title insurance producer, and the date that the notice is signed.

(b) The notice must be in substantially the following form:

NOTICE OF INTENT TO RECONVEY

NOTICE IS GIVEN TO YOU AS FOLLOWS:

1. THIS NOTICE CONCERNS THE DEED OF TRUST DESCRIBED AS FOLLOWS:

TRUSTOR: _____

BENEFICIARY: _____

RECORDING INFORMATION: _____

DOCUMENT NUMBER: _____

BOOK NUMBER: _____

PAGE NUMBER: _____

2. The undersigned claims to have paid in full or possesses satisfactory evidence of the full payment of the obligation secured by the deed of trust described above.

3. The undersigned will fully reconvey the deed of trust described in this notice, without warranty, within 90 days from the date stated on this notice unless:

(a) a reconveyance of the deed of trust has already been recorded; or

(b) the undersigned has received by certified mail a notice stating that the obligation secured by the deed of trust has not been paid or performed in full or that you otherwise object to the reconveyance of the deed of

trust. Notice must be mailed to the address stated on this form.

(c) Pursuant to [section 9], a beneficiary or servicer may be liable for damages, costs, and penalties for failing to reconvey a deed of trust within 90 days of the date stated in this notice if the obligation secured by the deed of trust has been fully paid prior to the delivery of this notice.

4. A copy of the reconveyance of deed of trust is enclosed with this notice.

(Signature of title insurer or title insurance producer)

(Address of title insurer or title insurance producer)

(5) (a) If, within 90 days from the day on which the title insurer or title insurance producer delivers the notice of intent to reconvey, the beneficiary or servicer does not send by certified mail to the title insurer or title insurance producer a notice that the obligation secured by the deed of trust has not been paid in full or that the beneficiary or servicer objects to the reconveyance of the deed of trust, the title insurer or title insurance producer may execute, acknowledge, and record a reconveyance of the deed of trust.

(b) A reconveyance of a deed of trust must be in substantially the following form:

RECONVEYANCE OF DEED OF TRUST

(Name of title insurer or title insurance producer) authorized to conduct business in this state reconveys, without warranty, the following trust property located in (name of county), state of Montana, that is covered by a deed of trust naming (name of trustor) as trustors and (name of beneficiary) as beneficiary which was recorded on (date) in book _____ at page _____ as document number _____: (Insert a description of the trust property.)

The undersigned title insurer or title insurance producer certifies as follows:

1. The undersigned title insurer or title insurance producer has fully paid the obligation secured by the deed of trust or possesses satisfactory evidence of the full payment of the obligation secured by the deed of trust.

2. As required by the provisions of [section 10], the title insurer or title insurance producer delivered to the beneficiary or servicer a notice of intent to reconvey and a copy of the reconveyance.

3. The deed of trust has not been reconveyed and the title insurer or title insurance producer did not receive, within 90 days from the day on which the title insurer or title insurance producer delivered to the beneficiary or servicer the notice of intent to reconvey, a notice from the beneficiary or servicer, sent by certified mail, that the obligation secured by the deed of trust has not been paid in full or that the beneficiary or servicer objects to the reconveyance of the deed of trust.

(Notarization)

(Signature of title insurer or title insurance producer)

(c) (i) A reconveyance of deed of trust executed and notarized in accordance with subsection (5)(b) may be recorded.

(ii) Except as provided in subsection (5)(c)(iii), a reconveyance of a deed of trust that is recorded in compliance with subsection (5)(c)(i) is valid regardless of any deficiency in the reconveyance procedure not disclosed in the reconveyance of the deed of trust.

(iii) If the title insurer's or title insurance producer's signature on a reconveyance of deed of trust recorded under subsection (5)(c)(i) is forged, the release of mortgage or reconveyance of deed of trust is void.

(6) A reconveyance of deed of trust pursuant to the provisions of this section does not, by itself, discharge any promissory note or other obligation that was secured by the deed of trust at the time that the deed of trust was reconveyed.

NEW SECTION. Section 11. Objection to reconveyance. A title insurer or title insurance producer may not record a reconveyance of deed of trust if, within 90 days of the date of the notice of intent to reconvey, the beneficiary or servicer notifies the title insurer or title insurance producer that the obligation has not been paid in full or that the beneficiary or servicer objects to the reconveyance.

NEW SECTION. Section 12. Liability of title insurer or title insurance producer. A title insurer or title insurance producer who reconveys a deed of trust is liable to the beneficiary for damages suffered by the beneficiary as a result of the reconveyance if:

- (1) the obligation secured by the deed of trust has not been fully paid;
- (2) the title insurer or title insurance producer failed to comply with the provisions of [section 10]; or
- (3) the title insurer or title insurance producer acted with gross negligence or in bad faith in reconveying the deed of trust.

NEW SECTION. Section 13. Curing default and reinstatement. (1) A monetary default under a deed of trust or under the terms of an obligation secured by a deed of trust may be paid and the obligation may be reinstated at any time within a period commencing with the date of recording of the notice of default until 5 business days prior to the date of sale set forth in the initial recorded notice of sale.

- (2) If the date of sale is postponed on the date of sale set forth in either an initial or any subsequent

notice of sale or is postponed on the date declared for the sale and the postponement is for a period that exceeds 5 business days from the date set forth in the notice of sale or declared at the time of postponement, then the right of reinstatement is revived as of the date of postponement and must continue from that date until 5 business days prior to the date of sale as declared at the time of the postponement.

(3) (a) This section may not give rise to a right of reinstatement during the period of 5 business days immediately preceding the date of sale, whether the date of sale is noticed in a notice of sale or is declared at a postponement of sale. A beneficiary, trustee, or their respective agents or successors are not liable in any manner to a trustor, the trustor's agent or successors, any beneficiary under a subordinate deed of trust, or any other person having a subordinate lien or encumbrance of record for the failure to allow reinstatement of the obligations secured by a deed of trust during the period of 5 business days immediately prior to the sale of the security property. Any right of reinstatement during that 5-day period is not created by this section. Any right of reinstatement created by this section is terminated 5 business days prior to the date of sale set forth in the initial date of sale and is revived only as prescribed in this subsection (3) and only as of the dates set forth in this subsection (3).

(b) As used in this subsection (3), the term "business day" means a business day as described in 1-1-216(2).

(4) (a) In order to cure a default and effect reinstatement of the obligation secured by the deed of trust, the trustor or the trustor's successor in interest may pay to the beneficiary or the beneficiary's successor in interest the entire amount due, at the time payment is tendered, with respect to:

(i) all amounts of principal, interest, taxes, assessments, insurance premiums, or advances that are in default and are actually known by the beneficiary to be in default and that are shown in the notice of default under the terms of the deed of trust and the obligation secured by the deed of trust;

(ii) all amounts in default on recurring obligations not shown in the notice of default; and

(iii) all reasonable costs and expenses that are actually incurred in enforcing the terms of the obligation or deed of trust up to the time of cure, including but not limited to recording fees, publication costs, the cost of a foreclosure guaranty and any update of the guaranty that the trust has obtained, trustee fees, and reasonable attorney fees.

(b) By paying the total of all the items enumerated in subsection (4)(a), the trustor or trustor's successor in interest may cure the default, and upon payment all foreclosure proceedings previously had or instituted must be dismissed or discontinued and the obligation and deed of trust must be reinstated and remains in force and effect, the same as if the acceleration had not occurred.

(5) (a) If the beneficiary has not made advances on defaults that would constitute recurring obligations, the beneficiary may require the trustor or the trustor's successors to provide reliable written evidence that the amounts have been paid prior to the cure and reinstatement.

(b) For purposes of this subsection (5), the term "recurring obligation" means:

(i) all amounts of principal and interest on the obligation secured by the deed of trust that is in default and that became due after the notice of default is recorded;

(ii) all amounts of principal and interest advanced on senior liens that are advanced after the recording of the notice of default; and

(iii) payment of taxes, assessments, and hazard insurance advanced after recording of the notice of default.

(6) If the trustor or other person authorized to cure the default pursuant to this section cures the default, the beneficiary or agent for the beneficiary shall, within 21 days following the reinstatement, execute and deliver to the trustee a notice of rescission which rescinds the declaration of default and advises the trustee of the date of reinstatement. The trustee shall cause the notice of rescission to be recorded within 30 days after receipt of the notice of rescission and of all allowable fees and costs. A charge, except for the recording fee, may not be made against the trustor for the execution and recording of the notice that rescinds the declaration of default.

NEW SECTION. Section 14. Statute of limitations for foreclosure. The foreclosure of a deed of trust by exercise of the power of sale or by judicial proceedings must be commenced within the same time, including extensions, that is provided by law for the foreclosure of a mortgage on real property.

NEW SECTION. Section 15. No right of redemption or postsale possession. Regardless of which method of foreclosure is utilized, the trustor and the trustor's successors in interest are not entitled to any right of redemption following completion of the sale, and the trustor and trustor's successors in interest shall deliver possession to the buyer at the foreclosure sale within 10 calendar days after the sale is concluded. A trustee exercising the power of sale may postpone completion of the sale on one or more occasions as provided in [section 20(5)(b)].

NEW SECTION. Section 16. Procedure for foreclosure by power of sale. Any foreclosure made by a trustee under a deed of trust pursuant to the power of sale provided in [sections 1 through 26] must follow the procedures set forth in [sections 17 through 22].

NEW SECTION. Section 17. Conditions precedent for foreclosure by power of sale -- enforcement of acceleration of maturity date of principal and interest or disbursement of process of property owners.

(1) The trustee may foreclose a deed of trust by exercise of the private power of sale under [sections 1 through 26] if:

(a) the deed of trust and any assignments of the deed of trust made by the beneficiary have been recorded in the office of the clerk and recorder of each county in which the real property described in the deed of trust or some part of the property is situated; and

(b) there is a default by the trustor or other person owing an obligation or by their respective successors in interest, the performance of which is secured by the deed of trust, with respect to any provision in the obligation secured by the deed of trust or any obligation contained in the deed of trust itself that authorizes the sale in the event of default on the provision.

(2) The provisions of any deed of trust on real property or of any obligation secured by a deed of trust that authorize any beneficiary, trustee, or the beneficiary's or trustee's agent or successor in interest to accelerate the maturity date of the principal and interest on any loans secured by the deed of trust or to exercise any power of sale or other remedy contained in the deed of trust upon failure of the trustor to pay, at the times provided for under the terms of the deed of trust, any taxes, rents, assessments, or insurance premiums with respect to the property or the loan or any advances made by the beneficiary or the beneficiary's agent or successor in interest must be enforceable whether or not impairment of the security interest in the property has resulted from the failure of the trustor to timely pay any principal or interest due under the obligation secured by the deed of trust or failure to pay real property taxes, rents, assessments, insurance premiums, or advances. The right to accelerate the maturity of the date of the principal and interest on any secured obligation, as provided in this subsection (2), is subject to the trustor's right to cure a default as provided in [section 13].

(3) The provisions of any deed of trust on real property that authorize any beneficiary, trustee, or the beneficiary's or trustee's agent or successor in interest to receive and control the disbursement of the proceeds of any policy of fire, flood, or other hazard insurance respecting the property are enforceable whether or not impairment of the security interest in the property has resulted from the event that caused the proceeds of the insurance policy to become payable.

NEW SECTION. Section 18. Substitution of trustee -- recording before recording notice of default.

If the beneficiary under a deed of trust desires to substitute the trustee in connection with a foreclosure by exercise of the power of the sale, the substitution must be recorded prior to recording the notice of default.

NEW SECTION. **Section 19. Notice of default -- recording and service.** (1) Before recording a notice of default, the trustee must have obtained a foreclosure guaranty issued by a title insurer. The foreclosure guaranty must show the then-current status of the title to all of the real property affected by the deed of trust, including all liens and encumbrances of record. The foreclosure guaranty must also contain a commitment by the issuing title insurer that upon completion of the foreclosure, the title insurer will insure title in the buyer at the foreclosure sale, subject only to the exceptions stated in the foreclosure guaranty.

(2) A foreclosure by exercise of the power of sale is begun by recording a notice of default containing the provisions specified in this subsection in the office of the county clerk and recorder of each county in which any portion of the real property described in the deed of trust is located. A copy of the notice must be mailed to the trustor. The notice of default must contain the following information and provisions:

(a) the nature and amount of each default actually known to the beneficiary;

(b) that the beneficiary elects to sell or cause to be sold the property to satisfy the obligations and any other obligations secured by or contained in the deed of trust that are also in default or which will be in default prior to the foreclosure sale;

(c) that not less than 90 days after recording the notice of default, the trustee or the trustee's agent will issue a notice of sale, stating the time and place of sale, and will mail the notice of sale as provided in subsection (7).

(3) The notice must contain information identifying the deed of trust and property as follows:

(a) the name of the trustor;

(b) the name of the beneficiary;

(c) the name of the trustee;

(d) the instrument number, book, and page containing the recording information for the deed of trust;

(e) the legal description of the real property subject to the deed of trust that is being foreclosed;

(f) the street address, if any, of the real property; and

(g) the name, address, and telephone number of the trustee or trustee's agent who is handling the foreclosure and from whom additional information may be obtained.

(4) (a) The notice of default must also contain a warning to the trustor or the trustor's successors in interest in substantially the following form:

IMPORTANT NOTICE

[14-point boldface type if printed or in capital letters if typed]

YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS OR

OTHERWISE IN DEFAULT. IT MAY BE SOLD WITHOUT ANY COURT ACTION, [14-point boldface type if printed or in capital letters if typed] and you may have the legal right to bring your account in good standing by paying all of your past-due payments plus all permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally 5 business days prior to the date set for the sale of your property. A sale date may not be set until 90 days after the date this notice of default is recorded (which date of recording appears on this notice).

The dollar amount in default is _____ as of _____ and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust. If you fail to make future payments on the note, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and deed of trust, the beneficiary may insist that you do so in order to reinstate your account in good standing. In addition, the beneficiary may require as a condition to reinstatement that you provide reliable written evidence that you have paid all amounts due on senior liens, property taxes, and hazard insurance premiums.

Upon your written request, the beneficiary will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your beneficiary may mutually agree in writing prior to the time the notice of sale is posted (which may not be earlier than the end of the 90-day period stated above) to, among other things, provide additional time in which to cure the default by transfer of the property or otherwise or establish a schedule of payments in order to cure your default, or both.

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.

To find out the amount you must pay or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reasons, contact:

(Name of beneficiary)

(Mailing address)

(Telephone number)

If you have any questions, you should contact a lawyer or the governmental agency which may have insured your loan.

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

Remember, **YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.** [14-point boldface type if printed or in capital letters if typed]

(b) Unless otherwise specified, the notice, if printed, must appear in at least 12-point boldface type.

(5) Any failure to comply with the provisions of this section may not affect the validity of a sale in favor of a bona fide purchaser in good faith or the rights of an encumbrancer in good faith for value and without notice.

(6) Within 10 business days following the recording of the notice of default, the trustee shall deposit or cause to be deposited in the United States mail two envelopes, one sent by certified mail and one sent by ordinary first-class mail, both with postage prepaid, containing a copy of the notice with the recording date shown on the notice to each of the following persons:

(a) the original trustor at the address shown on the deed of trust being foreclosed;

(b) any successor in title to the original trustor whose estate or interest is acquired by an instrument sufficient to impart constructive notice of the estate or interest in the real property or portion of the real property that is subject to the deed of trust being foreclosed, and provided that:

(i) the instrument is recorded in the office of the county clerk and recorder so as to impart that constructive notice prior to the recording date of the notice of default; and

(ii) the instrument as recorded sets forth a mailing address that the county clerk and recorder is to use for the return of the instrument after recording;

(c) each person whose name and address are set forth in a recorded request for a copy of the notice of default;

(d) the holder of a junior encumbrance whose encumbrance of the subject real property or any part of that property or an interest in that property has been recorded after the deed of trust being foreclosed. A junior encumbrance includes:

(i) a mortgage;

(ii) a trust indenture under the Small Tract Financing Act of Montana; or

(iii) a deed of trust.

(e) the buyer under any contract for deed affecting any part of the subject real property or any interest in the property that has been recorded in the county;

(f) the optionee of any option and the holder of any right of first refusal affecting the subject real property, any part of the real property, or interest in the real property that has been recorded;

(g) the lessee under any lease of the subject real property or any part of the real property, a copy or a memorandum of which has been recorded in the office of the county clerk and recorder of the county in which the property or any part of the property being foreclosed is located.

(7) Both the copy of the notice of default that is to be sent by certified mail and the additional copy of the notice of default that is to be sent by first-class mail must be sent to the address that is shown of record for each of the persons entitled to receive a copy of the notice of default.

(8) The trustee or person designated by the trustee to accomplish mailing of the notice of default shall execute and retain an affidavit identifying the notice mailed, showing the name and residence or business address of the person doing the mailing, that the person doing the mailing is over 18 years of age, the date of deposit in the mail, the name and address of each party to whom the notice was sent, and that the envelopes were sealed and deposited in the United States mail with postage fully prepaid. In the absence of fraud, the affidavit required by this subsection establishes a conclusive presumption of mailing.

(9) The recording, mailing, publishing, or delivery of any notice of default, notice of sale, or other notice authorized by [sections 1 through 26] may not give rise to any civil or criminal cause of action for defamation, injury to reputation, or any other cause of action.

NEW SECTION. Section 20. Notice of sale -- conduct of sale -- contents -- posting -- publication and recording -- place of sale -- prior bids. (1) Before posting and publishing the notice of sale as provided in this section, the trustee or the trustee's designated representative shall obtain a current update to the foreclosure guaranty issued by a title insurance company so as to be able to ascertain whether any notice of federal tax lien under section 7425 of Internal Revenue Code, 26 U.S.C. 7425, has been recorded subsequent to the deed of trust being foreclosed against the property to which the notice of sale applies. If a notice of federal tax lien has been recorded, a copy of the notice of sale must be given to the district director of the internal revenue service whose district includes Montana. The notice must be in writing, must be sent by certified mail, return receipt requested, not less than 30 days prior to the date of sale, and must be marked for the attention of the chief of the special procedures staff for the internal revenue district in which the sale is to be conducted. The date of sale may not be set on a date less than 30 days after the date of mailing of the notice to the internal

revenue service. The failure to provide the internal revenue service with a copy of the notice of sale pursuant to this subsection is sufficient cause to rescind the trustee's sale and invalidate the trustee's deed, at the option of either the successful bidder at the trustee's sale or the trustee, and in either case with the consent of the beneficiary. Any option to rescind the trustee sale pursuant to this subsection must be exercised prior to any transfer of the property by the successful bidder to a bona fide purchaser for value. A rescission of the trustee sale pursuant to this subsection may be recorded in a notice of rescission of sale. If notice of the sale is not timely given to the internal revenue service in accordance with federal tax law, any federal tax lien that had been recorded against the property prior to the foreclosure sale may still constitute a valid lien on the property after the foreclosure sale.

(2) (a) The sale date must be set not less than 90 days after the date of recording of the notice of default. However, if the updated foreclosure guaranty shows that a notice of federal tax lien has been recorded, the trustee shall set the sale date to allow sufficient time for notice to the internal revenue service as provided in subsection (1).

(b) At least 20 days before the date of sale, the trustee or the trustee's designated agent shall give notice of the sale in the following manner:

(i) A written notice must be posted containing the date and time of sale and of the street address and a specific place at the street address where the sale will be held and describing the property to be sold. A copy of the notice of sale must also be posted in a conspicuous place on the property to be sold at least 20 days before the date of sale. The notice must describe the property by giving its street address, if any, or other common designation, if any. However, if the property does not have a street address or other common designation, the notice must contain a legal description of the property. The notice of sale must also state the name and address of the beneficiary at whose request the sale is to be conducted. If the property being foreclosed does not have a street address, the notice of sale must also include a statement that directions for locating the property may be obtained pursuant to a written request submitted to the beneficiary within 10 days after the first publication of notice. Directions must be considered reasonably sufficient to locate the property if information as to the location of the property is given by reference to the direction and approximate distance from the nearest crossroads, frontage road, or access road. If a legal description and either a street address or other common designation of the property is given, the validity of the notice and the validity of the sale may not be affected by the fact that the street address or other common designation, name and address of the beneficiary, or locating directions obtained from the beneficiary are erroneous or that the street address or other common designation, name and address of the beneficiary, or directions obtained from the beneficiary are omitted.

(ii) In addition to the posting provided for in subsection (2)(b)(i), a copy of the notice of sale must be published once a week for 3 consecutive calendar weeks, the first publication to be at least 20 days before the date of sale, in a newspaper of general circulation published in the city in which the property or some part of the property is situated, if any part of the property is situated in a city, and if not, then in a newspaper of general circulation published in the county in which the property or some part of the property is situated. If a newspaper of general circulation is not published in the city or county, then the notice must be published in a newspaper of general circulation published in the nearest county in this state in which a newspaper of general circulation is published.

(3) A copy of the notice of sale must also be recorded with the county clerk and recorder of the county in which the property or some part of the property is situated at least 14 days prior to the date of sale.

(4) The notice of sale must contain a statement of the total amount of the unpaid balance of the obligation secured by the property to be sold and reasonably estimated costs, expenses, advances at the time of initial publication of the notice of sale, and any amounts such as real property taxes and insurance that have become due since the date of recording of the notice of default. However, the trustee may not incur liability for any good faith error in stating the proper amount, including any amount provided in good faith by or on behalf of the beneficiary. An inaccurate statement of this amount may not affect the validity of any sale to a bona fide purchaser who takes in good faith, for value, and without actual notice of the inaccuracy.

(5) (a) All sales of property under the power of sale contained in or considered contained in any deed of trust must be held in the county where the property or some part of the property is situated and must be made at auction, to the highest bidder, between the hours of 9:00 a.m. and 5:00 p.m. on any business day, Monday through Friday. If the date originally scheduled for the sale is a legal holiday, the sale must be held on the next business day. The sale must commence at the time and location specified in the notice of sale. Any postponement must be announced at the time and location specified in the notice of sale for commencement of the sale or pursuant to subsection (5)(b). When the property being sold consists of several known lots or parcels, they must be sold separately unless the deed of trust provides otherwise. The trustor or trustor's successor in interest, if present at the sale, may also, unless the deed of trust provides otherwise, direct the order in which the property is sold, when the property consists of several known lots or parcels that may be sold to advantage separately, and the trustee shall follow the direction. After sufficient property has been sold to satisfy the indebtedness, including all costs, expenses, advances up to the time of sale, trustee fees, and attorney fees, then no more of the property may be sold. If the property being foreclosed under power of sale is in two or more counties, the public auction sale of all of the property under the power of sale may take place in any one of the

counties where the property or a portion of the property is located.

(b) (i) There may be a postponement of the sale proceedings at any time prior to the completion of the sale at the discretion of the trustee or upon instruction by the beneficiary to the trustee that the sale proceedings be postponed. There may be a maximum of three postponements of the sale proceedings pursuant to this subsection. In addition, one postponement by the trustee based upon a reasonable belief that a petition of bankruptcy has been filed is not a postponement for purposes of determining the maximum number of postponements permitted pursuant to this subsection. If the sale proceedings are postponed more than three times, a new notice of sale must be given in the same manner prescribed by subsection (2) for the original sale date.

(ii) The trustee shall also postpone the sale upon the order of any court of competent jurisdiction, when stayed by operation of law, or by the mutual written agreement of the trustor and the beneficiary. Any postponement pursuant to this subsection (5)(b)(ii) is not a postponement for purposes of determining the maximum number of postponements permitted pursuant to subsection (5)(b)(i), and a postponement resulting from the prohibition upon a sale within 7 days from the expiration of an injunction, restraining order, or stay as provided in subsection (5)(c) is not a postponement for purposes of this subsection (5)(b)(ii).

(c) The notice of each postponement and the reason for the postponement must be given by public declaration by the trustee at the time and place last appointed for sale. A public declaration of postponement must also set forth the new date, time, and place of sale, and that place of sale must be the same place as originally fixed by the trustee for the sale. No other notice of postponement need be given. However, the sale must be conducted no sooner than the 7th day after the earlier of:

(i) dismissal of any pending action involving an injunction, restraining order, or stay; or

(ii) expiration or termination of an injunction, restraining order, or stay that required postponement of the sale, whether by entry of an order by a court of competent jurisdiction, operation of law, or otherwise, unless the injunction, restraining order, or subsequent order expressly directs that the conduct of the sale be held within the 7-day period.

(d) For the purposes of subsection (5)(c), the 7-day period may not include the day on which any action is dismissed or the day on which any injunction, restraining order, or stay expires or is terminated. If the sale had been scheduled to occur but this subsection (5) precludes its conduct during that 7-day period, a new notice of postponement must be given if the sale had been scheduled to occur during that 7-day period. The trustee shall maintain records of each postponement and the reason for the postponement.

(e) Notwithstanding the time periods established under this subsection (5), if postponement of a sale is

based on a stay imposed by Title 11 of the United States Code, the sale must be conducted no sooner than the expiration of the stay imposed by that title and the 7-day provision of this subsection (5) does not apply.

(6) If the sale has been stayed by an automatic stay that is provided under any provision of the Bankruptcy Act, Title 11 of the United States Code, and a bankruptcy court issues an order terminating the stay, the trustee may, at the trustee's discretion either:

(a) conduct the sale at a date to which it had previously been postponed; or

(b) give a new 20-day notice of sale that is posted, published, and recorded in accordance with the provisions of subsection (2).

NEW SECTION. Section 21. Bidding at sale -- damages and penalties. (1) Each bid made by a bidder at a trustee's sale under a power of sale contained in or considered contained in a deed of trust must be considered to be an irrevocable offer by that bidder to purchase the property being sold by the trustee under the power of sale for the amount of the bid. Any second or subsequent bid by the same bidder or by any other bidder for a higher amount is a cancellation of the prior bid.

(2) At the trustee's sale, the trustee may:

(a) require every bidder to show evidence of the bidder's ability to deposit with the trustee the full amount of the final bid in cash, which evidence must be in the form of a cashier's check drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank that is authorized to do business in this state. The trustee may, as a condition to the recognizing of any bid, take possession of, conditionally accept, and hold these amounts for the duration of the sale.

(b) require the last and highest bidder to deposit, if not deposited previously, the full amount of the bidder's final bid in the form of a cashier's check drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank that is authorized to do business in this state.

(3) The current beneficiary of the deed of trust under foreclosure has the right to make a credit bid, without having to deposit a financial instrument as required of other bidders under subsection (2). However, the credit bid may be made only to the extent of the total amount due the beneficiary as of the date of sale, including the unpaid balance of the obligation secured by the property, all costs, expenses, and advances up to the time of sale, the amount of any delinquent real property taxes or insurance premiums that were obligations of the trustor, trustee fees, and attorney fees incurred up to the date of sale. If the foreclosing beneficiary desires to

make a second bid in an amount higher than the original credit bid, the beneficiary must be required to deposit with the trustee, at the time of making the higher bid, a financial instrument in one of the forms enumerated under subsection (2) in an amount not less than the difference between the beneficiary's original credit bid and the amount of the beneficiary's higher bid.

(4) (a) If the highest bidder has deposited with the trustee a check from a financial institution pursuant to subsection (2) in an amount that is greater than the final highest bid, the highest bidder shall have 2 business days after completion of the sale within which to obtain and deliver to the trustee a financial institution check in the precise amount of the highest bid.

(b) (i) For purposes of [sections 1 through 26], the trustee's sale is considered final and complete upon acceptance by the trustee of the last and highest bid and is considered perfected as of 8:00 a.m. on the actual day of sale if the trustee's deed is recorded within 15 calendar days after the sale or on the next day following the 15th day if the clerk and recorder of the county in which the property or any part of the property is located is closed on the 15th day. However, the sale is subject to an automatic rescission for failure of consideration if the highest bidder's funds are not unconditionally available for withdrawal by the trustee within 5 business days after the date of sale. If the proceeds of the highest bidder's payment check are not unconditionally available for withdrawal within the 5-day period or if the highest bidder willfully fails to deliver to the trustee the precise amount of the final bid in a cashier's check drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank authorized to do business in this state or if the last and highest bidder cancels any financial institution check, then:

(A) the sale is considered automatically rescinded for failure of consideration;

(B) the trustee shall send a notice of rescission for failure of a consideration to the last and highest bidder submitting the financial institution check, if the address of the last and highest bidder is known to the trustee; and

(C) the last and highest bidder is guilty of a misdemeanor punishable by a fine of not more than \$2,500.

Absolute liability, as provided for in 45-2-104, is imposed for a violation of this section.

(ii) In addition to any other remedies, if the highest bidder fails to timely deliver to the trustee a financial institution check of the nature described in subsection (2) in the precise amount of the final and highest bid within 2 business days after completion of the sale, that bidder is liable to the trustee and to the beneficiary for all damages that the trustee or the beneficiary may sustain by the bidder's failure to deliver to the trustee the amount of the final bid. The damages include but are not limited to any court costs and reasonable attorney fees.

(c) If the sale is rescinded for failure of consideration pursuant to the provisions of this section, the rescission:

- (i) constitutes a cancellation of the last bid; and
- (ii) reinstates the interest of any lienholder in the same property as if the previous sale had not occurred.

(d) It is unlawful for any person, acting alone or in concert with others, to:

(i) offer to accept or to accept from another any consideration of any type not to bid; or

(ii) fix or restrain bidding in any manner at a sale of property conducted pursuant to a power of sale and a deed of trust. However, it is not unlawful for any trustee or beneficiary to state that a property subject to a recorded notice of default or subject to a sale conducted pursuant to [sections 1 through 26] is being sold in an as-is condition.

(e) If a trustee's sale is rescinded for failure of consideration as provided in this subsection (4) and if the trustee desires to resell the property, the sale must be renoticed for a new sale date as provided in [section 20], including posting, publishing, and recording a new 20-day notice of sale as provided in [section 20].

NEW SECTION. Section 22. Trustee's deed. The deed to be given by the selling trustee to the highest bidder at the trustee's sale shall convey to the highest bidder, without warranty, all of the trustee's and beneficiary's right, title, and interest in the property subject to the deed of trust.

NEW SECTION. Section 23. Effect of good faith errors in foreclosure under power of sale. An error by the foreclosing trustee or the foreclosing trustee's designated agent in failing to follow any of the provisions of [sections 1 through 26] in the process of exercising the trustee's power of sale may not invalidate the sale as to a bona fide purchaser who purchases in good faith, without notice of the error, and for value.

NEW SECTION. Section 24. Limitations with respect to deficiency judgment. (1) If a beneficiary has elected to cause the trustee to foreclose by exercise of the power of sale, the beneficiary's recovery is limited to the value of the real property being foreclosed and the beneficiary has no right to recover any deficiency judgment. Upon a power of sale foreclosure, the trustor has no right of redemption and is required to surrender possession of the property within 10 days after the foreclosure sale.

(2) If the beneficiary elects to pursue judicial foreclosure by a proceeding instituted in district court and if the foreclosure sale does not produce enough proceeds to satisfy both the debt being foreclosed and all foreclosure-related costs and expenses, including but not limited to trustee fees and attorney fees, the foreclosing beneficiary may obtain a deficiency judgment, subject to the following limitations:

(a) A deficiency judgment may not be issued against the trustor or trustor's successor in title upon judicial

foreclosure of residential real property containing not more than four residential units if:

(i) the deed of trust was given to secure a loan that was in fact used to provide all or a part of the purchase price for that property; and

(ii) that dwelling is occupied by the purchaser-trustor or the purchaser-trustor's successor in interest as a primary residence. If the property consists of a duplex, triplex, or four-plex, the owner must occupy at least one unit as the owner's primary residence. However, a deficiency judgment is allowed if the loan being foreclosed was made on a commercial property, including rentals other than duplexes, triplexes, and four-plexes in which the owner occupies one of the units as the owner's primary residence. Deficiency judgments may also be granted upon foreclosure against real property used as a vacation residence that is not the owner's primary residence.

(b) The court handling a judicial foreclosure in which the plaintiff seeks a deficiency judgment shall require an independent appraisal of the property being foreclosed to establish the fair market value of the property as of the date of the foreclosure sale. A deficiency judgment may not exceed the difference between that appraised value and the total of the debt being foreclosed plus all foreclosure-related expenses. The court in which the judicial foreclosure proceeding is handled shall also determine the amount of reasonable trustee fees or attorney fees. A deficiency judgment may not be sought later than 3 months after the date of the court-supervised foreclosure sale.

(c) Upon a judicial foreclosure, the trustor or trustor's successor in interest does not have any right of redemption and is not entitled to remain in possession of the property after the sale.

NEW SECTION. Section 25. Alternative right of foreclosure as mortgage. Notwithstanding any other provisions of [sections 1 through 26], if the deed of trust fails to contain any provision required by [sections 1 through 26], if an error of material magnitude has occurred in the procedure for either a power of sale foreclosure or a judicial foreclosure under the provisions of [sections 1 through 26], or if the beneficiary concludes for any other reason that a power of sale foreclosure or a judicial foreclosure under the provisions of [sections 1 through 26] are not feasible, the beneficiary may nevertheless foreclose the deed of trust in the manner specified by Montana law for the foreclosure of mortgages on real property. If, however, the beneficiary elects to proceed to foreclose a deed of trust as if it were a mortgage, then:

(1) the persons who would be entitled to exercise a right of redemption under the Montana law applicable to foreclosure of mortgages on real property also have a right of redemption under this section; and

(2) if the property being foreclosed includes the trustor-debtor's primary residence, the debtor may remain in possession of the property during the 1-year redemption period.

NEW SECTION. Section 26. Disposition of surplus sale proceeds. (1) Unless an interpleader action has been previously filed, if the proceeds of a foreclosure sale exceed the total amount owed to the foreclosing beneficiary, including all foreclosure-related costs and expenses, trustees fees, and reasonable attorney fees, the excess constitutes surplus and the trustee shall give written notice by first-class mail, postage prepaid, to all of the same persons that were authorized to be sent a copy of the notice of default as provided in [section 19(3)]. The notice must state that a foreclosure sale has been held under the deed of trust, that the sale proceeds produced a surplus in excess of the total amount owed to the foreclosing beneficiary, and that the addressee of the notice may have a right to some or all of the surplus. Each addressee who wishes to assert a claim against the surplus shall submit a written claim to the trustee within 30 days of the date of the trustee's mailing of the notice under this section. Each claim must be in the form of a sworn affidavit stating the amount of the claim up to the date of the trustee's sale and must include an itemized statement of the principal, interest, and other charges. There must be attached to the claim a true and correct copy of any note, assignment, mortgage, deed of trust, judgment, or other recorded document supporting the claim. Each document must include complete recording information. A claim must be received by the trustee at the address stated in the notice not later than 30 days after the date the trustee sends notice to the potential claimant.

(2) If after receipt of a claim pursuant to subsection (1) and after reasonable review the trustee is unable to determine the relative validity and priority of the claims, the trustee may:

(a) deduct from the surplus sale proceeds the amount of fees and expenses incurred in giving the notice and reviewing the claims and deposit the balance with the clerk of court;

(b) deliver to the clerk of court all of the claimants' affidavits and supporting documents; and

(c) pay the net balance to the trustor or the trustor's successors in interest.

(3) Within 90 days after the deposit of the net surplus sale proceeds with the clerk of court, the court shall determine the respective entitlement of each claimant. The court may determine the respective claims on the basis of the affidavits without a hearing.

(4) This section does not preclude a trustee from filing an interpleader action and depositing the net surplus sale proceeds with the clerk of court.

Section 27. Section 71-1-321, MCA, is amended to read:

"71-1-321. Deeds of trust and trust deeds not invalidated. The Small Tract Financing Act of Montana does not invalidate or preclude the use in this state of instruments, sometimes denominated deeds of trust, trust deeds, or trust indentures, ~~which~~ that are not executed in conformity with this part, but in which a conveyance

for security purposes is made to a trustee or trustees for the benefit of one or more lenders. ~~Such~~ Except as provided in [sections 1 through 26], the instruments are considered to be mortgages and are subject to all laws relating to mortgages on real property. The provisions of [sections 1 through 26] prevail over the provisions of this section with respect to instruments executed in conformity with [sections 1 through 26]. Every ~~such~~ instrument deed of trust, recorded as prescribed by law, from the time it is filed for record is constructive notice of its contents to subsequent purchasers and encumbrancers."

NEW SECTION. Section 28. Codification instruction. [Sections 1 through 26] are intended to be codified as an integral part of Title 71, chapter 1, and the provisions of Title 71, chapter 1, apply to [sections 1 through 26].

NEW SECTION. Section 29. Effective date. [This act] is effective on passage and approval.

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