

SENATE, No. 1574

STATE OF NEW JERSEY

INTRODUCED OCTOBER 3, 1996

By Senator INVERSO

1 AN ACT concerning non-judicial foreclosures of commercial
2 mortgages and supplementing Title 2A of the New Jersey Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. This act shall be known and may be cited as the "Commercial
8 Mortgage Non-Judicial Foreclosure Act."

9

10 2. a. The purpose of this act is to provide holders of commercial
11 mortgages with a process for non-judicial foreclosure as an alternative
12 to the judicial foreclosure process.

13 b. Nothing herein shall be deemed to limit or prevent judicial
14 foreclosure in accordance with the procedures provided by applicable
15 rules and statutes, at any time prior to the completion of any sale
16 pursuant to this act. The commencement of any action by a lender
17 under this act may, at the sole discretion of the lender, be discontinued
18 by the lender at any time prior to the completion of any sale pursuant
19 to this act, whereupon the lender shall thereafter be entitled to pursue
20 any rights the lender may have under this act or under any other
21 statute or other law, including the right to pursue foreclosure through
22 the judicial foreclosure process.

23 c. The exercise by the lender of its rights under this act shall not in
24 any way limit any rights pursuant to any other statute or other law,
25 including the right to pursue foreclosure through the judicial
26 foreclosure process. No provision of this act shall be construed to
27 require a lender to exercise its rights under this act prior to instituting
28 an action against a mortgagor or any other party, including any
29 guarantor, in order to exercise any right the lender may have against
30 a mortgagor or any other party or guarantor, including an action on a
31 promissory note, loan agreement guaranty, indemnification agreement
32 or obligation of a mortgagor or guarantor.

33

34 3. As used in this act:

35 "Commercial mortgage" means a mortgage, security interest or
36 other instrument which secures a loan made other than primarily for
37 personal, family or household purposes, in which the security is real

1 property located in this State, and which property, as of the execution
2 of the mortgage, is other than a one, two, three or four-family unit
3 dwelling in which at least one unit shall be, or is planned to be,
4 occupied as a residence by the debtor who is a natural person or by the
5 spouse, parent, brother, sister or child of the debtor or debtor's
6 spouse.

7 "Debtor" means the person or entity shown on the record of the
8 commercial mortgage lender as being obligated to pay the note, or
9 other evidence of an obligation, secured by the commercial mortgage.

10 "Default" means the failure to comply with any obligation in the
11 commercial mortgage, note, bond, or other loan agreement, with
12 respect to payment of money to the lender, payment of real estate
13 taxes, payment of premiums for required insurance, payment of
14 governmental assessments or tax or other liens against the mortgaged
15 property, payment of other specified amounts, or payment of funds
16 into escrow for any of the items set forth.

17 "Lender" or "mortgagee" means any person or entity which makes
18 or holds a commercial mortgage and any person or entity to which a
19 commercial mortgage is assigned or otherwise transferred and shall
20 include duly authorized agents.

21 "Mortgagor" means the debtor and shall also include the owner of
22 the property being sold subject to the power of sale permitted pursuant
23 to this act.

24

25 4. A commercial mortgage may contain a provision for a power of
26 sale which authorizes the lender upon default in the mortgage to
27 foreclose the mortgage and sell the mortgaged property without
28 instituting a foreclosure action through the judicial process. The
29 power of sale shall be exercised in accordance with the provisions of
30 this act.

31

32 5. If a lender issues a commitment in a transaction to make a
33 commercial mortgage loan, which loan is intended to contain a power
34 of sale provision pursuant to this act, the lender shall indicate in the
35 commitment that the mortgage will contain the power of sale
36 provision.

37

38 6. With respect to any commercial mortgage in which a power of
39 sale is granted:

40 a. The commercial mortgage shall state in bold and underlined
41 language, substantially the following: "A power of sale has been
42 granted in this commercial mortgage. A power of sale allows the
43 mortgagee to take the mortgaged property and sell it, without
44 instituting a judicial foreclosure action, upon default by the mortgagor
45 under this commercial mortgage."

46 b. A mortgagor shall not be liable for any deficiency in the amount

1 due and owing a mortgagee after a sale pursuant to this act unless the
2 mortgagor specifically agrees to be liable for the deficiency by
3 signature separate from the signature on the commercial mortgage,
4 which agreement and separate signature may either be on a separate
5 document recorded with the commercial mortgage or in the
6 commercial mortgage document. Failure to obtain the separate
7 agreement and signature shall not limit a mortgagee's rights against
8 any party or person in any way except to prevent the mortgagee from
9 pursuing a deficiency judgment against the mortgagor after sale
10 pursuant to this act. The amount of any deficiency shall be the
11 difference between the amount obtained by the mortgagee from the
12 sale of the mortgaged property and the total amount due under the
13 mortgage loan documentation including principal, interest, late
14 charges, default interest, and the reasonable costs and expenses of the
15 sale, including the amount of attorney's fees fixed in the commercial
16 mortgage by agreement, unless a portion of all of the fees are waived
17 by the parties or the amount fixed is found by a court to be
18 unconscionable. If such fees are found to be unconscionable or no
19 fees are fixed in the commercial mortgage by agreement, a court may
20 allow reasonable attorney's fees. If, in an action for a deficiency, the
21 mortgagor shall establish that the fair market value of the property as
22 of the date of the sale exceeded the sale price, then the deficiency
23 otherwise obtainable under this subsection shall be reduced by the
24 amount of the excess. Any action for a deficiency pursuant to the
25 provisions of this subsection shall be commenced within 90 days after
26 the date of the sale.

27

28 7. Nothing in this act shall be construed to impair the right of any
29 person who has a right to redeem the property from redeeming prior
30 to the execution and delivery of a deed pursuant to section 13 of this
31 act, upon payment of the amount owed, including all expenses.

32

33 8. a. If the commercial mortgage authorizes a mortgagee to
34 exercise a power of sale, the mortgagee, after default by a mortgagor
35 and before exercising a power of sale, shall send the mortgagor a
36 notice of default.

37 b. A notice of default shall be sent by certified mail, return receipt
38 requested, to the mortgagor at the mortgagor's address specified in the
39 commercial mortgage as the place to which notices are to be sent, or
40 if no address is specified for receipt of notices, to the address of the
41 mortgagor as set forth in the mortgage and if changed, to the address
42 specified in a written notice of a new address received by the
43 mortgagee prior to the date of the notice of default. Notice pursuant
44 to this subsection b. shall be considered to have been given to a
45 mortgagor if it is sent by certified mail, return receipt requested, to the
46 address as set forth herein or if served in the manner of service of the

1 notice of sale as set forth in section 10 of this act.

2 c. The notice shall state, in a manner reasonably calculated to make
3 the mortgagor aware of the situation:

4 (1) the particular commercial mortgage under which the mortgagee
5 intends to exercise a power of sale;

6 (2) the nature of the default claimed;

7 (3) that the mortgagee has accelerated the maturity of the debt, if
8 that is the case;

9 (4) any right the mortgagor has to cure the default, including the
10 amount to be paid or other action necessary to cure, and the time
11 within which the cure shall take place in order to prevent the
12 mortgagee's exercise of its right of sale;

13 (5) that the mortgagor's ownership may be terminated by a sale of
14 the property pursuant to this act;

15 (6) if the commercial mortgage specifically permits transfer of the
16 mortgaged property subject to the commercial mortgage, the
17 transferee's right, if any, to succeed to the rights of the mortgagor in
18 curing the default;

19 (7) that the mortgagor's right to possession will be terminated
20 effective upon delivery by the mortgagee of the deed pursuant to
21 section 13 of this act, and that upon such termination, the mortgagor
22 may be evicted from the mortgaged property; and

23 (8) the right of the mortgagor to any surplus from the sale.

24 d. A mortgagor, or any one authorized to act on behalf of the
25 mortgagor, shall have the right at any time, up to the date and time of
26 sale as set forth in the notice of sale pursuant to subsection b. of
27 section 9 of this act, to cure the default, de-accelerate and reinstate the
28 commercial mortgage by tendering the amount or performance
29 specified in subsection e. of this section. The payment or tender shall
30 be made to the lender, holder or servicing agent. Provided, however,
31 that if a mortgagee can establish in a court of competent jurisdiction
32 that the mortgagor has a pattern of waiting until more than 30 days
33 after receipt of notice of default to cure the default pursuant to
34 subsection e. of this section, or can establish that the mortgagor is not
35 using the right to cure in good faith, the court shall, if there is no
36 other basis for delay of the sale, order the sale of the mortgaged
37 premises no sooner than 30 days after a notice is published pursuant
38 to subsection c. of section 10 of this act.

39 e. To cure a default under this section, a mortgagor shall:

40 (1) pay or tender to the person whose name, address and phone
41 number is given in the notice of default, in the form of cash, cashier's
42 check, or certified check, all sums due as set forth in the notice of
43 default and all other sums due which have accrued after the date of the
44 notice of default and up to the time of payment or tender, including the
45 total amount due under the commercial mortgage loan documentation
46 including past-due principal payments, interest, late charges, default

1 interest, any other sum of money that is due under the commercial
2 mortgage loan documentation, and the reasonable costs and expenses
3 of collection of the foregoing, including the amount of attorney's fees
4 fixed in the commercial mortgage by agreement, unless a portion of all
5 of the attorneys's fees are waived by the parties or the amount fixed
6 for attorney's fees is found by a court to be unconscionable. If the
7 attorney's fees are found to be unconscionable or no attorney's fees are
8 fixed in the commercial mortgage by agreement, a court may allow
9 reasonable attorney's fees; and

10 (2) perform any other obligation which the mortgagor was bound
11 to perform under the commercial mortgage.

12 f. To cure a default under this section, a mortgagor shall not be
13 required to pay any charge, fee or penalty attributable solely to the
14 exercise of the right to cure a default as provided for in this act.

15 g. Cure of default reinstates the mortgagor, for the purposes of this
16 act, to the same position as if the cured default had not occurred. It
17 nullifies, as of the date of cure, any acceleration of any obligation
18 under the mortgage, note or bond arising from the default which was
19 cured.

20 h. The right to cure a default under this section is independent of
21 any right of redemption or any other right or remedy under the
22 common law, principles of equity, State or federal statute, or rule of
23 court.

24

25 9. a. If, upon default by a mortgagor, a mortgagee elects to use a
26 power of sale granted in the commercial mortgage, it shall execute a
27 notice of sale in written form directed to the mortgagor, any holder of
28 a commercial mortgage or other lien of record, which is subordinate
29 to the mortgagee's interest, and any other person having an interest,
30 claim or lien of record in the mortgaged property whose interest, claim
31 or lien the mortgagee seeks to foreclose by the exercise of its power
32 of sale.

33 b. The notice of sale shall state the name of the mortgagor, the
34 occurrence of a default, the general description of the default such as
35 "failure to make a payment due," "failure to pay taxes," or other
36 similar terms, the election to use the power of sale, the date, time and
37 place when the mortgaged property will be sold, the legal description
38 of the mortgaged property as it appears in the commercial mortgage
39 and any street address of that property, which appears in the
40 commercial mortgage, and as reasonably determined by the lender by
41 title search or otherwise, any holder of a prior commercial mortgage
42 or other lien of record, and any person having an interest, claim or lien
43 of record in the mortgaged property whose interest, claim or lien the
44 mortgagee seeks to foreclose by the exercise of its power of sale, and
45 shall designate the person or persons whose unknown successors are
46 being served. The notice shall state any terms and conditions

1 applicable to the sale, including whether the mortgaged property may
2 be sold in separate lots or parcels.

3 c. The notice shall advise the mortgagor of the mortgagor's right,
4 pursuant to this act, to redeem the mortgaged property from
5 foreclosure by paying to the mortgagee the total amount due under the
6 commercial mortgage loan documentation including: principal;
7 interest; late charges; default interest; prepayment fee, charge, penalty
8 or similar payment; any other sum of money due under the commercial
9 mortgage loan documents and the reasonable costs and expenses of a
10 sale including the amount of attorney's fees fixed in the commercial
11 mortgage by agreement, unless a portion of all of the attorney's fees
12 are waived by the parties or the amount of the attorney's fees is found
13 by a court to be unconscionable, prior to the execution and delivery of
14 a deed pursuant to section 13 of this act, and shall advise all other
15 persons claiming an interest in that property that the property will be
16 sold subject to their claims unless they elect to join the exercise of the
17 power of sale or that the mortgagee claims an interest superior to the
18 claims of such persons and that their interests shall be terminated by
19 the sale unless they take appropriate legal action.

20 d. (1) The date of sale specified in the notice of sale shall be at
21 least 30 days from the date the notice is served, mailed or posted
22 pursuant to section 10 of this act, as applicable, and also shall be at
23 least 120 days after the date a notice of default is mailed or served by
24 the mortgagee to the mortgagor pursuant to subsection b. of section
25 8 of this act.

26 (2) If the default by the mortgagor is due to the loss of a tenant or
27 tenants in the property subject to the commercial mortgage and less
28 than 50% of the total rentable square footage in the mortgaged
29 property is rented at the time of a default, the mortgagor may request
30 and shall be entitled to an extension of the date of sale for a period of
31 up to 60 days. Any such request shall be made in writing and shall be
32 sent certified mail, return receipt requested, to the mortgagee or its
33 agent, at least 15 days prior to the first scheduled date of sale. A
34 mortgagor shall be entitled to only one such extension.

35
36 10. a. The notice of sale shall be personally served by the
37 mortgagee's attorney or the attorney's agent or any other competent
38 adult not having a direct interest in the mortgaged property being
39 foreclosed. Service shall be made as follows:

40 (1) (a) Upon an individual other than a minor under 14 years of
41 age or an incompetent person, by delivering a copy of the notice to the
42 individual personally; or by leaving a copy thereof at the dwelling
43 house or usual place of abode with a competent member of the
44 household of the age of 14 years or over then residing therein; or by
45 delivering a copy thereof to a person authorized by appointment or by
46 law to receive service of process on the individual's behalf;

1 (b) Upon a minor under 14 years of age, by delivering a copy of
2 the notice personally to the minor's father, mother or guardian of the
3 person or a competent adult member of the household with whom the
4 minor resides;

5 (c) Upon an incompetent person, by delivering a copy of the notice
6 personally to the guardian of the person or a competent adult member
7 of the household with whom the incompetent resides; or, if the
8 incompetent is living in an institution, then to the director or chief
9 executive officer of the institution;

10 (2) Upon a domestic or foreign corporation, by serving, in the
11 manner prescribed in subsection a. of this section, either an officer,
12 director, trustee, or managing or general agent; or any person
13 authorized by appointment or by law to receive service of process on
14 behalf of the corporation; or the person at the registered office of the
15 corporation in charge thereof. If service cannot be made upon any of
16 the foregoing, then it may be made upon the person at the principal
17 place of business of the corporation in this State in charge thereof, or
18 if there is no place of business in this State, then upon any servant of
19 the corporation within this State acting in the discharge of his duties.
20 If it appears by affidavit of mortgagee's attorney or of any person
21 having knowledge of the facts that after diligent inquiry and effort,
22 personal service cannot be made upon any of the foregoing and if the
23 corporation is a foreign corporation, then, consistent with due process
24 of law, service may be made by mailing, by registered or certified mail,
25 return receipt requested, a copy of the notice to a registered agent of
26 service, or to its principal place of business, or to its registered office.

27 (3) Upon an unincorporated association which is subject to suit
28 under a recognized name and upon a partnership, a limited liability
29 partnership or a limited liability company by serving, in the manner
30 prescribed in subsection a. of this section, an officer, a managing or
31 general agent, or, in the case of a partnership, a partner, or, if it
32 appears that after diligent inquiry and effort, service cannot be made
33 upon any of the foregoing, then, consistent with due process of law,
34 by mailing, by registered or certified mail, return receipt requested, a
35 copy of the notice of sale to a registered agent for service, or to its
36 principal place of business, or to its registered office.

37 (4) Upon the State of New Jersey, by registered, certified or
38 ordinary mail or by delivering a copy of the notice personally to the
39 Attorney General or to any person in his office designated by him in
40 writing filed with the Clerk of the Superior Court.

41 (5) Upon any county, municipality, or other public body, by
42 delivering a copy of the notice personally to the presiding officer or to
43 the clerk or secretary thereof.

44 b. Notice of sale shall be mailed by the mortgagee, if by due
45 diligence, personal service cannot be made on an individual pursuant
46 to paragraph (1) of subsection a. of this section, within seven days of

1 the publication required by subsection c. of this section, to the
2 residence or place where the party to be served usually receives mail,
3 unless it shall appear after due diligence that such residence or place
4 cannot be ascertained after inquiry; and then the publication pursuant
5 to subsection c. of this section shall be deemed sufficient.

6 c. A notice of sale shall be published once in a newspaper which is
7 published in the county in which the property is located, or, if there is
8 none, in a newspaper published in this State circulating in that county.
9 In any instance when personal service has not been able to be made on
10 all parties pursuant to subsections a. and b. of this section, a copy of
11 the notice of sale shall be posted upon the property to be sold within
12 seven days after publication. The notice shall be published at least 30
13 days before the date appointed for selling the property.

14 d. A notice of sale shall be recorded in the office of the county
15 clerk or register of deeds of each county wherein the mortgaged
16 property is situated within 30 days after compliance with the
17 provisions of subsection c. of this section. The recording of the
18 notice of sale pursuant to this subsection shall serve as notice of the
19 pendency of the procedure to any person acquiring a subsequent
20 interest in the property. To verify compliance with the notice
21 provisions of section 9 of this act and subsections a., b. and c. of this
22 section, proof of receipt, return of service or affidavit in lieu of
23 personal service, or copies thereof and proof of publication of the
24 notice of sale shall be recorded in the office of the county clerk or
25 register of deeds of each county wherein the mortgaged property is
26 situated any time before the recording of the mortgagee's deed
27 executed pursuant to the sale under this act.

28

29 11. The sale shall be held in any county where part of the
30 mortgaged property to be sold is situated at the time designated in the
31 notice of sale, or a date to which the sale has been continued as
32 provided by this act, on a day other than a Saturday, Sunday or legal
33 holiday, between the hours of nine o'clock a.m. and five o'clock p.m.
34 at a specified place on that property, at the courthouse or at another
35 specified place in the county.

36

37 12. a. On the date and at the time and place designated in the
38 notice of sale, the mortgagee exercising the power of sale shall cause
39 the mortgaged property to be sold at public auction to the highest
40 bidder. If the mortgaged property is legally divisible into separate lots
41 or parcels, conditional bids shall be received for each and every
42 separate lot or parcel and for the entire property as a whole. The
43 mortgagee shall determine which conditional sale or sales result in the
44 highest total price bid for all of that property. An attorney or other
45 agent for the mortgagee may conduct the sale, and act at the sale as
46 the auctioneer for the mortgagee. Any person, including the

1 mortgagee or mortgagor may bid at the sale. Every bid shall be
2 deemed an irrevocable offer, until the sale is completed and the sale
3 shall not be deemed completed until the purchaser pays the price bid
4 in a form satisfactory to the mortgagee. If a purchaser other than the
5 mortgagee, when required by the mortgagee, fails to post cash or
6 certified funds equal to 15% of the amount bid for the mortgaged
7 property, the mortgagee may proceed with the sale and may accept the
8 next highest bid. The party that fails to make the payment shall be
9 liable to any person who suffers loss or expenses, including attorney's
10 fees, occasioned thereby and the mortgagee may thereafter in any sale
11 of the mortgaged property reject any bid of that person. The 15%
12 deposit shall be placed and held in escrow by the mortgagee pending
13 completion of the sale. In the event a purchaser fails to complete the
14 transaction of sale within 30 days of the sale or a longer reasonable
15 time permitted by the mortgagee in writing, any deposit shall be
16 applied first to the expenses of the sale and the balance to the debt,
17 and the purchaser shall be liable to any person who suffers loss or
18 expenses, including attorney's fees, occasioned by the resale of the
19 mortgaged property.

20 b. The person conducting the sale, for any cause deemed in the
21 interest of the mortgagee, the mortgagor, or both, may postpone or
22 continue the sale or change the place of the sale to another location
23 permitted by law, by giving notice, including the new time and place,
24 by public declaration at the time and place last appointed for the sale
25 and in any other manner reasonable under the circumstances which
26 shall include publication one time at least 10 days prior thereto of a
27 notice of the new date, time and place of sale, such notice to be
28 directed to the same persons as the original notice of sale, and proof
29 of publication then to be filed in the office of the county clerk of each
30 county wherein the mortgaged property to be sold is situated any time
31 before the recording of the mortgagee's deed executed pursuant to the
32 sale under this act. No other notice of the postponed, continued,
33 changed or relocated sale is required.

34
35 13. a. The sale shall be closed at a time and under reasonable
36 conditions determined and specified by the mortgagee at the time of
37 the sale. Upon receipt of payment in form satisfactory to the
38 mortgagee, the mortgagee shall execute and deliver a deed, without
39 warranty or covenants to the purchaser, except as specifically set forth
40 in this act, and which identifies the mortgagee's and other interests
41 foreclosed and the parties involved and indicates where the documents
42 evidencing those interests are recorded, recites the amount of the
43 successful bid, and recites that the deed is executed by the mortgagee
44 exercising a power of sale after a breach or default and sale under this
45 act. Signature and title or authority of the person signing the deed as
46 grantor is sufficient proof of the signer's authority to sign. Further

1 proof is not required even though the signer is also named as grantee
2 in the deed. The mortgagee's deed shall raise a presumption of
3 compliance with the requirements of this act regarding the exercise of
4 the power of sale and the sale of the mortgaged property, including the
5 giving of the notice of default and of sale and the conduct of sale.
6 Such deed shall constitute conclusive evidence of the meeting of such
7 requirements in favor of purchasers for value and without actual notice
8 so long as the failure to meet those requirements would otherwise
9 render the sale only voidable and, even if the sale is void, the deed
10 shall constitute conclusive evidence of the meeting of the requirements
11 in favor of purchasers for value and without actual notice after the
12 passage of two years from the date of the recording of the deed, unless
13 a contrary determination is made within such two-year period by a
14 court of competent jurisdiction.

15 b. The mortgagee's deed, pursuant to compliance with the
16 provisions of this act, shall have the same effect as delivery of a valid
17 sheriff's deed in a judicial foreclosure process and shall operate to
18 convey to the purchaser the title, interest and claim of the mortgagee
19 and of the mortgagor and their respective successors in interest, and
20 of all persons claiming an interest in the property sold which was
21 acquired subsequent to the recording of the commercial mortgage
22 pursuant to which the power of sale is exercised and prior to delivery
23 of the mortgagee's deed. Such conveyance shall be absolute, without
24 right of redemption and clear of all liens, claims, or interests to the
25 extent provided in this section, if the record shows that all necessary
26 parties were duly notified or served with process as required pursuant
27 to this act and except for any statutory right of redemption which may
28 be held by the United States of America under authority of 28
29 U.S.C. § 2410.

30

31 14. a. The mortgagee shall apply the proceeds of the sale of the
32 mortgaged property as follows:

33 (1) To the reasonable costs and expenses of exercising the power
34 of sale and of the sale, including the payment of reasonable attorney's
35 fees actually incurred; and

36 (2) Unless otherwise required by law, to the payment of the
37 contract or indebtedness secured by the commercial mortgage, the
38 payment of all other obligations provided in or secured by the
39 commercial mortgage, and the obligations of any junior lienholders or
40 encumbrancers, in order of their priority as otherwise provided for by
41 law. After payment in full to all junior lienholders and encumbrancers,
42 payment shall be made to the party who is the owner of the property
43 immediately preceding the sale.

44 b. In lieu of making payments to subordinate lienholders or
45 encumbrancers or the mortgagor, the mortgagee may elect to deposit
46 all or any part of the sale proceeds which exceed the amount due to

1 the mortgagee with the clerk of the Superior Court subject to order of
2 the Superior Court upon the application of any interested party. Upon
3 deposit of such monies together with a legal description of the
4 property whose sale produced the proceeds, the mortgagee shall be
5 discharged from all responsibility for acts performed in good faith
6 according to the provisions of this act.

7
8 15. a. A mortgagor who claims not to be in default or claims any
9 other valid defense to the non-judicial foreclosure by power of sale
10 may commence a summary proceeding in Superior Court to contest
11 the proposed sale.

12 b. Nothing herein shall be deemed to affect any right of possession
13 a mortgagee may have to the property prior to the completion of the
14 sale or to limit the equitable jurisdiction of the courts with respect to
15 mortgages or with respect to the provisions of this act.

16
17 16. This act shall take effect immediately.

18
19
20 STATEMENT

21
22 This bill provides a lender who makes commercial mortgage loans
23 the authority to include a power of sale provision in a commercial
24 mortgage and the holder of a commercial mortgage containing such a
25 provision the authority to exercise this power of sale upon default by
26 the mortgagor. The use of power of sale mortgages is consistent with
27 the common law relating to mortgage foreclosures. In addition, in a
28 transaction in which the lender intends to include a power of sale
29 provision in a commercial mortgage, the lender is required to indicate
30 this intent in the commitment as well as specifically inform the
31 borrower of the conditions under which the borrower may be liable for
32 a deficiency under a power of sale agreement.

33 Upon the default by the mortgagor and before exercising a power
34 of sale, the mortgagee is required to mail a notice of default to the
35 mortgagor, by certified mail, return receipt requested, by which notice
36 the mortgagor is informed of the default and is provided with the
37 following information: the particular commercial mortgage under
38 which the mortgagee intends to exercise a power of sale; the nature
39 of the default claimed; that the mortgagee has accelerated the maturity
40 of the debt, if that is the case; the right of the debtor to cure the
41 default, the amount to be paid or other actions necessary to cure and
42 the time by which such cure must take place; the methods by which the
43 mortgagor's ownership of the mortgaged property may be terminated;
44 any right to transfer the mortgaged property and the transferee's
45 rights, if any, to cure; the circumstances under which the mortgagor's
46 right to possession will be terminated and the consequences of such

1 termination; and the right of the debtor to any surplus from the sale.

2 The bill provides that a mortgagor may cure a default up to the
3 date and time of the sale. This right is unlimited, except that the
4 mortgagee has the right to take action in a court of competent
5 jurisdiction to seek to establish that the mortgagor is abusing that
6 right. If the mortgagee establishes that the mortgagor is abusing the
7 right to cure and there is no other basis for delay, the court is required
8 to order the sale of the mortgaged premises no sooner than 30 days
9 after publication of a notice of sale, if there is no other basis for delay.
10 If the mortgagee executes a notice of sale, the mortgagee is required
11 to serve the mortgagor and other parties in interest with the notice,
12 publish the notice in a paper with circulation in the county in which the
13 property is located at least 30 days before the date of the sale and
14 record the notice in the county recorder's office. The date of the sale
15 specified in the notice of sale must be not sooner than 120 days after
16 a notice of default is mailed by a mortgagee to a mortgagor.

17 Under the bill, if the default by the mortgagor is due to the loss of
18 a tenant or tenants in the property subject to the mortgage and less
19 than 50% of the total rentable square footage in the mortgaged
20 premises is rented, the mortgagor may request, and is entitled to, an
21 extension of the date of sale for a period of up to 60 days. This
22 request has to be made in writing and sent certified mail, return receipt
23 requested, at least 15 days before the first scheduled date of sale. A
24 mortgagor is entitled to only one such extension.

25 The sale shall take place in any county in which part of the property
26 to be sold is situated, on the date and at the time and specific place
27 designated in the notice of sale. The sale may be conducted by an
28 agent of the mortgagee. Any person, including the mortgagee and
29 mortgagor, may bid at the sale. The mortgagee may require a
30 purchaser, other than the mortgagee, to post cash or certified funds
31 equal to 15% of the amount bid for the property. If the purchaser fails
32 to post the required amount, the mortgagee may continue the sale and
33 may accept the next highest bid. The purchaser has 30 days, or a
34 longer period of time as agreed to by the mortgagee, to complete the
35 sale by submitting an amount necessary to pay the full amount bid.

36 Upon completion of the sale, the mortgagee is to execute and
37 deliver a deed, without warranty, to the purchaser. This deed operates
38 to convey to the purchaser the title, interest and claim of the
39 mortgagee, the mortgagor and their respective successors in interest
40 and of all persons claiming an interest in the property sold. Under the
41 bill, if the record shows that all necessary parties were duly notified or
42 served with process, this conveyance is absolute, without right of
43 redemption and clear of all liens, claims, or interests.

44 Under the bill, a mortgagor has the right to redeem by paying all
45 principal, interest and other sums secured by the commercial mortgage
46 prior to the execution and delivery of the deed. The execution and

1 delivery of a deed can take place at any time up to 30 days, or a longer
2 period of time agreed to by the mortgagee, after closing the sale. In
3 addition, if the mortgagor has specifically agreed in a separate
4 document recorded with the mortgage or on the mortgage agreement,
5 he is also liable for any deficiency between the amount obtained by the
6 mortgagee from the sale and the amount of the indebtedness, interest
7 and the reasonable costs and expenses of the sale. However, if the
8 amount obtained from the sale is less than the current fair market
9 price, the deficiency will be reduced by the amount by which the fair
10 market price exceeds the sale price.

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15 Provides for non-judicial foreclosure of commercial mortgages.