

NEW MEXICO

Broker Basics

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Unit 1: New Mexico Real Estate License Law

■ PRE-READING ASSIGNMENT

61-29-2 through 61-29-17.2, Parts 1, 2, 3, 6, 7, 8, 9, 11, 12, 13, 16, 17, 21, 27, 29, 31, 32, 33, 35, and 36 of *New Mexico Real Estate License Law, Real Estate Commission Rules* and Excerpt of the Uniform Licensing Act – appendix in back of book

■ LEARNING OBJECTIVES *When you have completed this unit, you will be able to*

- **differentiate** between trade organizations and the New Mexico Real Estate Commission,
- **interpret** the rules and laws of the New Mexico Real Estate Commission,
- **explain** the various responsibilities of licensees, and
- **define** the following *key terms*:

associate broker
attorney-in-fact
business opportunity broker
concealment
disclosure
final consummation
Notice of Contemplated Action (NCA)
power of attorney
property owner
qualifying broker
regular employee
severed mineral interests
Uniform Licensing Act (ULA)
unlicensed assistant

■ NEW MEXICO REAL ESTATE COMMISSION VS TRADE ORGANIZATIONS

There is a distinct difference between trade organizations and the New Mexico Real Estate Commission (NMREC). The National Association of REALTORS® (NAR) is a voluntary trade organization that licensees may join through the local board or association. Members of NAR subscribe to a specific code of ethics, and only NAR can enforce the code through local boards or associations. Members of this group may have access to multiple listing services based on their local area. Because NAR does not issue real estate licenses, in order to be a NAR member, individuals must first have a license issued by their state regulating agency. Once licensed, they must affiliate with a member office.

The New Mexico Real Estate Commission

All New Mexico real estate brokers receive their licenses from the New Mexico Real Estate Commission.

The Commission shall be appointed by the governor and shall consist of five members who shall have been residents of the state for three consecutive years immediately prior to their appointment. Four members must be licensed real estate brokers, and one member must be a nonlicensed member of the public who has never been licensed, and not more than one member shall be from any one county within the state. Members serve a five-year term. The governor also fills vacant positions on the Commission.

The New Mexico Real Estate License Law and Real Estate Commission Rules grant the Commission the power and authority to create and enforce rules to carry out the provisions of the act. A violation by a licensee of any of the Commission's laws or regulations could be considered grounds for the refusal, suspension, or revocation of that license.

The Commission has three functions:

- Licensing
- Education
- Enforcement

■ DEFINITIONS

It is unlawful to act as a real estate broker within the state of New Mexico without a license except as otherwise provided in Section 61-29-2 NMSA 1978. The basic definitions of real estate broker are as follows:

- A **qualifying broker** a broker who has qualified a proprietorship, corporation, partnership or association to do business as a real estate brokerage in the state of New Mexico, and who discharges the responsibilities of a qualifying broker as set forth in 16.61.16.9 NMAC.
- An **associate broker** is a person holding a New Mexico associate broker's license who is affiliated with a New Mexico qualifying broker.

The following acts, when done for others, are included in the definition of a real estate broker:

- Buying
- Selling
- Leasing or renting
- Auctioning
- Exchanging
- Listing
- Negotiating
- Dealing in options

■ EXCEPTIONS TO LICENSE REQUIREMENT

Even though individuals may buy, sell, lease or rent, auction, exchange, or list the real estate of another for valuable consideration, they may be exempted from obtaining a license if they fit one of the categories of specific exclusions established by the legislature.

Exempt from license requirements are the following:

- **Property owners**, with respect to the property so owned. **Regular employees** of the property owner or of the qualifying broker with respect to property owned or managed by

the broker are also exempt. If subdivisions containing more than 99 parcels, then employees of the owner builder must be licensed. All time-share salespersons must be licensed unless they have a 15% ownership interest in the time-share project.

- A person holding a **power of attorney** from an owner authorizing the **final consummation** of a real estate transaction, provided the transactions are isolated or sporadic, and not exceeding two transactions per year. Any transactions where an **attorney-in-fact** under a duly executed power of attorney delivered by an owner related to the attorney-in-fact, by up to the fourth degree of consanguinity, authorizing the person to finally consummate and to perform under any contract for the sale, leasing or exchange of real estate on behalf of the owner.
- Attorneys when acting as attorneys
- Public officials, court appointees, executors, or trustees while acting as such
- Brokers of **severed mineral interests**
- **Business opportunity brokers** selling a business only and not becoming involved in the negotiation or transfer of any real property interests

■ PENALTIES FOR VIOLATING THE LICENSE LAW OR REAL ESTATE COMMISSION RULES

A violation of the license law by an unlicensed person is a fourth-degree felony; the attorney general or district attorney may prosecute, and the courts may impose fines on individuals found guilty of a violation; the maximum penalty is 18 months imprisonment, a fine of \$5,000, or both.

A violation of the license law by a licensee is a misdemeanor and shall be punished by a fine of not more than \$500 or imprisonment for not more than 6 months, or both.

The license law also allows the attorney general to seek a civil penalty of up to \$5,000 per violation, plus attorney fees and court costs. The Uniform Licensing Act allows for the New Mexico Real Estate Commission to impose administrative fines of up to \$1,000 for each violation. The NMREC has jurisdiction over licensees and no licensees performing regulated acts.

■ LICENSE APPLICATION

A license applicant must

- be a legal resident of the United States,
- be 18 years of age, and
- pass the licensing exam.

License Recognition

New Mexico has license recognition agreements with various states. Full information can be found at the Commission website. In most cases, a New Mexico broker may obtain a license in one of these states by simply applying. Similarly, a licensee in another state could also simply apply for a New Mexico broker license.

Associate broker applicants (entry level) must complete 90 hours of prelicense instruction: 30 hours each in Real Estate Law, Real Estate Principles and Practice, and Broker Basics, before taking the broker examination.

Qualifying broker applicants must have at least four years active experience as a licensed associate broker during the 60-month period immediately preceding the filing of the application and complete 120 hours of prelicense instruction: 30 hours each in Real Estate Law, Real Estate Principles and Practice and Broker Basics, and Brokerage Office Administration. In the case of a qualifying broker who will not be supervising or managing other brokers, at least two years of active experience as a licensed associate broker during the 60-month period immediately preceding the filing of the application. Qualifying brokers who have qualified for qualifying broker status under the exception of not supervising or managing others, must document at least four years of active experience as an associate broker and qualifying broker before being eligible to supervise other brokers. If licensed in another state, not less than four years' experience as the equivalent of an associate broker during the 60-month period immediately preceding the filing of the application with verification in writing by the applicant's qualifying broker(s) or the state's applicable equivalent to a qualifying broker. A candidate for a qualifying broker license from another state will, in all circumstances, be required to fulfill all the remaining requirements, including experience, education and acknowledgement of responsibilities.

Documented qualifying transactional experience – total 100 points, with at least one transaction accomplished during each of the four years prior to filing of the application. Points are awarded as follows:

- (a) Each sale or lease transaction is deemed to have two sides, one side working with the buyer/tenant and the other side working with the seller/owner. Both transaction sides receive points.
- (b) Transactions handled by teams comprised of more than one associate broker, the qualifying broker shall determine which associate broker is deserving of earning the points allowed, or divided the points among team members.
- (c) Real estate and property management transactions; total points available per transaction side:
 - 1. Residential sales – 5 points
 - 2. Residential lot sale – 3 points
 - 3. Residential lease – 4 points
 - 4. Commercial improved property sale – 8 points
 - 5. Commercial unimproved lot sale – 6 points
 - 6. Commercial lease – 6 points
 - 7. Property Management points are accumulated as follows:
 - a. Residential property management – each property receives 3 points , plus 1 point for each additional unit in that property to max 25 points per property per year
 - b. Commercial property management – each property receives 4 points, plus one point for each individual tenant space in that property to max 25 points per property per year

8. Farm and Ranch/Vacant Land – (property which is used for commercial agricultural purposes)
 - a. Less than 100 acres – 8 points
 - b. 100 acres or more – 10 points
9. Limited Waiver – a waiver may be granted by the Commission to an associate broker who can demonstrate that their particular circumstance, i.e. size of market, lack of property types, health issues, force majeure, make it very difficult to obtain 100 points. The Commission may waive up to 30 points and the transaction per year requirement.

Fingerprinting and Arrest Record Checks

All persons applying for or renewing a New Mexico real estate broker's license or upgrading an associate broker's license to a qualifying broker's license must be fingerprinted as a condition of licensure or license renewal.

Applicant fingerprints and processing fees are submitted electronically to the New Mexico Department of Public Safety from approved live scan vendor sites for the purpose of matching applicant fingerprints with fingerprints in state and national arrest record databases. Applicants must register on the vendor website before being fingerprinted. The vendor website address and a list of approved live scan sites are available on the Real Estate Commission website at www.rld.state.nm.us.

To verify compliance with the fingerprinting requirement, applicants for licensure or license renewal must submit to the Commission, along with their license or renewal application, a copy of the Commission-approved fingerprint certification form completed by the vendor. To ensure that the Commission is receiving the most current information available, fingerprinting shall be done no earlier than twenty-one (21) days prior to submitting documents to apply for or renew a license.

License or license-renewal applicants who do not have access to approved live scan vendor sites may be fingerprinted by other vendors using hardcopy fingerprint cards provided by the Commission. Such applicants will be responsible for mailing the hardcopy cards and fees to vendor's headquarters at the address shown on the Commission website.

License Transfer

When a broker requests a transfer, the qualifying broker or broker in charge must return that broker's license to the New Mexico Real Estate Commission within **48 hours**. The associate broker may not carry out any real estate activity until the transfer is complete. The transfer form must be accompanied by a certificate certifying that the associate broker or qualifying broker has current errors and omissions insurance coverage. The license will not be transferred until the certificate is received in the Commission office. The transfer is effective on the date that the transfer fee, transfer form, and the current license are received and stamped at the Commission office.

Brokers moving to another state must notify the New Mexico Real Estate Commission of their new address within **ten days**.

It is the responsibility of each licensee to make sure the real estate commission has the most current information regarding a licensee's name, and physical or email address.

License Inactivation

When a broker requests that a license be put on inactive status, the qualifying broker or broker in charge must return, by mail or in person, that license to the Commission within 48 hours.

Inactivation takes place at the time the license is received and stamped at the Commission, or upon receipt of written notification to the Commission by the qualifying broker or broker in charge, whichever is earlier.

License Expiration and Renewal

A license, active or inactive, expires on the last day of the month following the broker's birth month. It is the broker's responsibility to renew the license, even if the broker did not receive a renewal form in the mail from the Commission.

Figure 1.2 illustrates what must be submitted at the time of license renewal. Incomplete renewal applications will not be accepted. Incomplete applications may result in license expiration and subject the broker to a triple renewal fee to restore the license to current status.

Except for brokers who are exempt from continuing education by virtue of having attained 65 years of age and a minimum of 20 years of continuous licensure prior to July 1, 2011;

A. All active and inactive associate brokers and qualifying brokers shall successfully complete a minimum of 36 credit hours of continuing education in courses approved by the commission during each licensing cycle.

B. Required courses include the four hour New Mexico real estate commission (NMREC) core course to be completed annually; a four hour commission approved core elective course to be completed once during each three year licensing cycle; and four hours of commission approved ethics courses to be completed once during each three year licensing cycle.

C. Of the remaining 16 credit hours, no more than 10 credit hours may be earned toward the continuing education requirements from training category courses. All 16 hours may be earned from education category courses.

D. Qualifying Brokers must attend the QB Refresher course once every three years for zero credit hours and must also attend a commission meeting, rule hearing or disciplinary hearing once every three years.

More Information

For more specific information concerning the license law or the rules, review the current copy of the *New Mexico Real Estate License Law and Real Estate Commission Rules* in your brokerage office. The New Mexico License Law and Real Estate Commission Rules are available at www.rld.state.nm.us/nmrec.

Figure 1.2

License Renewal Requirements

	Qualifying Broker	Associate Broker	Inactive Broker
Renewal form	X	X	X
Fee	X	X	X
Criminal background check(fingerprinting)	X	X	X
Proof of continuing education (36 hours to include)	X*	X*	X*
Proof of four-hour Core Course in each year of licensing cycle	X	X	X
Proof of four-hour Ethics course once in licensing cycle	X	X	X
Proof of four-hour Core Elective once in licensing cycle	X	X	X
Minimum of eight-hours of courses from the QB's professional track	X	N/A	N/A
Proof of errors & omissions insurance	X	X	N/A
Proof of taking QB refresher course	X	N/A	N/A
Attendance at one Commission Meeting	X	N/A	N/A

* Brokers over the age of 65 with 20 years continuous licensure prior to July 1, 2011 are exempt from continuing education requirements.

■ REFUSAL, SUSPENSION, AND REVOCATION OF LICENSES

A major function of the Commission lies in its obligation of enforcement. Just as the Commission may issue licenses under its licensing function, it may deny, suspend, or revoke licenses under its enforcement function.

Licenses may not be refused, suspended, or revoked, except upon a hearing as provided by the **Uniform Licensing Act (ULA)**. Licensees are notified of pending action against their license by a **Notice of Contemplated Action (NCA)** issued to the licensee by the Commission. The NCA gives the licensee **20 days to request a hearing**. It advises that the licensee may be represented by counsel at the hearing. Failure to request a hearing may result in license revocation by default. The Commission has the power to subpoena persons and/or records for the hearing.

The Real Estate Commission hears complaints and makes the decisions. The decision of the Commission may be appealed to a court as provided by the Uniform Licensing Act. Licensees may bear all costs for disciplinary proceedings, unless they are excused by the Commission from paying all or part of the fees, or if they prevail at the hearing and no disciplinary action is taken by the Commission.

Licenses may be suspended or revoked for any of the grounds established in Section 61-29-12 of the New Mexico Real Estate License Law.

Particular attention should be paid to misrepresentation and omission of material facts. The two types of misrepresentation are **intentional and careless**. Misrepresentation of either type can be grounds for suspension or revocation of a license.

Continued negligence in making representations or in practice may also serve as grounds for action against a licensee. False promises are also a form of misrepresentation.

Concealment or the failure to make a required **disclosure** is a type of misrepresentation. This would be particularly true when involving a consumer to whom a licensee owes a duty of disclosure of adverse material facts actually known, but it might also apply to the failure to disclose hidden defects.

Complaints and Investigations

Part 36 of the New Mexico Administrative Code addresses complaints and investigations, and is quoted as follows:

16.61.36.8. Complaints. The commission may file a complaint against any person who engages in the business or acts in the capacity of a real estate broker, real estate commission approved education sponsor or instructor, in New Mexico with or without a New Mexico real estate license based on information indicating that there may have been a violation of the Real Estate License Law or the commission rules.

The commission may also act on a complaint made by a member of the commission, a member of the public, or another real estate broker. Upon receipt of a complaint the commission will determine if the complaint is within its jurisdiction. If the commission determines the complaint is within its jurisdiction, the complaint will be assigned for investigation.

16.61.36.9. Investigations. In conducting an investigation, the commission shall give the person under investigation the opportunity to answer the complaint made against them in writing and to produce relevant documentary evidence, in accordance with the Uniform

Licensing Act. If the person under investigation fails to **respond within ten (10) working days** of having been provided with a copy of the complaint and having been informed by the commission in writing that a complaint has been filed against him or her, the investigation may proceed without benefit of that person's response.

- A. If the investigation reveals that the complaint does not involve a violation of the Real Estate License Law or the commission rules, the complaint will be dismissed by the commission, and the parties to the complaint will be so advised.
- B. If the investigation reveals that the complaint does involve a violation of the Real Estate License Law or the commission rules, the commission may refer the complaint to the attorney general's office and request that a notice of contemplated action (NCA) be issued to the respondent, or offer the respondent a pre-NCA settlement with the understanding that if the respondent does not accept the settlement offer the complaint will be referred to the attorney general's office for the issuance of an NCA.
- C. Withdrawal of a complaint by a member of the commission, a member of the public, or another broker does not bind the commission to dismiss the complaint.**

Uniform Licensing Act 61-1-4

The Uniform Licensing Act addresses board action and hearings as follows:

Notice of contemplated board action; request for hearing; notice of hearing

- A. For the purpose of investigating complaints against licensees, the board may issue investigative subpoenas prior to the issuance of a notice of contemplated action as provided in this section.
- B. When a board contemplates taking any action of a type specified in Subsection A, B or C of Section 61-1-3 NMSA 1978, it shall serve upon the applicant a written notice containing a statement:
 - 1. That the applicant has failed to satisfy the board of his qualifications to be examined or to be issued a license, as the case may be;
 - 2. Indicating in what respects the applicant has failed to satisfy the board;
 - 3. That the applicant may secure a hearing before the board by depositing in the mail **within twenty days after service of the notice a certified return receipt requested letter addressed to the board and containing a request for a hearing.**

License Suspension and Revocation

License suspension and revocation are addressed by Part 12 of the New Mexico Administrative Code, as follows:

16.61.12.8. Disciplinary Actions. Violation of any provision of the real estate license law or commission rules may be cause for disciplinary action against any person who engages in the business or acts in the capacity of a real estate broker in New Mexico with or without a New Mexico real estate license, up to and including license suspension or revocation if the person is licensed in New Mexico, and other penalties as provided by law, commission rules, or policies, in the case of an unlicensed person. A person found by the commission to be engaging in unlicensed real estate activity has thereby submitted to the jurisdiction of the state and to the administrative jurisdiction of the commission and is subject to all penalties and remedies

available for a violation of any provision of the real estate license law Chapter 61, Article 29 NMSA 1978 and the commission rules, Title 16 Chapter 61 NMAC. Nothing herein contained shall be deemed to be a restriction on any other penalty or provision provided by law.

16.61.12.9. License Surrender. Any qualifying broker's or associate broker's license suspended or revoked by an order, stipulated agreement or settlement agreement approved by the commission shall be surrendered to the commission by the broker upon the delivery of the order to the broker by the commission, or on the effective date of the order.

All real-estate-related activity conducted under such license shall cease for the duration of the license suspension or revocation, and the license of any associate broker affiliated with a qualifying broker whose license is suspended or revoked shall be automatically placed on inactive status until a new qualifying broker or broker in charge is designated.

[The New Mexico Real Estate License Law (61-29-12 (A) 1–12) provides that the Real Estate Commission shall have the power to suspend or revoke a license if the] licensee has:

1. made a substantial misrepresentation;
2. pursued a continued and flagrant course of misrepresentation; made false promises through agents, salespersons, advertising or otherwise; or used any trade name or insignia of membership in any real estate organization of which the licensee is not a member;
3. paid or received any rebate, profit, compensation or commission to or from any unlicensed person, except his principal or other party to the transaction, and then only with that principal's written consent;
4. represented or attempted to represent a qualifying broker other than a qualifying broker with whom he is associated without the express knowledge and consent of that qualifying broker;
5. failed, within a reasonable time, to account for or to remit any money coming into the licensee's possession that belongs to others, commingled funds of others with the licensee's own or failed to keep funds of others in an escrow or trustee account or failing to furnish legible copies of all listing and sales contracts to all parties executing them;
6. been convicted in any court of competent jurisdiction of a felony or any offense involving moral turpitude;
7. employed or compensated directly or indirectly a person for performing any of the acts regulated by Chapter 61, Article 29 NMSA 1978 who is not a licensed qualifying broker or an associate broker;
8. failed, if a qualifying broker, to place as soon after receipt as is practicably possible, after securing signatures of all parties to the transaction, any deposit money or other money received by the qualifying broker in a real estate transaction in a custodial, trust or escrow account maintained by the qualifying broker in a bank or savings and loan institution or title company authorized to do business in this state;
9. failed, if an associate broker, to place as soon after receipt as is practicably possible in the custody of the associate broker's qualifying broker, after securing signatures of all parties to the transaction, any deposit money or other money entrusted to the associate broker by any person dealing with the associate broker as the representative of the qualifying broker;
10. violated a provision of Chapter 61, Article 29 NMSA 1978 or a rule promulgated by the commission;

11. committed an act, whether of the same or different character from that specified in this subsection, that is related to dealings as a qualifying broker or an associate broker and that constitutes or demonstrates bad faith, incompetency, untrustworthiness, impropriety, fraud, dishonesty, negligence or any unlawful act; or
12. been the subject of disciplinary action as a licensee while licensed to practice real estate in another jurisdiction, territory or possession of the United States or another country.

Violators of the Part 35 of the Parental Responsibility Act also face license revocation or suspension.

An unlawful act or violation of Chapter 61, Article 29 NMSA 1978 by an associate broker, employee, partner or associate of the qualifying broker **shall not** be cause for the revocation of a license of the qualifying broker unless the qualifying broker had guilty knowledge of the unlawful act or violation.

Complaint Resolution and Process Time Line for the Real Estate Commission

- Licensees have **ten days to respond** to a complaint by the Commission.
- After hearing the complaint, the Commission may dismiss or may issue an NCA.
- Licensees must **request a hearing within 20 days**. If licensees do not request a hearing within 20 days, the Commission **may revoke their license**.
- After the hearing, the Commission will render a decision.
- The status of the license is still active during the complaint process until the decision of the Commission after the hearing.

Appeals

- Decisions of the Commission in favor of licensees are final.
- If the Commission rules against licensee, the licensee may seek judicial review in district court.
- **Appeals** are made to the district court **within 30 days** of a Commission decision.

Penalties

- The Commission may fine a licensee based on the Uniform Licensing Act up to \$1,000 per violation.
- The Commission may deny, revoke, or suspend a license.
- The Commission may require a licensee to attend education courses with no credit hours awarded toward license renewal.
- **The minimum penalty** that the Commission may impose is a **letter of reprimand**.

Qualifying brokers are required to comply with all rules of the Commission, but they have specific duties as listed in Part 16, as follows, for qualifying brokers.

Qualifying Broker: Affiliation and Responsibilities

16.61.16.8. Affiliation. A qualifying broker is responsible for all real estate activities within the brokerage. A qualifying broker may serve concurrently as a qualifying broker for more than one brokerage. A qualifying broker may, by written agreement, engage the services of associate brokers and qualifying brokers, provided that the terms of such agreements are consistent with the responsibilities of associate brokers and qualifying brokers as set forth in parts 16.61.16.9 NMAC and 16.61.17.9 NMAC. A qualifying broker may serve as qualifying broker and associate broker for different brokerages simultaneously provided that there are written agreements executed specifying the responsibilities and scope of authority that the broker has for each brokerage.

16.61.16.9. Responsibilities. The qualifying broker shall, in addition to all other requirements imposed by law, comply with the following:

A. conduct the real estate brokerage business under the trade name and from the brokerage address or addresses registered with the commission;

B. prominently display in the brokerage office, the qualifying broker's own license and the licenses of all other affiliated associate brokers conducting real estate brokerage business from the brokerage office; in the event of a virtual office, this requirement is met by displaying a legible photo or scanned image of the licenses on the brokerage's web site through a link labeled "real estate licenses".

C. have in the brokerage office and available to all affiliated associate brokers and qualifying brokers a current copy of the state of New Mexico Real Estate License Law and Commission Rules manual;

D. notify the commission in writing within ten days of a change of the brokerage office address or telephone number;

E. supervise all real estate related activities performed by all personnel, licensed or unlicensed, on behalf of others; as follows:

(1) review and maintain all records and documents required for real estate related matters processed by all personnel supervised by the qualifying broker.

(2) provide or promote appropriate training of all brokers and staff affiliated with the qualifying broker for compliance with the Real Estate License Law and Commission Rules.

(3) supervise advertising of real estate or real estate services conducted on behalf of others by anyone affiliated with the qualifying broker.

(4) execute and maintain current written employment agreements or independent contractor agreements with associate brokers affiliated with the qualifying broker.

F. all records and documents wherein the qualifying broker and affiliated associate brokers are engaged on behalf of others, or on their own behalf, in real estate related matters; the required records shall be available to the commission or any duly authorized commission representative at the place of business of the qualifying broker or at the commission office. All such records

whether in paper or electronic format shall be retained for a period **not less than six years**. In the case of a property manager, all records shall be retained for the full term of any agreement and for **six years** from the termination of the management agreement;

G. supervision of trust account management by brokerage owners whether or not the brokerage owners are licensed real estate brokers. Such trust account management will conform to other trust account requirements in the commission rules.

H. deposit all money received on behalf of others in the proper trust account as soon after receipt as is practicably possible after securing signatures of all parties to the transaction documents;

I. receive and disburse all commissions, referral fees, and other considerations to any broker affiliated with the qualifying broker, or broker who had been affiliated with the qualifying broker at the time the transaction went under contract; the qualifying broker may also disburse or authorize the disbursement of such commissions and fees to any entity entitled by law to receive same, including the estate of a deceased broker, the deceased broker's surviving spouse, or any legally recognized entity wholly owned by an associate broker and their spouse. Such partnership, corporation, or Limited Liability Company shall not be required to have a qualifying broker for purposes of this subpart;

J. assure that when the brokerage cooperates with or makes a referral to, or receives a referral from any broker, there be a transaction specific written co-brokerage or referral agreement signed by the qualifying broker;

K designate a broker in charge in the event actual supervision by the qualifying broker is not possible, and inform the commission of such designation in writing. During this period of time, the broker in charge shall assume all of the responsibilities of the qualifying broker for the brokerage;

L. return the associate broker's license to the commission within **48 hours** of termination or discharge;

M. ensure that each qualifying broker and associate broker affiliated with the brokerage obtain and maintain a current errors and omissions insurance policy as provided in NMSA 1978 Section 61-29-4.2 of the real estate license law and 16.61.5 NMAC of the commission rules;

N. successfully complete as a condition of license renewal or as a condition of reinstatement of qualifying broker status the commission-approved qualifying broker refresher course;

O. ensure that associate broker's affiliated with their brokerage complete the commission-approved new broker business practice course or the CCIM 101 course within their first year of licensure.

P. ensure that the qualifying broker's name and contact information, including license number, is clearly and conspicuously displayed on any written document generated by the brokerage or presented to a prospective customer or client, and that has the potential to become an express written agreement.

Associate Broker: Affiliation and Responsibilities

Associate brokers are also required to comply with all NMREC rules, but they have specific duties as listed in Part 17 for associate brokers.

16.61.17.8. Affiliation. An associate broker must be affiliated with a qualifying broker in order to engage in real estate brokerage business. An associate broker may have only one associate broker's license and be affiliated with only one qualifying broker at a time.

16.61.17.9. Responsibilities. An associate broker shall:

A. complete within their first year of licensure, the commission approved new broker business practice course or the CCIM 101 course. Associate brokers who have been on inactive status since their initial licensure shall complete the new broker business practice course or the CCIM 101 course prior to activation of their license;

B. be affiliated with only one qualifying broker at a time;

C. not engage in any real estate activity for any other qualifying broker other than the qualifying broker with whom the broker is affiliated;

D. not engage in any real estate activities for others for which a real estate license is required outside the knowledge and supervision of their qualifying broker;

E. not engage in any real estate activities on their own behalf outside the knowledge of the qualifying broker with whom the broker is affiliated;

F. not engage in any real estate activity under a trade name(s) other than the trade name(s) of the qualifying broker with whom the broker is affiliated;

G. not receive any commissions or fees for real estate activities from anyone other than the qualifying broker with whom the broker was affiliated with at the time the transaction went under contract, or persons authorized in writing by the qualifying broker to disburse such commissions or fees;

H. when advertising real estate or real estate services for others, include in the advertising the trade name and telephone number as registered with the commission of the qualifying broker with whom the broker is affiliated;

I. remit all funds received from others related to real estate transactions to the qualifying broker or their designee as soon as possible after receipt of those funds, and after securing signatures of all parties to the transaction;

J. deliver in a timely manner to their qualifying broker all records required to be maintained by the qualifying broker under 16.61.16 NMAC;

K. maintain a current errors and omissions insurance policy as provided in NMSA 1978 Section 61-29-4.2 of the Real Estate License Law and part **16.61.5.8 of the commission rules, and provide documentation of such policy to their qualifying broker.**

Unlicensed Assistants

Part 21 of the New Mexico Administrative Code addresses unlicensed assistants as follows:

16.61.21.7. Definitions.

An **unlicensed assistant** is defined in 16.61.1.7. DDD:

As a person who does not hold an active New Mexico broker's license and works under the supervision of a responsible person to perform duties for the brokerage as provided in 16.61.21 NMAC.

16.61.21.8. Permitted activities. Identify three activities that unlicensed assistants **may perform** according to NMAC rules:

1. _____
2. _____
3. _____

16.61.21.9. Prohibited activities. An unlicensed assistant is not permitted to engage in a number of activities in connection with the purchase, sale, or exchange of real property.

Identify three activities that an unlicensed assistant **may not perform** according to NMAC rules:

1. _____
2. _____
3. _____

OTHER NMAC RULES

Other important NMAC Rules are quoted in the following paragraphs:

Foreign Brokers

A foreign broker may act in the capacity of a qualifying broker or associate broker with respect to commercial real estate located in New Mexico provided that prior to performing any of the real estate activities of a qualifying broker or associate broker the foreign broker enters into a transaction-specific written agreement with a New Mexico qualifying broker that includes, at a minimum:

- (1) a description of the parties, the commercial real estate and any additional information necessary to identify the specific transaction governed by the agreement;
- (2) the terms of compensation between the foreign broker and the New Mexico qualifying broker;
- (3) the effective date and definitive termination date of the agreement;
- (4) a statement that the foreign broker agrees to:
 - a. cooperate fully with the New Mexico qualifying broker and all associate brokers designated by the New Mexico qualifying broker;

- b. except for the foreign broker's interaction with the foreign broker's client, conduct all contact with parties, including the general public and other brokers, in association with the New Mexico qualifying broker or associate broker designated by the New Mexico qualifying broker;
- c. conduct all marketing and solicitations for business in the name of the New Mexico qualifying broker;
- d. timely furnish to the New Mexico qualifying broker copies of all documents related to the transaction that are required by the laws of New Mexico to be retained by its brokers, including without limitation, brokerage relationship disclosure, offers, counteroffers, purchase and sale contracts, leases and closing statements;
- e. comply with and be bound by and subject to New Mexico law and the rules of the real estate commission;
- f. submit to the jurisdiction of the courts of New Mexico with respect to the transaction and any and all claims related thereto by service of process upon the secretary of state of New Mexico and upon the appropriate official of the state, province, or nation of the foreign broker's real estate licensure.

B. When a New Mexico associate broker or qualifying broker makes a referral to or receives a referral from a foreign broker for the purpose of receiving a fee, commission or other consideration, the qualifying broker of the New Mexico brokerage office and the foreign broker shall execute a written, transaction-specific referral agreement at the time of the referral.

Trade Name Registration

Prior to the use of any trade name for the operation of a brokerage, **the qualifying broker shall register such trade name** with the commission. A qualifying broker must conduct real estate brokerage business under a trade name registered with the commission.

When a brokerage ceases using a trade name, the qualifying broker shall, **within 10 days**, return the qualifying broker's license and the licenses of all qualifying and associate brokers affiliated with the brokerage to the commission, advise the commission in writing that the trade name is no longer being used, and remove all signs and advertising using the trade name.

Signage

16.61.31.8. Requirements.

A. Each qualifying broker shall place and maintain a **legible sign in a conspicuous** place near the office entrance identifying them as the qualifying broker. The trade name of the brokerage as registered with the commission shall be clearly shown.

B. In the case of a qualifying broker whose office is located in an office building, the qualifying broker may comply with this regulation by listing their name on the directory of offices provided by the office building and by displaying the trade name on or near the office entrance.

Real Estate Advertising

16.61.32.8. Advertisements.

A. All real estate advertising shall be a true and factual representation of the property and real estate services being advertised and the brokerage providing the services and shall not be presented in such a manner that will confuse or mislead the public.

B. Every qualifying broker advertising real property for others for sale, purchase, lease, exchange or rent, including short-term or vacation rentals, or advertising real estate services, shall at a minimum, use in such advertising the trade name and current brokerage office telephone number as registered with the commission. Directional signs are exempt from these requirements. Additional telephone numbers may be used in such advertising.

C. Associate brokers, when advertising real property for others for sale, purchase, lease, exchange or rent, or when advertising real estate services, shall include in the advertisement the trade name and the current telephone number as registered with the commission of the brokerage with which they are affiliated. Effective January 1, 2017 the brokerage trade name and telephone number shall be prominently displayed in a type size not less than thirty-three percent of the type size of the associate broker's name, or in the case of a team of associate brokers, the team name.

D. A broker advertising to, sell, or exchange real property which the broker owns or partially owns shall indicate within such advertising, including signs, that the broker owns the real property. Disclosure of such ownership must also be made in the listing contract, purchase agreement, or exchange agreement. If an owner-broker engages a third party broker to list the owner-broker's property, the third party broker is not required to make an owner-broker disclosure in advertising and signs, but such disclosure is required in the listing contract, purchase agreement or exchange agreement. A broker advertising to rent or lease real property which the broker owns or partially owns is not required to disclose such ownership in advertising and signs, but is required to make such disclosure in rental or lease agreements.

E. When advertising real property owned by a broker and the telephone number of the brokerage is used in the advertisement, the advertisement must also include the trade name of the brokerage as registered with the commission.

F. All advertising must be in compliance with all local, state and federal laws and regulations.

G. These requirements apply to all forms of advertising, including but not limited to print, audio and video recordings, computer presentations, online and electronic media. In the event that disclosure of the brokerage name and telephone number as registered with the commission is not practical in electronic displays of limited information, such as thumbnails, text messages, links and tweets of 200 characters or less, such displays are exempt from the disclosure requirement provided such displays are linked to a display that includes all of the required disclosures.

Document Execution and Delivery

16.61.33.8. Execution of documents. All transactions shall be documented and signed by all parties to the transaction.

16.61.33.9. Delivery of documents. Except as otherwise provided by law, in all circumstances it shall be the responsibility of each broker engaged in a transaction to assure that all parties to the transaction receive legible copies of any and all documents they have signed and any documents that pertain to their respective interest in the transaction as soon as practicably possible, and copies of all fully executed documents thereafter.

Child Support Enforcement

The New Mexico Real Estate Commission has adopted provisions from the responsible parent act which allows for the commission to take action on a licensee in the arrears and/or default of their child support obligation as noted in Part 35 of the rules with an excerpt as follows:

16.61.35.10. Initial action.

Upon determination that a broker or broker applicant appears on the certified list, the commission shall:

A. commence a formal proceeding as set forth in Section 11 of Part 35 to take the appropriate action under Section 8 of Part 35; or

B. for current brokers only, informally notify the broker that the broker's name is on the certified list, and that the broker must provide the commission with a subsequent statement of compliance from HSD by the earlier of the application for license renewal or a specified date not to exceed thirty (30) days. If the broker fails to provide this statement, the commission shall commence a formal proceeding as set forth in Section 11 of Part 35.

16.61.35.11. Notice of contemplated action.

Prior to taking any action specified in Section 8 of Part 35, the commission shall serve upon the broker or broker applicant a written notice stating that:

A. the commission has grounds to take such action, and that the commission shall take such action unless the broker or broker applicant:

(1) mails a letter (certified, return receipt requested) within twenty (20) days after service of the notice requesting a hearing; or

(2) provides the commission, within thirty (30) days of the date of the notice, with a statement of compliance from HSD; and

B. if the broker or broker applicant disagrees with the determination of non-compliance, or wishes to come into compliance, the broker or broker applicant should contact the HSD child support enforcement division.

Quiz 1

1. Which of the following *REQUIRES* a real estate license?
 - a. sale of 20 lots in a sub division by an employee
 - b. three-week rental of a condominium
 - c. sale of time-share units
 - d. sale of more than 20 personally owned properties
2. The Real Estate Commission may *NOT* impose
 - a. licensing requirements
 - b. penalties for Code of Ethics violations
 - c. disciplinary penalties
 - d. a recovery fund assessment
3. The responsibilities of the Real Estate Commission do *NOT* include
 - a. regulating brokerage fees
 - b. enforcing the license law
 - c. enforcing the rules and regulations
 - d. refusing a license for cause
4. The governor of the State of New Mexico
 - a. appoints members to the Real Estate Commission with the advice and consent of the state legislature
 - b. fills vacancies on the Real Estate Commission for unexpired terms
 - c. may remove any member without cause
 - d. all of these
5. Paying a referral fee to an unlicensed person for information leading to a listing
 - a. is a violation of the license law
 - b. is permissible if the unlicensed person performs no further acts
 - c. is permissible if paid to only the employing broker
 - d. violates the statement of principles
6. A broker's license can be revoked if the broker
 - a. fails to account for funds that belong to others
 - b. is unwilling to act as a broker
 - c. pays a commission to a broker of another state
 - d. entrusts earnest money with another cooperating broker
7. Which of the following are exempt from the provisions of the real estate license law?
 - a. a trustee acting under a deed of trust
 - b. a trustee acting under a trust agreement
 - c. a person who deals exclusively in mineral leases
 - d. all of these
8. Once a notice of contemplated action (NCA) is issued by the Commission, the respondent has how many days to respond to the Commission to request a hearing?
 - a. 7 days
 - b. 10 days
 - c. 20 days
 - d. 30 days

9. The *MAXIMUM* fine the Commission may impose is
 - a. \$1,000
 - b. \$1,000 per violation
 - c. \$1,500
 - d. \$1,500 per violation
10. Brokerage office signage *MUST* do all of the following *EXCEPT*
 - a. be legible
 - b. be near the office entrance
 - c. contain the trade name of the brokerage
 - d. list the license number
11. An associate broker involved in a real estate transaction may accept compensation from the
 - a. real estate firm's qualifying broker
 - b. seller
 - c. lending institution when creating a new loan
 - d. buyer
12. Records generated in connection with real estate matters processed through a brokerage
 - a. are public records
 - b. are protected by attorney-client privilege
 - c. must be made available to the Commission upon request
 - d. must be maintained in an electronic format
13. An unlicensed assistant may do which of the following?
 - a. host an open house with her responsible person present
 - b. write a purchase agreement
 - c. obtain signatures on financial documents
 - d. solicit appointments for showings
14. Licensees are notified of impending action against their license by
 - a. a Notice of Contemplated Action (NCA)
 - b. the attorney general's office
 - c. the Uniform Licensing Act (ULA)
 - d. a court order
15. An associate broker is *REQUIRED* by rule to do all of the following *EXCEPT*
 - a. remit all monies of others to the QB
 - b. register their trade name with the Real Estate Commission
 - c. receive compensation only from their QB or the QB's designee
 - d. conduct all real estate related activities in the name of the brokerage
16. A broker who prepares a purchase agreement *MUST* give a copy of this signed document to the buyer
 - a. within 5 days after acceptance of the offer
 - b. as soon as practically possible
 - c. at the time all parties' signatures are obtained
 - d. no later than closing
17. What information *MUST* a broker provide to the real estate commission staff members who are conducting an investigation of a complaint filed
 - a. no information needs to be released unless the commission has a court order
 - b. all information with the permission of the broker's E & O insurance carrier
 - c. all information except confidential client financial information
 - d. all information requested

18. Which of the following is *NOT* a circumstance that would allow the commission to refuse to renew the license of a broker
- a. there is a disciplinary action pending against the broker
 - b. the broker has failed to submit a completed fingerprint certification form
 - c. the broker has failed to provide a certificate of current errors and omissions insurance
 - d. the broker has failed to complete his or her continuing education requirements
19. If an associate broker, employee, or partner violates a license law or commission rule, the Qualifying broker's license could be revoked if they
- a. were the broker in charge at the time of the violation
 - b. had guilty knowledge of the violation
 - c. was on vacation and had a broker in charge
 - d. had no guilty knowledge of the violation
20. A qualifying broker is responsible for all of the following *EXCEPT*
- a. conducting business under the trade name and from the address registered with the Real Estate Commission
 - b. maintain a brokerage office located in New Mexico
 - c. maintaining full and complete records of real estate matters conducted through the business
 - d. maintaining written employment or independent contractor agreements with associate brokers affiliated with the brokerage

Unit 2: Brokerage Relationships

■ PRE-READING ASSIGNMENT

61-29-10.1 through 61-29-10.2, 61-29-20 through 61-29-29 and Part 19 (ALL) of *New Mexico Real Estate License Law, Real Estate Commission Rules*

■ LEARNING OBJECTIVES *When you have completed this unit, you will be able to*

- **explain** the various broker relationships,
- **identify** the broker duties as required by part 19 of the rules,
- **differentiate** between fiduciary duties and broker duties,
- **recognize** and identify broker service agreements, and
- **define** the following *key terms*:

agency
brokerage relationship
client
customer
designated agency
dual agency
exclusive agency
fiduciary
listing agreement
party to the transaction
procuring cause
scope of authority
subagent
transaction broker

Brokerage relationships are one of the more complex areas in real estate transactions. The term **brokerage relationship** refers to the legal or contractual relationship between the brokerage and the consumer (buyer, seller, landlord, or tenant) in a regulated real estate transaction. There are two basic types of brokerage relationships: transaction broker and **agency**. The relationship created in a transaction will set forth the responsibilities and the liabilities of the parties.

It is imperative that licensees develop a basic understanding of the various types of legal and contractual relationships, how each is established, the disclosures required under different relationships, the effect of each on all parties involved, and the legalities of each.

Licensees should also become aware of the responsibilities and the liabilities that automatically arise with all brokerage relationships.

Brokerage relationships affect the broker and the brokerage as well as the consumers, known as parties to the transaction. Every broker must be familiar with the following terms as defined by the New Mexico Real Estate Commission:

Client—a person who has entered into an express written agreement with a brokerage for real estate services subject to the jurisdiction of the Commission

Customer—a person who uses real estate services without entering into an express written agreement with a brokerage subject to the jurisdiction of the Commission

Party to the transaction—a client or customer or any other person who utilizes real estate related services subject to the jurisdiction of the Commission, not including a person who acquires an interest as security for an obligation

■ NEW MEXICO LAW

New Mexico Real Estate License Law addresses the creation of brokerage relationships, as follows.

61-29-10.1. Brokerage relationships; creation

A. For all regulated real estate transactions first executed on or after January 1, 2000, no agency relationship between a buyer, seller, landlord or tenant and a brokerage shall exist unless the buyer, seller, landlord or tenant and the brokerage agree, in writing, to the agency relationship. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant or licensee, or created orally or by implication.

B. A brokerage may provide real estate services to a client pursuant to an express written agreement that does not create an agency relationship and no agency duties will be imposed on the brokerage.

C. A brokerage may provide real estate services to a customer without entering into an express written agreement and without creating an agency relationship and no agency duties will be imposed on the brokerage.

D. The Commission shall promulgate rules governing the rights of clients or customers and the rights, responsibilities and duties of a brokerage in those brokerage relationships that are subject to the jurisdiction of the commission.

61-29-10.2. Licensee's duties; disclosure

A. Prior to the time a licensee generates or presents any written document that has the potential to become an express written agreement, the licensee shall give to a prospective buyer, seller, landlord or tenant a list of the licensee's duties that are in accordance with requirements established by the commission.

B. Licensees shall perform all duties that are established for licensees by the commission.

Part A of 61-29-10.2 is repealed effective July 1, 2012. The session material contains many of the common terms, definitions, explanations, and applications you will likely encounter in the various brokerage relationships.

The New Mexico Licensing Act and rules provide for three types of brokerage relationships (representation) for licensees and consumers:

- **Transaction broker**—the licensee represents a consumer in a non-fiduciary capacity, owing the basic duties as outlined in Part 19 of the Rules. This is the default relationship with consumers.
- **Exclusive agency**—the licensee as agent represents only one party to the transaction in a fiduciary capacity.
- **Dual agency**—the licensee as agent represents both parties to the transaction in a fiduciary capacity.

No matter which relationship is chosen, a licensee owes certain minimum duties defined by the Commission as broker duties: those minimum duties required of all licensees regardless of any contractual or non-contractual brokerage relationship.

Part 19: Broker Duties and Brokerage Relationships

Broker duties; disclosure

Brokers owe specific broker duties to prospective buyers, sellers, landlords (owners), tenants as set forth in this Part 16.61.19.8. Brokers shall disclose the applicable set of broker duties owed to buyers, sellers, landlords (owners) of rental property and tenants as set forth in this Part 16.61.19.8 prior to the time the broker generates or presents any written document to that party that has the potential to become an express written agreement and obtain from that applicable party written acknowledgement that the broker has made such disclosures. In the case of prospective buyers, sellers, landlord (owners) and tenants to whom the broker is not directly providing real estate services, such disclosure and acknowledgment of receipt shall be made through the broker who is directly providing real estate services to that buyer, seller, landlord (owner) or tenant.

A. Brokers owe the following duties to prospective buyers, sellers, landlords (owners) and tenants:

- (1) Honesty and reasonable care and ethical and professional conduct;
- (2) Compliance with local, state, and federal fair housing and anti-discrimination laws, the New Mexico real estate license law and the Real Estate Commission rules, the New Mexico Uniform Owner Resident Relations Act, and other applicable local, state, and federal laws and regulations;
- (3) Performance of any and all written agreements made with the prospective buyer, seller, landlord (owner) or tenant;
- (4) Written disclosure of any potential conflict of interest that the broker has in the transaction including but not limited to:
 - (a) Any written brokerage relationship the broker has with any other parties to the transaction or;
 - (b) Any material interest or relationship of a business, personal, or family nature that the broker has in the transaction;
- (5) Written disclosure of any adverse material facts actually known by the associate broker or qualifying broker about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction; adverse material

facts requiring disclosure do not include any information covered by federal fair housing laws or the New Mexico Human Rights Act.

B. In addition to the broker duties owed to prospective buyers, sellers, landlords (owners) and tenants as set forth in this Section 16.61.19.8(A). Brokers owe the following Broker Duties to the buyers, sellers, landlord (owners) and tenants to whom the broker is directly providing real estate services, regardless of the scope and nature of those services; Brokers working as Property Managers for a landlord (owner) are directly providing real estate services to the landlord (owner), not to the tenant:

(1) Assistance to the party in completing the transaction, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services, including:

(a) Timely presentation of and response to all offers or counter-offers; and

(b) Active participation in assisting in complying with the terms and conditions of the contract and with the finalization of the transaction;

If the broker in the transaction is not providing the service, advice or assistance described in Paragraphs (a) and (b) of this Subsection B of 16.61.19.8 NMAC, the party must agree in writing that the broker is not expected to provide such service, advice or assistance;

(2) Acknowledgement by the broker that there may be matters related to the transaction that are outside the broker's knowledge or expertise and that the broker will suggest that the party seek expert advice on these matters;

(3) Advice to consult with an attorney regarding the effectiveness, validity or consequences of any written document generated by the brokerage or presented to the party and that has the potential to become an express written agreement.

(4) Prompt accounting for all money or property received by the broker;

(5) Maintenance of any confidential information learned in the course of any prior agency relationship unless the disclosure is with the former principal's written consent or is required by law;

(6) Written disclosure of brokerage relationship options available in New Mexico;

(7) Unless otherwise authorized in writing, a broker who is directly providing real estate services to a seller/owner shall not disclose the following to the buyer/tenant in a transaction:

(c) That the seller/owner has previously indicated they will accept a sales/lease price less than the asking or listed price of a property;

(d) That the seller/owner will agree to financing terms other than those offered;

(e) The seller/owner's motivations for selling/leasing; or

(f) Any other information the seller/owner has requested in writing remain confidential, unless disclosure is required by law;

(8) Unless otherwise authorized in writing, a broker who is directly providing real estate services to a buyer/tenant shall not disclose the following to the seller/owner in the transaction:

- (a) That the buyer/tenant has previously indicated they will pay a price greater than the price submitted in a written offer;
- (b) The buyer/tenant's motivation for buying/leasing; or
- (c) Any other information the buyer has requested in writing remain confidential, unless disclosure is required by law.

(9) In the event the broker is working for the landlord (owner) as a residential property manager, the broker additionally owes to the landlord (owner) all duties owed under the law of agency.

C. In addition to the broker duties owed to prospective buyers, sellers, landlords (owners) and tenants as set forth in this Section 16.61.19.8(A), Brokers working as Property Managers for a landlord (owner) owe the following duties to tenants:

- (1) Prompt accounting for all money or property received by the broker from the tenant, including issuance of a receipt for cash received;
- (2) If a residential property manager, written disclosure that the broker is the agent of the owner of the property and not of the tenant; in the commercial property management context, written disclosure of the broker's relationship with the landlord (owner).

D. Broker Obligations to Other Brokers. Brokers owe the following professional obligations to other brokers; however, brokers are not required to provide to one another a list of these broker obligations.

- (1) Honesty, reasonable care, and ethical and professional conduct;
- (2) Timely presentation of offers or counter-offers and responses thereto, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services;
- (3) Active participation in assisting the party to whom the broker is directly providing real estate services in complying with the terms and conditions of the contract and with the closing of the transaction, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services;
- (4) Compliance with local, state, and federal fair housing and anti-discrimination laws, the New Mexico real estate license law and the Real Estate Commission rules; the New Mexico Uniform Owner-Resident Relations Act, and other applicable local, state, and federal laws and regulations;
- (5) Written disclosure of any adverse material facts actually known by the broker about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction; adverse material facts requiring disclosure do not include any information covered by federal fair housing laws or the New Mexico Human Rights Act;

- (6) Written disclosure of any potential conflict of interest that the broker has in the transaction, including but not limited to, any material interest the broker has in the transaction or any relationship of a business, personal, or family nature that the broker has with a party to the transaction;
- (7) Non-interference with a purchase agreement or any express written agreement that another broker has with a buyer, seller, landlord (owner) or tenant.

Brokerage relationships

Brokerages working with consumers either as customers or clients may do so through a variety of brokerage relationships. These relationships include but are not limited to a transaction broker relationship, an exclusive agency relationship or a dual agency relationship. For all regulated real estate transactions, a customer or client may enter into an express written agreement to become a client of a brokerage without creating an agency relationship, and no agency duties will be imposed.

■ TRANSACTION BROKER RELATIONSHIP

The Licensing Act and Commission rules and regulations create a non-fiduciary relationship called **transaction broker** between sellers and buyers as the default relationship. In this capacity, the licensee does not represent either the seller or the buyer as an agent. In this type of relationship, the broker may enter into an express written agreement with the party, thus making the party the broker's client, but with no agency duties imposed. All parties must sign the written agreement. Brokers may enter into listings agreements with owners or buyers in a transaction broker capacity. The broker is not acting as the agent of the person, but simply as a broker.

■ EXCLUSIVE AGENCY RELATIONSHIPS

Exclusive agency relationships in New Mexico can only be created by an express written agreement between a person and a brokerage wherein the brokerage agrees to exclusively represent as an agent the interests of the person in a real estate transaction. Such agreements include buyer agency, seller agency, designated agency, and sub-agency.

Other Forms of Exclusive (Single) Agency

Designated agency is a form of exclusive agency and allows for a qualifying broker to designate an associate as agent for the seller and another associate as an agent of the buyer in a single in-house transaction. Designated agency must be in writing and be made a part of the listing and buyer employment agreements. In designated agency, the broker is expected to remain an impartial party between the seller and the buyer.

A **subagent** is the person delegated by the agent of a principal to also act on behalf of that same principal. The person so appointed becomes an agent of the principal's agent and a subagent of the principal. Licensees associated with a qualifying broker are agents of the broker (the broker is the principal).

■ DUAL AGENCY RELATIONSHIP

Dual agency is the act, on the part of the licensee, of representing both buyer and seller in a real estate transaction in an agency capacity. The Real Estate License Law permits dual agency only upon written disclosure to all parties to the transaction. All parties must sign a dual agency agreement in addition to the listing and buyer employment agreements. (*See* RANM Form 1301.)

Although the license law permits dual agency by obtaining written consent and signatures of all parties to the transaction, licensees must be aware of the responsibility they incur when representing both parties to the transaction.

■ FIDUCIARY (AGENCY) RELATIONSHIPS

A fiduciary relationship is a relationship that implies a position of trust or confidence. The term *fiduciary* describes the faithful relationship owed by an agent to a principal.

The fiduciary relationship imposes certain duties, obligations, and high standards of good faith and loyalty on the agent, as fiduciary of the principal.

The fiduciary duties automatically arise with the creation of any type of agency. They are based on the concept that an agent must hold the interest of the principal above all other interests in a transaction, including the interests of the agent.

Among the duties a fiduciary owes the principal are the following:

- Obedience
- Loyalty
- Disclosure
- Confidentiality
- Account for all monies and property
- Reasonable skill, care, and diligence

Note that the duty of confidentiality continues beyond termination of agency.

An agent is generally subject to the following two distinct areas of liability for the breach of fiduciary duties:

- The principal can sue in a civil court
- The principal can file a complaint with the Real Estate Commission.

Client/Principal

Client/principal refers to the consumer who employs an agent to act on the consumer's behalf in the sale or purchase of property. The client is normally the agent's principal, and the agent works for the principal. The principal is the only person to whom the agent owes fiduciary duties. According to Commission rules and regulations, the word *client* is used when a broker has entered into a written agreement with a party.

Third Party

Customers are third parties with whom the broker has no agency agreement or relationship. The licensee does not owe fiduciary duties to third parties. However, the licensee is expected to treat the customers with honesty, disclosure and fair dealing.

Respondeat Superior

Respondeat superior is an agency law concept meaning “let the master answer.” This legal maxim means that the employer is liable in certain cases for the wrongful acts of the employee, and a principal for those of the agent. In the real estate business, this means that clients may be liable for the wrongful acts of their broker. In a recent New Mexico Court of Appeals case, the court made clear that an associate broker is an agent of the qualifying broker for tort purposes (*Robertson v. Carmel Builders* Opinion # 2004-NMCA-056).

■ LISTING AGREEMENTS

A **listing agreement** is the contract between the brokerage and the seller of real property authorizing the brokerage to market the property. It will include a term of the agreement and an agreement for the seller to pay the brokerage a fee or a commission.

Scope of Authority

Those acts that a seller authorizes a broker to perform while acting on behalf of the seller during the term of the listing agreement are known as the **scope of authority**. New Mexico property law requires a written agreement before working on behalf of the seller to collect a commission.

In a typical listing agreement, the broker is usually authorized to perform the following tasks:

- Find a willing and able buyer.
- Place a sign on the property.
- Place the listing in a multiple listing service (MLS).
- Advertise and show the property.
- Accept earnest money deposits on behalf of the owner.
- Receive offers from purchasers on behalf of the owner.

The listing agreement should address the following:

- Cooperation with, and compensation to, other brokers, such as
 - subagents,
 - buyers agents,
 - dual agents,
 - designated dual agents, and
 - transaction brokers
- All acts the seller authorizes the broker to perform.

Normally, the licensee is not authorized to initial changes on offers, to sign contracts, to make contractual decisions for the owner, or to accept or reject offers on behalf of the owner.

Licensees should read their preprinted listing agreements to determine exactly what is expressed in the scope of authority.

Licensees performing acts outside their scope of authority could be

- held in violation of the licensing laws,
- found in breach of their fiduciary duties, and
- held liable for damages.

■ ESTABLISHING BROKERAGE RELATIONSHIPS WITH SELLERS

Written employment with sellers can be created by the use of the RANM standard listing forms. Each form creates a brokerage relationship; the default relationship is that of transaction broker. To create an agency relationship, an agency addendum is added to the contract. The agreement also addresses the compensation to be received by the broker. Compensation is negotiable, not only in the amount of compensation but also under what circumstances compensation is to be paid. The most common types of compensation agreements are as follows:

- Exclusive right to sell
- Exclusive agency
- Open/nonexclusive listing
- Net listing

Exclusive Right to Sell

This is a written listing agreement wherein the owner appoints the broker as the **exclusive representative** for the sale of the property for a specified period. This type of listing gives the broker the authority to cooperate with other brokers (associates and co-brokers) and share compensation with the other brokers. The broker is entitled to the agreed commission regardless of who sells the property. This is the most common agreement made with sellers and is the only type of listing form available from RANM.

Exclusive Agency (Brokerage)

This is a written listing agreement wherein the owner appoints a brokerage as the exclusive agency for the sale of the property for a specified period but retains the right to sell the property independently without owing a commission to the broker. A commission is due to the broker if the property is sold by anyone other than the owner.

This type of listing may be used for a one-time showing for a specified prospective buyer, without preventing the owner from continuing to try to sell the property to persons other than the specified prospect.

Open Listing

This is a written listing agreement wherein the owner appoints the broker as the representative, but not exclusively. Usually, the broker is not authorized to cooperate with other licensees. The owner reserves the right to have open listings with other licensees or to sell the property independently without the payment of a commission. Either party can terminate this type of listing at will. In the event of a sale, the owner is not obligated to notify all brokers holding open listings for the sale.

In an open listing, the first broker securing a buyer acceptable to the owner is the only licensee due a commission.

Net Listing

This is a written employment contract (either exclusive right to sell, exclusive agency, or open) wherein the broker receives, as commission, all excess monies over and above the minimum net sales price the owner has specified in the listing.

■ ESTABLISHING BROKERAGE RELATIONSHIPS WITH BUYERS

Written employment with buyers can be created by the use of the RANM standard forms. Each form creates a brokerage relationship; the default relationship is that of transaction broker. To create an agency relationship, an agency addendum is added to the contract. The agreement also addresses the compensation to be received by the broker. Compensation is negotiable, not only in the amount of compensation but also under what circumstances compensation is to be paid. In many buyer broker agreements, the broker will look to the seller for compensation.

Some of the most common agreements for compensation are as follows:

- Exclusive buyer broker employment agreement
- Exclusive agency buyer employment agreement
- Open/nonexclusive buyer employment agreement

Exclusive Right to Buy Buyer Broker or Buyer Agency Agreement

This is an agreement that binds the buyer to pay the licensee's fee if the buyer purchases property during the term of the agreement.

Exclusive Agency Buyer Broker Agreement

This is an agreement that binds the buyer to pay a fee to the broker if the buyer purchases property through that broker or another broker during the term of the agreement. However, in this type of agreement, the buyer may purchase independently, not using a broker, and without any obligation to pay the fee.

Open Buyer Agreement

Under the terms of this type of agreement, the licensee will be paid a fee only if the licensee is the **procuring cause**. The buyer may buy independently or through another broker without obligation to pay the broker holding the open buyer employment agreement.

Quiz 2

1. When acting as a property manager for a principal, the brokerage relationship is which of the following
 - a. transaction broker
 - b. exclusive agency
 - c. the relationship is chosen by the parties
 - d. sub agency
2. Every licensee must meet disclosure requirements to any consumer. Disclosure *MUST* include which of the following
 - a. disclosure of any conflict of interest
 - b. description of the licensee's broker duties
 - c. notice of an in-house transaction
 - d. all of these
3. Which duties below are owed to an agent's client but *NOT* owed to a transaction broker's client or customer
 - a. honesty and reasonable care and ethical and professional conduct
 - b. prompt accounting for all monies
 - c. loyalty and obedience
 - d. performance of any oral or written agreements
4. Which of the following would a New Mexico listing broker *NOT* be required to disclose to a potential buyer
 - a. seller is a licensed New Mexico real estate broker
 - b. list of broker duties
 - c. listing broker is related to seller
 - d. a seller's motivation for selling the property
5. Broker duties *MUST* be disclosed
 - a. in writing to a prospective customer or client
 - b. within 48 hours of acceptance of contract
 - c. only if entering into an agency relationship
 - d. only if the purchase offer is accepted
6. A buyer's agent *MUST* disclose to a seller facts concerning a buyer's
 - a. willingness to pay more than the purchase price
 - b. reasons for purchasing the property
 - c. financial inability to perform the terms of the contract
 - d. willingness to accept methods of financing other than those offered
7. Any transaction broker owes the buyer a duty to
 - a. disclose conditions that adversely affect the property
 - b. investigate conditions that may impact a property
 - c. independently verify the accuracy of statements made by the seller
 - d. disclose any information they learn about the seller
8. If asked to estimate the dollar amount a buyer can deduct on his income taxes, a transaction broker should
 - a. calculate the interest deduction for the buyer
 - b. call the listing broker and ask for a disclosure of the tax deduction
 - c. suggest that the buyer seek advice from a tax expert
 - d. call the County Assessor to determine what the taxes on the property are

9. Prior to presenting any document that has the potential to become an express written agreement, a broker *MUST* disclose in writing all of the following *EXCEPT*
 - a. any written brokerage relationship the broker has with any other parties to the transaction
 - b. any material interest or relationship of a business, personal, or family nature that broker has in the transaction
 - c. other brokerage relationship options available in New Mexico
 - d. broker's license number and county where it was issued
10. What term is used when the principal is held liable for the wrongful acts of the agent
 - a. respondeat superior
 - b. agency law
 - c. broker duties
 - d. liability
11. Broker Howard has a three-month listing on a property. A buyer walks into his office and asks Howard if he will represent him in the purchase of the property. Howard
 - a. may not represent both the buyer and the seller
 - b. must report all details of the transaction to the Real Estate Commission
 - c. may represent both parties, if both give their consent
 - d. may not represent both parties, even if both give their consent
12. The maximum time an exclusive listing contract is valid is
 - a. any period up to a statutory limit of two years
 - b. whatever reasonable specific time agreed to by the seller and the broker
 - c. 90 days
 - d. 120 days
13. A broker writes an offer without having a brokerage service agreement. What brokerage relationship has been created between the broker and the buyer?
 - a. agency
 - b. fiduciary
 - c. transaction broker
 - d. dual agency
14. The duty of honesty and reasonable care means
 - a. following all lawful instructions of the principal
 - b. actively applying a broker's skill and expertise in a professional manner for the benefit of the broker's principal
 - c. safeguarding all information that would weaken principal's position
 - d. safeguarding all money and documents entrusted to the broker by the principal
15. You are a buyer's agent for Susan Brown. Susan wishes to purchase a house where she can operate a beauty salon in her home. When showing Susan property you should
 - a. check the current zoning on all properties you wish to show her
 - b. advise her that businesses open to the public cannot be operated from a private home
 - c. recommend that she verify the zoning classification of any property before making an offer
 - d. notify the local chamber of commerce that a new business will be opening in the community

Unit 3: Property Management

■ PRE-READING ASSIGNMENT

New Mexico Uniform Owner/Resident Relations Act, NMSA 1978 47-8-1 through 47-8-52 and Parts 23 and 24 of Real Estate Commission Rules.

■ LEARNING OBJECTIVES *When you have completed this unit, you will be able to*

- explain leasehold estates,
- differentiate between landlord and tenant responsibilities and between the various types of trust accounts,
- review the Uniform Owner/Resident Relations Act,
- **list** repositories defined as acceptable financial institutions, and
- define the following *key terms*:

abate
actual eviction
acceptable financial institution
constructive eviction
estate at sufferance
estate at will
estate for years
estate from period to period
escalator clause
graduated lease
gross lease
ground lease
holdover tenant
index lease
landlord
lease
leasehold
net lease
notice to quit
percentage lease
property management
property management trust account
property manager
quiet enjoyment
resident

sale-leaseback
step-up lease
substantial violation
tenant
unlawful detainer
waste

■ LESS-THAN-FREEHOLD ESTATES

Unlike freehold estates, less-than-freehold estates are estates of possession only, not estates of ownership. They are generally called **leaseholds**.

Leaseholds are personal property interests in real estate called chattels real.

There are four types of leasehold estates:

- **Estates for years** are leasehold interests that have a definite termination date, regardless of the length of the period of the leasehold. A lease for three weeks ending on September 19 of this year would be an estate for years.
- **Estates from period to period** (also called periodic tenancies) are distinguished from estates for years in that they have no definite termination date, but will automatically renew for successive periods until one party gives notice of termination.
- **Estates at will** give the tenant the right to possession with the consent of the landlord, but the term of the estate is more indefinite than periodic tenancies.
- **Estates at sufferance** arise when a tenant comes into possession of the real property lawfully, and then, after the lease has expired, remains in possession without the consent of the landlord. Because a tenant at sufferance has not entered the property illegally, technically the tenant is not a trespasser. However, under the law, such a tenant is treated the same as a trespasser. Such a tenant is called a **holdover tenant**. A holdover tenant may be bound for a new lease for the lesser of (a) a like period as the original lease, or (b) one year.

■ LANDLORD/TENANT RELATIONSHIP

A **lease** is an agreement in which a **landlord** (lessor) gives a **tenant** (lessee) the right to use and to have exclusive possession of real estate for a specified period in consideration of the payment of rent.

A lease operates both as a conveyance of property interests (leasehold) and as a contract between the landlord and the tenant. Therefore, rights and liabilities between the parties are defined by both property law, which applies to conveyances, and contract law principles.

When a lessor conveys property by a lease, it is done by demise. The leasehold estate conveyed is ordinarily considered personalty, though it involves real estate.

The right of exclusive possession (**quiet enjoyment**) is such that if the landlord should enter upon the premises without permission after the lease has begun, a suit for trespass can be successfully brought by the tenant. Leases ordinarily provide for the landlord to enter upon the premises in case of an emergency, and during reasonable hours near the expiration of the term to show prospective new tenants the premises.

A tenant is responsible for injuries to third persons who are injured on the property within the exclusive control of the tenant. The landlord is responsible for injuries occurring in the common areas and other areas under the landlord's control.

Waste

Waste is anything that the tenant does or does not do that injures or changes the essential character of the landlord's reversion (the property that reverts to the owner after the lease).

If the tenant abuses the realty—cuts down trees or demolishes improvements—this is voluntary

waste. If the tenant fails to properly maintain and repair the premises, allowing the improvements to deteriorate beyond normal wear and tear, this is permissive waste. A tenant may be liable for damages to the landlord for either voluntary or permissive waste.

■ TYPES OF LEASES

With a **gross lease**, the lessor (landlord) pays most costs incidental to the leasehold, such as property taxes, insurance, maintenance costs, and many operating costs. Gross leases are frequently used for residential property.

Net leases are frequently used for business properties. A net lease imposes on the tenant/lessee an obligation to pay some or all the expenses, usually not including mortgage amortization. The terms net, double net, and triple net lease are often used in real estate markets. More nets mean the lessee is assuming more of the expenses (i.e., insurance on the property and property taxes), in which case the property owner may generate the highest rate of return.

Percentage leases are commonly used in shopping centers. In a percentage lease, the lessor receives a percentage of the gross sales as rental for the property. The percentage lease also may include a fixed guaranteed minimum. The percentage received by the landlord is always a percentage of gross sales—not net income. The percentage can vary tremendously according to the type of tenant.

A **graduated lease** includes an **escalator clause** that provides for rent increases to accommodate rising costs, such as inflation. An **index lease** provides for rent increases or decreases based on the consumer price index (CPI), wholesale price index (WPI), or other index. A **step-up lease** has definite increases specified at future dates.

■ **FOR EXAMPLE** A commercial lease calls for rent increases based upon an index. The index was initially 3.24. For the next lease period, the index will be 3.64. The annual rent was \$40,000 in the first period, how much will the annual rent increase for the next lease period?

- a. 40%
- b. \$0.40
- c. 12.3%
- d. \$16,000

See Figure 3.1 for the solution.

figure 3.1

Example Solution

$$\frac{A}{\text{Per} \times B} = \frac{A}{\text{Per} \times B} \frac{3.64}{3.24} = 1.123 \text{ (per)} = \frac{112.3\%}{12.3\%}$$

A **sale-leaseback** describes a situation in which an owner of property sells the property to an investor and then leases the property back. The primary purpose of a sale-leaseback is to enable the person or the organization that sells the property and leases it back to avoid tying up large amounts of capital in real estate investments.

A **ground lease** is ordinarily a long-term lease for a parcel of unimproved land. The tenant pays what is known as a ground rental and pays all taxes and other charges associated with ownership.

Termination of Leases

Transfer of fee title (ownership) normally will not terminate a lease.

Death of either the lessor or the lessee normally will not terminate a lease.

A tenant's lease is terminated upon eviction by the landlord, either actual or constructive. **Constructive eviction** occurs when the landlord creates a situation that makes it impossible for the tenant to enjoy peaceful possession according to the terms of the lease.

To terminate either an estate from period to period (periodic tenancy) or an estate at will, a **notice to quit** must be served within a specified time before the end of the tenancy by the party wishing to terminate.

No termination notice is required to end an estate for years (a leasehold interest that has a built-in definite termination date).

When a tenant unjustifiably retains possession of property other than residential real estate it is called **unlawful detainer**.

■ NEW MEXICO UNIFORM OWNER/RESIDENT RELATIONS ACT

The purpose of the Uniform Owner/Resident Relations Act (47-8-1 to 47-8-51 NMSA, 1978) is to simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of owners and residents.

The act primarily deals with the terms and conditions that may be included in the required written rental agreements. It also contains the rights and obligations of both owners and residents. **Residents** are people entitled under a rental agreement to occupy a dwelling unit in peaceful possession to the exclusion of others.

Exemptions to the act include

- a person who resides in an institution that provides medical, religious, or educational services;
- the purchaser of property under a contract of sale;
- fraternal or social organization members who reside in an organization operated building;
- transient occupancy in a hotel or motel;
- occupancy by an employee of the owner as a condition of employment; and
- structures used by the occupant primarily for agricultural purposes.

Service of Notice

Service of notice is important in rental agreements. A person has notice of a fact if that person

- has actual knowledge,
- has received notice or notification, or
- based on all facts and circumstances known at the time, has reason to know that something exists.

A person notifies or gives notice by taking steps reasonably calculated to inform the other person. A person receives a notice or notification when it

- comes to that person's attention,
- is delivered to the owner's place of business, or
- is delivered to the resident's unit.

Payment of Rent

The resident must pay rent according to the rental agreement. If there is no agreement, the resident must pay the fair rental value. This amount is what is generally charged for comparable units.

Rent is payable without demand or notice and, unless otherwise agreed, is always payable at the dwelling unit.

Periodic rent is payable at the beginning of any term of one month or less. Monthly installments are due at the beginning of each monthly period. A one-month term is from one date of a month to the same date the next month.

Residency is month to month unless another time is agreed upon, such as week to week.

Rent does not include damage deposits, and damage deposits are not considered rents.

An owner is permitted to demand a reasonable deposit to recover damages caused by the resident.

The owner is not required to pay interest on the deposit if the deposit does not exceed one month's rent. If the term is less than one year, the deposit must not exceed one month's rent.

If the owner receives a deposit greater than one month's rent, the owner must annually pay interest equal to passbook interest rate.

If the last month's rent is prepaid, it is not considered a deposit, and a deposit is not prepaid rent.

Upon termination, the owner may apply the deposit to unpaid rent or for damages. The deposit or prepaid rent balance must be mailed to the resident within **30 days**, together with a written and itemized accounting. If the owner fails to provide the refund and accounting, the resident may recover the entire deposit, reasonable attorney fees, and court costs. An owner or manager who fails to meet this 30-day requirement gives up the right to any further action for recovery. Part 24 of the Commission rule book indicates that upon termination of a management agreement, a broker must provide a **final accounting** to the owner within **60 days**.

Obligations of the Owner

The owner is required or allowed to do the following under the act:

- The owner must notify in writing to the resident, the name and address of the person authorized to manage the premises. Also, the name and address for service of process (subpoena) must be provided.

The owner must substantially comply with minimum housing codes that affect health or safety. The owner must provide electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities in good and safe working order and Parts 23 and 24 of New Mexico Real Estate License Law, Real Estate Commission Rules, and Time Share Act, 2012 Edition, reprinted from Annotated Statutes of New Mexico and 2012 Supplement.

- Provide receptacles for the removal of ashes, garbage, rubbish, and other waste; and supply running water and reasonable amounts of hot water and heat.
- The owner may adopt rules and regulations concerning the resident's use and occupancy of the premises. The resident must receive a copy of existing rules when entering into the rental agreement.
- The owner may enter the dwelling unit in order to inspect the premises, make necessary or agreed repairs, or exhibit the dwelling unit to prospective residents or maintenance workers, provided that the owner has given advance written notice of 24 hours of the intent to enter.
- If the owner or tenant fails to comply with this act or the rental agreement in such a manner as to materially affect health or safety, or violate the above rules, the affected party may terminate the agreement after seven days' written notice to the other party if a reasonable attempt to remedy has not been initiated.

Obligations of the Tenant

The resident is required or allowed to do the following under the act:

- Comply with minimum housing codes.
- Dispose of waste in a safe manner.
- Keep plumbing fixtures clean and use facilities in a reasonable manner.
- Not destroy, damage, or remove any part of the premises or permit others to do so.
- Not disturb the neighbors.
- Abide by the rental agreement and resident rules and regulations.

Notice of Termination

The owner or the resident may terminate a week-to-week residency with written notice to the other by providing at least seven days before the termination date. A month-to-month residency may be terminated by written notice provided at least 30 days before the termination date.

If the rent is unpaid when due, and the resident fails to pay rent within three days after the owner's written notice of nonpayment and intention to terminate the rental agreement, the owner may terminate the rental agreement and the resident must immediately deliver possession of the dwelling unit.

For a breach of the rental agreement by the owner or tenant aside from nonpayment, the affected party may give a seven-day notice to cure the breach or terminate the tenancy.

The act defines a **substantial violation** as criminal activity, assaults, property damage, or drug use. An owner may give a non-recourse three-day notice to terminate the tenancy if a substantial violation has occurred.

If the landlord fails to maintain the property or to repair a condition that affects the habitability of the premises, the tenant may be entitled to **abate** (not pay) a portion of the rent for the period the property is not fully usable.

Trust Accounts, Property Management and the New Mexico Real Estate Commission Rules Part 23 – Trust Accounts

When handling any money or managing any property or unit belonging to others, New Mexico brokers are required to place funds of others into a properly established trust account. What follows are excerpts from Part 23.

16.61.23. 9. Types of trust accounts

A qualifying broker shall have only the following types of accounts and they shall be used only for the purposes stated.

A. Brokerage trust account. This account shall be used for money belonging to others related to a real estate sales transaction. Property management funds may not be placed in this trust account. In lieu of a brokerage trust account, a broker may deposit funds with a title company authorized to do business in the state of New Mexico. If a title company is used in lieu of a brokerage trust account, then receipt and deposit records shall be kept as outlined in this section.

B. Property management trust account. This account shall be used for money belonging to others received by a qualifying broker related to managing properties for others. All management commissions and fees may be deposited, withdrawn and tracked through the property management trust account as long as those commissions and fees are specified in the management agreement.

C. Special trust account. In the event the principals agree in writing that an interest bearing special trust account is to be established, it shall be done as follows: A written trust agreement shall be prepared stating as a minimum the following:

- (1) the qualifying broker shall be named as sole trustee;
- (2) name of the acceptable financial institution wherein the funds are to be deposited;
- (3) the amount of interest to be paid on the funds and to whom the interest shall accrue;
- (4) the final disposition of principal and interest upon closing, termination or default by either party to the transaction; and
- (5) the signatures of all parties to the transaction and the qualifying broker as trustee.

D. Custodial account. Funds designated to be deposited in a custodial account shall first be placed in a brokerage trust account or a property management trust account of the qualifying broker and then may be transferred to the custodial account of the owner. Custodial accounts shall not contain any funds other than those belonging to the owner of the custodial account. Custodial accounts may be interest bearing; however, the interest shall be paid only to the owner or his designee. The qualifying broker shall have on file a written agreement signed by all principals as to the establishment and operational details of each custodial account.

16.61.23.11. Deposits, Disbursements and Commingling

A. Deposits. All trust account deposits shall conform to the following requirements:

- (1) **Timeliness.** All funds of others pertaining to a real estate transaction shall be deposited into the proper trust account per written agreement of the parties to the transaction.
- (2) **Receipt records.** A detailed record of all funds received shall be maintained by the qualifying broker and shall clearly indicate the following:
 - (a) date received;
 - (b) date deposited;
 - (c) from whom received;

(d) amount of deposit;

(e) property address or legal description including unit number (if unit number is applicable); and

(f) category or purpose of receipt (e.g., earnest money, rent, security deposit, funds from owner, etc.).

(3) Wrongful deposits. The following actions involving any trust account shall be improper and shall constitute commingling:

(a) depositing a broker's own funds into a trust account without disclosure to the owner of a managed property;

(b) depositing funds in a trust account that are not directly related to a real estate transaction or a managed property; and

(c) depositing funds of others in an account that is not a properly designated trust account.

B. Disbursements. All trust account disbursements shall conform to the following requirements:

(1) Timeliness. All funds of others pertaining to a real estate transaction shall be disbursed as soon as reasonably possible after the conclusion of a transaction.

(2) Disbursement records. A detailed record of all funds disbursed shall be maintained by the qualifying broker and shall clearly indicate the following:

(a) check number or unique transaction identification number;

(b) date of disbursement;

(c) payee;

(d) category or purpose of disbursement;

(e) amount of disbursement;

(f) property address or legal description including unit number (if unit number is applicable).

(3) Fees due broker. Fees as determined by written agreement may be disbursed as soon as the basis for calculation can be determined and funds are available.

(4) Wrongful disbursements. The following actions involving any trust account shall be improper and shall constitute commingling:

(a) disbursing trust funds for personal use of the qualifying broker or the broker's designee;

(b) disbursing commission or commission splits from any trust account to any entity other than the qualifying broker.

(c) disbursing New Mexico gross receipts tax or other non-property related business expenses directly from a trust account;

(d) disbursing funds before the completion of the related transaction, except upon court order; this provision does not prevent a broker from transferring funds from one properly designated trust account to another properly designated trust account within the same brokerage;

(e) disbursing funds in excess of the trust account balance or in excess of a specific property or client ledger balance; and

(f) trust account overages can only be disbursed in accordance with the Unclaimed Property Act with written notification to the commission.

C. Commingling. Commingling of trust account funds is not permitted. Commingling shall include, but is not limited to, the following actions:

(1) wrongful deposits as described in this section;

(2) wrongful disbursements as described in this section;

(3) allowing a property or client ledger within a trust account to be in deficit;

(4) placing funds derived from the management of the qualifying broker's personally owned properties, or properties owned by any legally recognized entity in which the qualifying broker as a ten percent (10%) or more interest in a trust account containing funds of others;

(5) failing to withdraw from the trust account within a reasonable time, funds to which the qualifying broker is entitled;

(6) allowing money designated to one property or transaction to be used for the benefit of another property or transaction.

D. Exceptions to commingling. The following are exceptions.

(1) Non-trust funds may be placed in a trust account in an amount not to exceed the required minimum balance requirements of a financial institution necessary to maintain the account and avoid charges.

(2) Non-trust funds may be placed in a trust account in order to pay fees for credit card transactions and bank fees.

(3) Depositing broker's own funds in a trust account with full disclosure to the owner of a managed property and with specific, prior written approval of the commission followed immediately by written documentation to the owner and to the commission of the deposit transaction.

(4) If a written sharing agreement specifies, funds of one property may be used for the benefit of another property owned by the same person or entity.

(5) Funds received from an owner for the benefit of all their managed properties may be credited to an owner's ledger.

16.61.23.8. Reconciliation

A. Trust account reconciliation must be performed monthly and verified by the qualifying broker.

16.61.23.10 Record accessibility, retention and inspection

Every qualifying broker shall keep bank and office records of all funds related to all trust accounts, as set forth below.

- A. Records shall be maintained at or accessible from the brokerage office as registered with the commission.
- B. All trust account records shall be retained for **six (6) years** after the completion of a transaction.
- C. All property management trust account records shall be retained for the full term of any agreement and for **six years** from the termination of the management agreement.
- D. All financial documents shall be subject to inspection by the commission or its duly authorized representative at the designated location of such records or at the offices of the commission. The records shall include, at a minimum, clear indication of all funds received and disbursed on behalf of others in all real estate transactions wherein the qualifying broker is involved.
- E. The qualifying broker is responsible for the maintenance and safekeeping of all trust accounts records.

Property Management

Property management for others is defined by New Mexico Administrative Code 16.61.1.7 DEFINITIONS as follows:

Property management—real estate services, as specified by a management agreement which include, but are not limited to, the marketing, showing, renting and leasing of real property; the collection and disbursement of funds on behalf of owners; the supervision of employees and vendors; the coordination of maintenance and repairs; the management of tenant relations; or the preparation of leases or rental agreements, financial reports and other documents. In the course of listing and marketing properties for sale, inspections of the property, repairs and maintenance incident to the sale and authorized by the owner shall not be considered property management.

Property management trust account—an account at an acceptable financial institution established by the qualifying broker for the purpose of holding money belonging to others received during the management of real property for others.

Property manager—a broker who, for a fee, salary, commission or other valuable consideration, is engaged in managing property for others. A residential property manager is, by virtue of a written agency agreement, an agent of the owner(s) of the property for the purpose of performing the obligations of the owner(s) under the Uniform Owner-Resident Relations Act and/or under the rental or lease agreement.

Acceptable financial institution—a federally insured bank, savings and loan, or title company authorized to do business in the state of New Mexico.

When managing property for others, a New Mexico broker is in an exclusive agency relationship with the property owner and is acting as a general agent and must comply with Part 24 of the Commission rules:

Real Estate Commission Rules Part 24: Property Management

16.61.24.11. Property Management Trust Account

A. This account shall only contain funds derived from the management of property for others and shall be clearly identified as a property management trust account.

B. All funds received by the qualifying broker shall be deposited into the property management trust account prior to any disbursements. Once deposited, the qualifying broker may then disburse funds as specified in the management agreement.

C. Deposits from tenants shall be placed in a property management trust account. Deposits may be held in a property management trust account or may be disbursed to the owner as specified in the property management agreement and agreed to by the tenant.

D. Commingling of funds is not permitted. No funds may be deposited in a property management trust account that are not received in connection with a managed property except as provided for in 16.61.23 NMAC (Exceptions to commingling).

E. Property ledgers. When the property management trust account contains funds from the rental or lease of more than one property, separate accounting records shall be maintained on each property.

16.61.24.12. Reports and documents to Owners

A. Owner statements. The qualifying broker shall provide the owner with a report of receipts and disbursements monthly or as required by the management agreement, showing the following:

- (1) previous balance;
- (2) funds deposited by category, i.e., rent, deposits, late payment fee, etc.;
- (3) funds disbursed by category, i.e., mortgage payments, utilities, maintenance, management fees, etc.
- (4) ending balance

B. additional reports may be provided as set forth in the property management.

C. Documents. Fully executed copies of the management agreement shall be provided to the owner after obtaining all signatures. Except as otherwise provided herein, signed leases or other documents related to the management agreement shall be provided to the owner upon request, except for documents that the property manager is prohibited by law or contract from disclosing, including but not limited to criminal background checks and credit reports.

D. Final statement after termination. Final accounting of trust account funds shall be provided to the owner within **60 days** of the effective date of termination of a management agreement.

16.61.24.13. Management Agreements

A. There shall be a signed written management agreement between the brokerage and the owner for each property managed. The agreement shall be executed prior to acting on behalf of the owner and shall specify that the brokerage relationship

B. The agreement shall define the duties and responsibilities of the brokerage and the owner including, but not limited to, the following:

- (1) duties to be provided by the brokerage;
- (2) disclosure of all fees to be charged to owner;
- (3) disclosure of all fees to be charged to tenant that are retained by the brokerage; and
- (4) a question asking the owner to disclose the status of any foreclosure or other financial situation that could affect the tenant's occupancy.

C. If the property manager is prohibited by law or contract from providing the owner with a given document, such as a tenant's criminal background check or credit report, the property management agreement shall include the following;

- (1) a written disclosure to the owner that the property manager is prohibited by law or contract from providing such documents to the owner, or
- (2) the owner's written consent that such documents will not be provided.

16.61.24.14. Tenancy Agreements

There shall be a signed written tenancy agreement for each property or rental unit. Tenancy agreements shall include, but are not limited to, the following:

- A. name of tenant;
- B. property address or legal description including unit number (if unit number is applicable);
- C. rent amount;
- D. security deposit and other deposit amounts;
- E. when and where rent is to be paid;
- F. date possession began.
- G. date possession ends
- H. all fees charged tenant; and
- I. how payment are to be applied to outstanding charges.

16.61.24.15. Record Accessibility, Retention, and Inspection

The property management brokerage shall maintain office records of all properties managed for others.

- (1) Accessibility. Records shall be maintained at or accessible from the brokerage office at the location as registered with the commission.

(2) Retention. All property management records shall be retained for the full term of any agreement and for six years and for six years from the termination of the management agreement.

(3) Inspection. All records are subject to inspection by the commission or its duly appointed representative at or accessible from the brokerage office or at the offices of the commission.

(4) The qualifying broker is responsible for the maintenance and safe-keeping of all property management records.

16.61.24.16. Short Term Rentals

In addition to the provisions set forth above, the following special provisions apply only with respect to the management of short term and vacation rentals.

A. Management agreement to authorize collection of New Mexico gross receipts tax and lodger's tax from tenant. Broker to report and pay gross receipts tax and lodger's tax due on all receipts derived from reservations in accordance with New Mexico law.

B. Tenancy agreement shall also include the following:

- (1) arrival and departure dates;
- (2) check-in and check-out times;
- (3) nightly rental rate;
- (4) rental deposit;
- (5) security deposit;
- (6) disclosure of all fees charged to tenant (e.g. cleaning, hot tub, phone, cable internet, resort, etc.);
- (7) accommodation rules (e.g. occupancy, parking, smoking, pets, noise, etc.); and
- (8) cancellation policy.

C. Reports to owners. In the monthly statement to the owner, the qualifying broker shall also list rental income, credit card fees, maintenance charges and amount paid in commission to the brokerage office.

D. Tenant security deposits. Funds collected as a tenant security deposit shall be deposited into the property management trust account.

E. Tenant rental deposits. Funds collected as a tenant rental deposit shall be deposited into the property management trust account to secure a reservation.

F. Employees of the brokerage handling short term or vacation rentals or third parties who engage only in taking reservations for short term or vacation rentals shall not be required to be licensed.

Quiz 3

1. A licensee's commingling of funds may include
 - a. mixing clients' money with personal accounts
 - b. misappropriating and using clients' money
 - c. failing to deposit clients' money in a trust account
 - d. all of these
2. The owner of a property has terminated his property management agreement. How long after the termination of the agreement does the property manager have to reconcile all monies and give a final accounting to the owners
 - a. 15 days
 - b. 30 days
 - c. 45 days
 - d. 60 days
3. A qualifying broker managing property *MUST* document all of the following regarding a deposit to the trust account *EXCEPT*
 - a. amount of the deposit
 - b. related property to the transaction
 - c. dates of receipt and deposit amount of funds
 - d. broker's federal tax identification number
4. A tenant pays rent. The broker *MUST* record all of the following about the deposit *EXCEPT*
 - a. date received
 - b. name of the owner
 - c. date deposited
 - d. name of the tenant
5. A tenancy agreement must contain all of the following *EXCEPT* the
 - a. rental address
 - b. name of property owner
 - c. date possession begins
 - d. how payment are to be applied
6. A property manager collecting rents for six individual rental units is *REQUIRED* to have a *MINIMUM* of
 - a. one property management trust account
 - b. one special trust account
 - c. one custodial account
 - d. six individual property management trust accounts
7. To terminate tenancy for nonpayment of rent, a property manager must give a *MINIMUM* of how many days' written notice
 - a. 3 days
 - b. 10 days
 - c. 30 days
 - d. 90 days

8. The trustee of a trust account can *ONLY* be
- a. the brokerage bookkeeper
 - b. the buyer's agent
 - c. a certified public accountant
 - d. the qualifying broker
9. Which of the following types of funds belonging to others are *NOT* required to be maintained in a separate trust account by the qualifying broker
- a. rental security deposits
 - b. short-term advance rental deposits
 - c. gross receipts taxes
 - d. earnest money deposits
10. What is the maximum time a broker may legally hold onto a security deposit
- a. 20 days
 - b. 30 days
 - c. 45 days
 - d. 60 days

Unit 4: Disclosure Requirements of the New Mexico Broker

■ PRE-READING ASSIGNMENT

None

■ LEARNING OBJECTIVES *When you have completed this unit, you will be able to*

- **differentiate** between federal and state disclosure requirements,
- **identify** the requirements to disclose lead-based paint,
- **discuss** New Mexico requirement of disclosure of property condition,
- **describe** the disclosure requirements of FIRPTA, HOA, and PIDS, and
- **define** the following *key terms*:

homeowners' association

on-site liquid waste

Public Improvement District

Residential Lead-Based Paint Hazard Reduction Act (1992)

target housing

■ LEAD-BASED PAINT DISCLOSURE

The **Residential Lead-Based Paint Hazard Reduction Act (1992)** and the regulations provide for mandatory lead-based paint disclosure in housing built before 1978 called **target housing**. Approximately three-quarters of the nation's housing stock built before 1978 (about 64 million dwelling units) contains some lead based paint. The law helps inform about 9 million renters and 3 million homebuyers each year. Mandated disclosure is designed to protect families from exposure to lead from paint, dust, and soil. Lead poisoning can cause permanent damage to the brain and many organs, and can also result in reduced intelligence and behavioral problems. Disclosure of this potential hazard is important because when properly maintained and managed, lead based paint poses little health risk.

Some types of housing built before 1978 are not covered by disclosure requirement:

- Zero-bedroom units, such as efficiencies, lofts, and dormitories
- Dwelling units leased for less than 100 days, when there is no opportunity for renewal, such as vacation dwellings or short-term rentals

- Housing for the elderly or handicapped (unless children live there or are expected to live there)
- Rental housing that has been inspected by an EPA-certified inspector and found free of lead based paint
- Foreclosure sales (judicial)

The law requires disclosure activities prior to ratification of a contract to purchase or lease of target housing (dwellings built before 1978).

- Sellers and landlords must disclose known lead based paint and lead based paint hazards and provide available reports to buyers or renters.
- Sellers and landlords must give buyers and renters the pamphlet *Protect Your Family from Lead in Your Home* (see Figure 4.1), which was developed by the Environmental Protection Agency (EPA), Department of Housing and Urban Development (HUD), and the Consumer Product Safety Commission (CPSC). The information can also be found at www.hud.gov or www.epa.gov.
- Homebuyers are given the opportunity for a ten-day period to conduct a lead based paint inspection or risk assessment at their own expense. The rule gives the two parties flexibility to negotiate key terms of the evaluation.
- Sales contracts and leasing agreements must include certain notification and disclosure language.
- Sellers, lessors, and real estate agents share responsibility for ensuring compliance.

What Is Not Required?

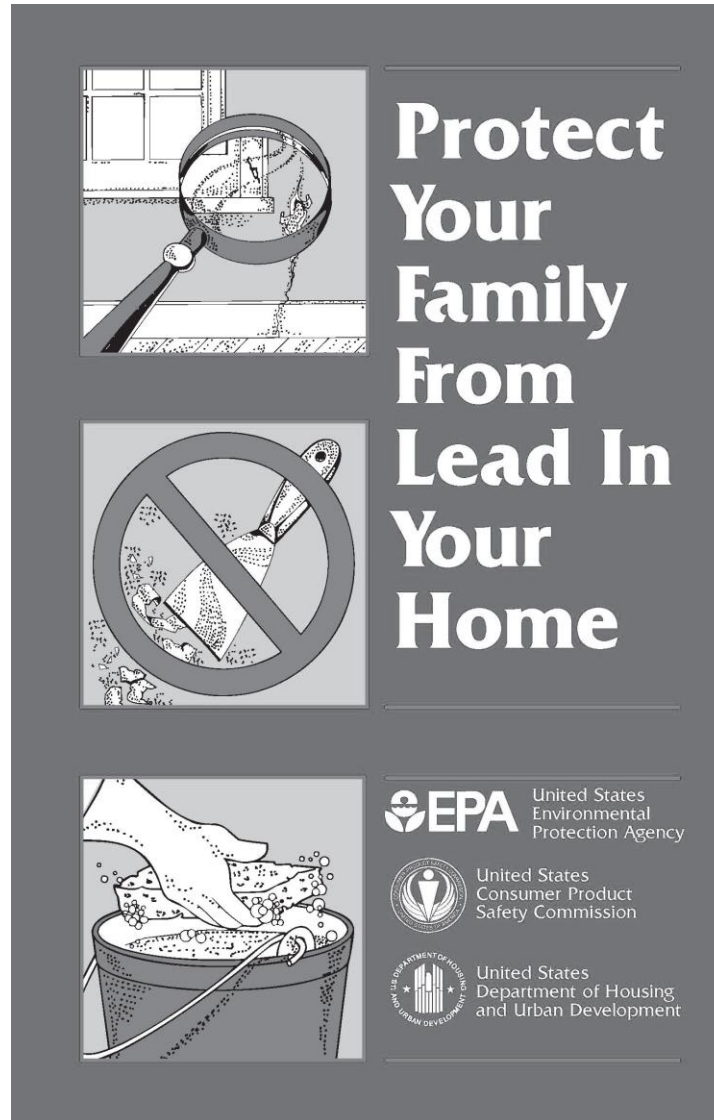
- Any testing or removal of lead-based paint by sellers or landlords is not required.
- Failure to disclose does not invalidate leasing and sales contracts.

The EPA now also requires managers and landlords to disclose lead-based paint to tenants when the renovation or repair of target housing will disturb less than six square feet inside and less than twenty square feet outside.

Enforcement of the Residential Lead-Based Hazard Reduction Act is the responsibility of HUD, the EPA, and the Department of Justice.

- The EPA and HUD are carrying out enforcement independently and jointly with the assistance of the Department of Justice. The policies between the two departments differ slightly; however, they use the same methods at the penalty stage for violators.

Protect Your Family from Lead in Your Home



- HUD is focusing on compliance with the requirements as they apply to property rentals in large urban areas. HUD officials will generally show up at an office to conduct unannounced inspections.
- The EPA may conduct unannounced inspections, or it may send a letter alerting the owner/managers of a visit.
- A response policy can be found on the EPA's website at <http://es.epa.gov>.

Federal Penalties and Private Actions

- HUD authority—civil penalties up to \$11,000 for each violation
- EPA authority—civil penalties up to \$11,000 for each violation; criminal penalties up to \$11,000 for each violation
- Private action—civil liability and direct compensation. Title X states, "Any person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to 3 times the amount of damages incurred by such

individual.” This provision also authorizes the court to award court costs, reasonable attorney fees, and expert witness fees to a prevailing plaintiff.

Lead Renovation, Repair, and Painting Program

The Environmental Protection Agency (EPA) has issued a final rule under the authority of section 402(c)(3) of the Toxic Substances Control Act (TSCA) to address lead-based paint hazards created by renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities.

Target housing is defined in TSCA section 401 as any housing constructed before 1978, except housing for the elderly or person with disabilities (unless any child younger than six resides or is expected to reside in such housing) or any zero-bedroom dwelling. Under this rule, a child-occupied facility is a building, or a portion of a building, constructed before 1978, visited regularly by the same child, younger than six, on at least two different days within any week (Sunday through Saturday period), provided that each day’s visit lasts at least three hours and the combined weekly visits last at least six hours, and the combined annual visits last at least 60 hours.

Child-occupied facilities may be located in public or commercial buildings or in target housing. This rule establishes requirements for training renovators, other renovation workers, and dust sampling technicians; for certifying renovators, dust sampling technicians, and renovation firms; for accrediting providers of renovation and dust sampling technician training; for renovation work practices; and for recordkeeping. Interested states, territories, and Indian tribes may apply for and receive authorization to administer and enforce all of the elements of these new renovation requirements.

EPA Requirements

Common renovation activities like sanding, cutting, and demolition can create hazardous lead dust and chips by disturbing lead-based paint, which can be harmful to adults and children.

To protect against this risk, on April 22, 2008, the EPA issued a rule requiring the use of lead-safe practices and other actions aimed at preventing lead poisoning. Under the rule, beginning in April 2010, contractors performing renovation, repair and painting projects that disturb lead based paint in homes, child care facilities, and schools built before 1978 must be certified and must follow specific work practices to prevent lead contamination. The law will also require property managers to hire certified contractors anytime paint is disturbed due to repair or renovation in target housing. If property managers have staff members do the work, they must become certified.

Until that time, EPA recommends that anyone performing renovation, repair, and painting projects that disturb lead-based paint in pre-1978 homes, child care facilities and schools follow lead-safe work practices.

All contractors should follow these three simple procedures:

- Contain the work area.
- Minimize dust.
- Clean up thoroughly.
- Read EPA’s Regulations on Residential Property Renovation at 40 CFR 745.80, Subpart E.

■ SELLER'S DISCLOSURE OF PROPERTY CONDITION

New Mexico law requires the seller to disclose material defects actually known about the property (even if being sold "As Is"). Our disclosure law however does not specify the manner that the disclosure is made, and there is no requirement for the seller to make a written disclosure.

The Realtor Association New Mexico (RANM) does provide a Seller's Property Disclosure form as a method of providing a standardized written disclosure of the condition of the property. It is recommended that you consult with your qualifying broker as to any office policies or preferences when using this form.

■ DISCLOSURE OF RESIDENTIAL PROPERTY TRANSFERS; AFFIDAVIT TO BE FILED WITH ASSESSOR

New Mexico Statute 7-38-12.1 requires disclosure of residential property transfers to the county assessor for property transferred after January 1, 2004. A transferor or the transferor's authorized agent, or a transferee or the transferee's authorized agent presenting for recording with a county clerk a deed, real estate contract or memorandum of real estate contract transferring an interest in real property classified as residential property for property taxation purposes must also file with the county assessor within thirty days of the date of filing.

The affidavit required for submission must be in a form approved by the department and signed by the transferors or their authorized agents.

■ ESTIMATED PROPERTY TAX DISCLOSURE

The following is required in 47-13-4 NMSA 1978:

The legislature finds that property tax levied on a residential property for the current year can be a misleading guide to property tax levies in the years following the sale of that property and that a prospective buyer needs information regarding the property tax obligation in the year following the property's sale to properly judge the affordability of a contemplated purchase.

B. Prior to accepting an offer to purchase, the property seller or the seller's broker shall:

(1) request from the county assessor the estimated amount of property tax levy with respect to the property and shall specify the listed price as the value of the property to be used in the estimate; and

(2) provide a copy of the assessor's response pursuant to Subsection D of this section in writing to the prospective buyer or the buyer's broker.

C. A buyer's broker shall provide to the prospective buyer the county assessor's estimated amount of property tax levy immediately upon receiving it from the property seller or the seller's broker. The prospective buyer shall acknowledge in writing the receipt of the estimated amount of property tax levy.

D. Upon request, a county assessor shall furnish in writing, pursuant to the provisions of Subsection E of this section, an estimated amount of property tax levy with respect to a residential property in the county, calculated at a property value specified by the requestor. The request shall be complied with by the close of business of the business day following the day the request is received. A county may satisfy this obligation through an internet site or other

automated format that allows a user to print the requested estimated amount of property tax levy. A document associated with the request or the response is not a public record or a valuation record. County assessors shall not use information provided with a request, including the specified value, to assess the valuation of the property. Neither the county nor any jurisdiction levying a tax against residential property in the county is bound in any way by the estimate given.

E. A county assessor's estimated amount of property tax levy with respect to a residential property in the county shall contain the following:

(1) the actual amount of property tax levied for the property for the current calendar year if the tax rates for the current year have been imposed in accordance with Section 7-38-34 NMSA 1978 for the county in which the property is located or, in all other cases, the amount of property tax levied with respect to the property for the prior calendar year;

(2) the estimated amount of property tax levy, as calculated by the county assessor, for the property for the calendar year following the year in which the transaction takes place; and

(3) a disclaimer substantially similar to the following:

"The estimated amount of property tax levy is calculated using the stated price and estimates of the applicable tax rates. The county assessor is required by law to value the property at its "current and correct" value, which may differ from the listed price. Further, the estimated tax rates may be higher or lower than those that will actually be imposed. Accordingly, the actual tax levy may be higher or lower than the estimated amount. New Mexico law requires your real estate broker or agent to provide you an estimate of the property tax levy on the property on which you have submitted or intend to submit an offer to purchase. All real estate brokers and agents who have complied with these disclosure requirements shall be immune from suit and liability arising from suit relating to the estimated amount of property tax levy."

F. A prospective buyer may waive the disclosure requirements of this section by signing a written document prior to the time the offer to purchase is to be made in which the buyer acknowledges that the required estimated amount of property tax levy is not readily available and waives disclosure of the estimated amount of property tax levy.

G. All property sellers and real estate brokers and agents who have complied with the provisions of this section shall be immune from suit and liability arising from or relating to the estimated amount of property tax levy.

H. The New Mexico real estate commission shall biannually inform all New Mexico real estate licensees of the statutory requirement for disclosure of the estimated amount of property tax levy to prospective residential property purchasers.

■ HOMEOWNERS' ASSOCIATION DISCLOSURE ACT

Description and Purpose of a Homeowners' Association

A **homeowners' association (HOA)** is an organization of homeowners of a particular neighborhood, subdivision, or planned unit development. Generally, HOAs provide services for, regulate the activities of, levy assessments against, or impose fines on owners of property located within the HOA; assessments or dues are typically used to pay for expenses that arise from having and maintaining common property within the development. The law does not

require that an HOA be incorporated. Under the Homeowners' Association Act ("act") which took effect July 1, 2013, an HOA must be identified in a recorded declaration. The HOA declaration is an instrument that imposes certain responsibilities on the HOA and gives certain authority to the HOA. Other specific rights and obligations of the HOA are set forth in additional HOA documents, such as the HOA's **bylaws** and policies. Collectively, these documents are referred to as the HOA's Community Documents. Except as provided for in the Community Documents, the HOA's Board of Directors (Board) acts on behalf of the HOA.

Generally, the HOA Act does not apply to a condominium governed by the Condominium Act. However, in the event a condominium that falls under the Condominium Act is also part of a larger HOA, then both the Condominium Act and the HOA Act may apply.

Seller's Disclosures and HOA Disclosure Certificate

The act provides that a seller of property located in an HOA must provide the potential buyer with the following documents prior to the closing date:

- 1) the declaration of the HOA;
- 2) the bylaws of the HOA;
- 3) the covenants, conditions, and restrictions applicable to the property at issue; and
- 4) the rules of the HOA.

In addition, no later than seven (7) days prior to closing, the seller must provide the buyer with a Disclosure Certificate from the HOA.

The Disclosure Certificate must include the following:

- 1) a statement disclosing the existence and terms of any right of first refusal or other restraint on the free alienability of the property;
- 2) a statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling property owner;
- 3) a statement of any other fees payable by property owners;
- 4) a statement of any capital expenditure anticipated by the HOA and approved by the board for the current fiscal year and the two next succeeding fiscal years;
- 5) a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the HOA for any approved projects;
- 6) the most recent regularly prepared balance sheet and income and expense statement, if any, of the HOA;
- 7) the current operating budget of the HOA;
- 8) a statement of any unsatisfied judgments or pending suits against the HOA and the status of any pending suits material to the HOA of which the HOA has actual knowledge;
- 9) a statement describing any insurance coverage provided for the benefit of property owners and the Board of the HOA;

10) a statement of the remaining term of any leasehold estate affecting the HOA and the provisions governing any extension or renewal thereof; and

11) the contact person and contact information for the HOA.

Upon written request by a property owner, the HOA must provide the Disclosure Certificate within 10 business days. A property owner is not liable to a buyer for failure or delay of the HOA to provide the Disclosure Certificate in a timely manner or for any erroneous information provided by the HOA and included in the Disclosure Certificate. Upon receiving the Disclosure Certificate, a purchaser has seven (7) days to terminate the purchase agreement. If the purchaser terminates the purchase agreement, the seller must refund any fees and/or earnest money paid by the buyer within 15 days of termination.

A disclosure certificate is not required in the case of a disposition:

- 1) pursuant to court order;
- 2) by a government or governmental agency (Freddie Mac and Fannie Mae are *not* government entities);
- 3) by foreclosure (this refers to the court-ordered foreclosure sale; it does not apply to the sale of bank-owned properties even if the bank/lender acquired the property at a foreclosure sale);
- 4) by deed given to a lender in lieu of foreclosure; or
- 5) that may be canceled at any time and for any reason by the purchaser without penalty.

■ PUBLIC IMPROVEMENT DISTRICT DISCLOSURE

Description and Purpose of a Public Improvement District

A **Public Improvement District (PID)** is a means of financing the construction or improvement of local public improvements, such as streets, parks, sewer lines, drainage ways, recreational facilities, etc. A PID may issue special levy bonds or general obligation bonds to pay for the improvements or maintenance. The debt service on the bonds (interest, principal, etc.) is charged to the property owners within the district in the same manner as are property taxes. In New Mexico, PIDs are governed by the Public Improvement District Act (act), NMSA 1978, § 5-11-1 et.al.

Seller's Required Disclosures

Effective July 1, 2013, **PRIOR TO** a seller whose lot is located within a PID being able to accept an offer to purchase, the seller, seller's agent, or seller's broker must provide the potential buyer a written notice of the following information:

- 1) information that the property is within a PID;
- 2) the purpose of the PID;
- 3) an explanation that the purchaser is obligated to pay any property tax or special levy that is imposed by the PID board;

- 4) an explanation that the property tax or special levy imposed by the PID board is in addition to any other state, county, or other local governmental taxes and assessments;
- 5) information that the failure to pay the property tax or special levy could result in the foreclosure of the property;
- 6) information that more information concerning the rate of the property tax or the amount of the assessment and the due dates of each may be obtained from the Governing Body; and
- 7) information that a feasibility study was completed as part of the formation of the PID and that the feasibility study is available through the Governing Body.

In addition, the seller, seller's agent, or seller's broker must provide the following: For special bonds,

- 1) if a special levy has not been authorized by the PID board, information that a special levy has not been authorized; or
- 2) if a special levy has been authorized by the PID board:
 - a) the maximum special levy that is authorized to be imposed upon the property in the PID; or
 - b) that the special levy to be imposed on the property in the PID has been prepaid in full as provided in the rate or method of apportionment.

For general obligation bonds:

- 1) if general obligation bonds have not been issued, information that general obligation bonds have not been issued; or
- 2) if general obligation bonds have been issued:
 - a) the amount of general obligation bonds that are outstanding;
 - b) the amount of annual debt service on outstanding general obligation bonds;
 - c) that the maximum rate and amount of property taxes that may be imposed upon the property in the PID are limited only by the amount of debt outstanding; and
 - d) the estimated or projected annual mill levy or special levy per one thousand dollars (\$1,000) of assessed value as of the date of the disclosure with an explanation that the estimated levy or rate may be increased by the PID board when necessary to meet debt obligations.

All information regarding the special levy bonds and general obligation bonds, as well as information that failure to pay the property tax or special levy could result in the foreclosure of the property must be set apart in a clear and conspicuous manner and in at least 12-point bold type. See RANM Form 4550, Public Improvement District Disclosure. There is no explicit provision in the act that allows a potential purchaser to waive receipt of these disclosures prior to the seller accepting the offer.

New Mexico Environmental Improvement Board

Under the authority of Sections 74-1-16, 74-1-7(A)(3), 74-1-8(A)(3), and 74-1-9, the New Mexico Environmental Improvement Board issued **on-site liquid waste** regulations effective September 1, 2005, which require an inspection of on-site liquid waste systems before transfer by an inspector certified by the New Mexico Environmental Department. The inspection, whether new or existing, will be conducted no earlier than 180 days prior to the date of recordation of the deed. Buyers cannot waive the pretransfer inspection, and sellers are held legally responsible if the pretransfer inspection is not done.

If the property has an advanced treatment system, the buyer is required—by no later than the settlement/signing date—to enter into a maintenance agreement with a maintenance service provider approved by the New Mexico Environmental Department and file notice of change of ownership of the system on the form provided by that department. (*See* RANM Form 5120(a) Septic System Contingency Addendum.)

A summary of these changes is available at
www.nmenv.state.nm.us/fod/LiquidWaste/LWDRrewrite.pdf.

Quiz 4

1. When *MUST* a broker disclose the current and future tax levy on a property
 - a. when taking the listing
 - b. prior to writing a purchase offer
 - c. upon acceptance of the purchase offer
 - d. at closing
2. A buyer relied on the Seller's Property Disclosure, which stated that the seller was not aware of any problems with the plumbing, but discovered within a few weeks that the entire system of pipes in the house was badly deteriorated, springing one leak after another. A plumber who examined the system after the problems arose found fairly recent repairs to the system. What is the liability of the seller's agent in this case?
 - a. if they did not know of the problem, they have no liability in this matter
 - b. they share the sellers' liability by virtue of their agency relationship
 - c. they had a duty to discover this problem and disclose it as part of their agency duties
 - d. they share the liability because they were required to approve the seller's Property Condition Disclosure
3. The New Mexico Environmental Improvement Board requires the inspection of a property's on-site wastewater system upon
 - a. obtaining the buyer's and seller's signatures on the purchase agreement
 - b. the seller's listing the property for sale
 - c. the funding of the transaction
 - d. any transfer of ownership of the property
4. After January 1, 2004, *MOST* changes of residential ownership in New Mexico require disclosure of sales price information for the property. This is done by
 - a. the buyer's giving oral consent to the real estate broker
 - b. including the sales price in the warranty deed
 - c. submitting the property tax affidavit to the county assessor
 - d. sending the information to the IRS after closing
5. The Homeowner's Association Act provides that a seller of property located in an HOA must provide the potential buyer with documents prior to closing that include
 - a. bylaws and rules of the HOA
 - b. covenants, conditions, and restrictions applicable to the property at issue
 - c. declaration of the HOA
 - d. all of the above
6. The inspection and certification of a property's on-site wastewater system must be done
 - a. 90 days prior to the date of recordation of the deed
 - b. 130 days prior to the date of recordation of the deed
 - c. 180 days prior to the date of recordation of the deed
 - d. no certain time line required
7. How many days prior to closing *MUST* the seller provide the buyer with a Disclosure Certificate from the HOA
 - a. 7 days prior
 - b. 10 days prior
 - c. 12 days prior
 - d. 15 days prior

8. Homeowners are given the opportunity to conduct a lead based paint inspection or risk assessment at their own expense for
 - a. a 5 day period
 - b. a 7 day period
 - c. a 8 day period
 - d. a 10 day period
9. HUD has the authority to impose civil penalties for violating the Lead Based Paint Disclosure Act up to
 - a. \$10,000 per violation
 - b. \$10,000 plus criminal penalties per violation
 - c. \$11,000 per violation
 - d. \$11,000 plus criminal penalties per violation
10. If a purchaser terminates the purchase agreement upon receiving the HOA Disclosure Certificate, the seller must refund any fees and /or earnest money paid within
 - a. 7 days of termination
 - b. 10 days of termination
 - c. 12 days of termination
 - d. 15 days of termination

Unit 5: Other Matters Affecting Real Estate Transactions

■ PRE-READING ASSIGNMENT

61-29-21 through 61-29-29 and Part 5, 25, of *New Mexico Real Estate License Law, Real Estate Commission Rules*, and Excerpt of the Time Share Act – appendix in back of book

■ **LEARNING OBJECTIVES** When you have completed this unit, you will be able to

- **differentiate** between errors and omission and the recovery fund,
- **identify** the protected classes of the New Mexico Human Rights Act,
- **review** requirements related to the Truth in Lending Act (Regulation Z), and
- **define** the following *key terms*:

1968 federal Fair Housing Act
affirmative action
broker price opinion
Civil Rights Act of 1866
errors and omissions (E&O) insurance
interval estate
New Mexico Human Rights Act
seller financing
stigmatized property
time-span estate

■ ERRORS AND OMISSIONS INSURANCE

Errors and omissions (E&O) insurance is professional liability insurance. This policy insures the licensee against liability for innocent or negligent mistakes in a real estate transaction. There are exclusions to coverage, and fraud or other intentional acts are not covered.

The New Mexico Real Estate Commission requires all licensees to carry E&O insurance.

Part 5 of the NMAC rules requires policy limits of not less than \$100,000 per incident and \$500,000 aggregate per licensee.

The Commission contracts with a group carrier to provide insurance at a cost not to exceed \$500 per year. A deductible amount for each claim of not more than \$1,000 per claim and no deductible for legal expenses and defense. Licensees may elect to carry either the group policy or equivalent coverage by the carrier of their choice. Licensees who fail to carry or provide proof of coverage will have their license placed on inactive status.

■ REAL ESTATE RECOVERY FUND

The purpose of the fund is to satisfy judgment payments awarded pursuant to the Real Estate Recovery Fund Act. The Real Estate Recovery Fund was established from funds collected from licensees. Licensees may be assessed \$10 at the time of issuance or renewal of their license.

The amount of the fund must be maintained at a minimum balance of \$150,000. If the real estate recovery fund falls below this amount, the commission shall have authority to adjust the annual amount of additional fees to be charged licensees or to draw on the real estate commission fund in order to maintain the fund level as required. If on July 1 of any year, the balance is the fund exceeds \$400,000, the amount over \$400,000 shall be transferred to the real estate commission fund to be used for the purposes of carrying out the provisions of Chapter 61, Article 29 NMSA 1978.

When any aggrieved person obtains a final judgment in a court of competent jurisdiction against a state-licensed real estate broker or associate broker based upon fraud, misrepresentation, or deceit, that person may, within one year after the termination of all proceedings, file a verified petition with the Commission for payment from the Real Estate Recovery Fund for the actual damages included in the judgment and unpaid. No more than \$10,000 will be awarded for any one transaction and no more than \$30,000 per licensee.

■ TIME-SHARING

A time-share unit is divided into either interval estates or time-span estates. In New Mexico, time-share sales are regulated by the New Mexico Real Estate Commission in Part 25 of the rules as well as the Time Share Act as noted in 47-11 NMSA 1978. In addition to the fact that time shares are deemed real estate, and may be subject to securities laws with the requirement to have a securities license, the rules include the following:

16.61.25.10. Description of interest in time share property; recordation

All contracts and deeds conveying an interest in a time share must contain a legal description of the time share project, time share unit and interval number for which the interest is being conveyed, if applicable. The developer shall not record a conveyance instrument until after the expiration of the purchaser's 7-day right of rescission.

16.61.25.12. License requirements

Any individual, including a tour guide, who shows time share units or facilities to prospective purchasers, shall hold a New Mexico real estate associate broker's or qualifying broker's license. No person except the developer may participate in any part of a time share sales presentation unless that person holds a New Mexico real estate associate broker or qualifying broker license.

An **interval estate** (nonfreehold interest) ends after a certain period. An interval estate is a leasehold tenancy for years and will revert at some future time.

■ **FOR EXAMPLE** Anne has a lease giving her the right to occupy a unit for three weeks of each year for the next 25 years. At the end of the lease, Anne has nothing. She has an interval estate.

A **time-span estate** (freehold interest) will not end after a certain period of time, it is permanent. A time span owner has fee simple title.

■ **FOR EXAMPLE** Beth owns an undivided interest in fee simple in a unit and she has a right to occupy the unit for three weeks of each year forever. Beth has a time-span estate.

Two major federal laws govern fair housing in the United States. The first and oldest is the **Civil Rights Act of 1866**, which prohibits discrimination based on race only. The second is the **1968 federal Fair Housing Act**, as amended.

1968 Federal Fair Housing Act

The federal Fair Housing Act was enacted into law as Title VIII of the Civil Rights Act of 1968. The purpose of the federal Fair Housing Act is to provide for fair housing throughout the United States. There are key differences between this new act and the original one of 1866:

- The 1866 act prohibits discrimination based on race only. The Civil Rights Act of 1866 refers to all real estate, unlike the 1968 Fair Housing Act, which covers only residential property. There are no exceptions to the 1866 act, but there are to the 1968 act.
- The 1968 act, as amended, goes further than the older one by making illegal any discrimination in connection with the sale or rental of most housing, and vacant land offered for residential use, when such discrimination is based on race, color, religion, or national origin. Sex was added as an amendment in the 1970s.

1988 Fair Housing Amendment to the 1968 Act

The 1988 amendment provides that rental or sale of real property cannot be denied because of familial status (families with children) or against the handicapped (physical and mental). The handicap amendment requires that owners allow tenants to modify living quarters to accommodate a disability, but places the financial responsibility on the tenant, not the owner. The act is now called the Fair Housing Act of 1968, as amended.

Complaints

A **complaint** may be filed with the Department of Housing and Urban Development (HUD) within one year of an alleged discriminatory act. HUD **first will attempt to reconcile** the complaint. If reconciliation is unsuccessful, HUD could take the complaint to an administrative **law judge, who could impose fines up to \$11,000 for the first offense, \$27,500 for a second violation within 5 years and \$55,000 for further violations within 7 years.**

A **civil suit** may be filed in federal court without first filing a complaint with HUD. In addition, an action may be taken by the Attorney General of the United States. He may file a civil suit where there exists a pattern or practice of discrimination.

■ NEW MEXICO HUMAN RIGHTS ACT

The **New Mexico Human Rights Act** is a state law enacted by the state legislature and enforced by a state agency called the Human Rights Commission, consisting of seven members appointed by the governor.

The act prohibits discrimination based on race, religion, color, national origin, ancestry, sex, physical or mental handicap, sexual orientation, gender identity, and spousal affiliation in the sale, leasing, showing, advertising, or financing of real estate, including commercial and industrial properties. The law also applies to employers of four or more employees.

Exceptions to the act include the following:

- An owner of a single-family dwelling, who does not discriminate in advertising, does not own or have reserved any interest in more than three single-family dwellings, and does not live in the dwelling, or was not the most recent occupant, qualifies for an exemption for one sale in 24 months.
- A church or church-sponsored corporation that provides housing may discriminate in favor of members of the sponsoring denomination.
- Accommodations in public institutions where the preference or limitation is based on sex are exempted.

Hearings are conducted by a panel of three commissioners. The Commission may require actual damages, not to exceed \$1,000, to be paid plus **affirmative action**.

Complaints may be filed with the Commission or with the district court. Complaints must be filed with the Commission within 180 days after the alleged act was committed. An aggrieved person may appeal a decision of the Commission to the district court within 30 days of the decision.

■ STIGMATIZED PROPERTY

A **stigmatized** (psychologically impacted) **property** is property marked with a history of abnormality or an ill event. For example, the real property might be a home where a homicide occurred.

The New Mexico legislature passed the **Real Estate Disclosure Act** in May 1991. This act provides states the following:

A seller, lessor, or landlord of real property, including a participant in an exchange of real property and any agent involved in such a transaction, will not be liable for failure to disclose and will not have a duty to disclose to any person who acquires, by voluntary or involuntary transfer, a legal or equitable interest in the real property, including any leasehold interest or security interest for an obligation, the fact or suspicion that the real property is or has been

- the site of a natural death;
- the site of a homicide, suicide, assault, sexual assault, or any other crime punishable as a felony; or
- owned or occupied by a person who was exposed to, infected with, or suspected to be infected with the human immunodeficiency virus (HIV) or diagnosed as to be suffering from acquired immune deficiency syndrome (AIDS) or any disease that has been determined by medical evidence as highly unlikely to be transmittable to others through the occupancy of improvements to real property or that is not known to be transmitted through the occupancy of improvements on that real property.

■ PROPERTY TAXES

New Mexico's property tax year begins on January 1 of one calendar year and ends on December 31 and is paid in arrears. Property taxes are ad valorem assessed at its fair market value as of January 1 of the current year. Property valuation increases are capped at 3% over the previous year's value, or 6.1% over the previous 2 year's value.

The tax ratio in New Mexico is 33 1/3%, so each property is taxed at one-third of its assessed value. Since 2004, property owners (buyers) are responsible to report the sales price of the property to the County Assessor's Office. New Mexico allows for 2 exemptions to subtract from the taxable value:

1. The head-of-household deduction is \$2,000.
2. The veteran's exception is \$4,000.

Taxes become a lien on January 1 of the year for which the taxes are due. The Notice of Valuation is mailed on April 1, and the owner has 30 days to challenge the assessment. Taxes are due and payable in 2 parts: November 10 of the current year and April 10 of the following year. Taxes are delinquent on December 10 and May 10 of each year.

■ HOMESTEAD PROTECTION

Protects the first \$60,000 single and \$120,000 married for the forced sale of a property for unsecured debt. Homeowner must record declaration of homestead. No protection against the following:

- Property tax or special assessment liens
- Mechanics' liens
- Mortgage liens
- Condominium association liens

■ MECHANICS' LIENS

A mechanics' lien is a statutory, equitable lien created in favor of contractors, laborers, and material men who have performed work or furnished materials in the erection or repair of a building and who have not been paid. The lien must be filed on the parcel of real estate where the material was used or the labor performed and must be filed in the county in which the real estate is located.

Suppliers of labor and materials under contract to improve a property may file a mechanics lien if they have not been paid. Only licensed contractors may file a lien. In New Mexico, mechanics' liens have priority over each other based on the delivery of materials or start of work (earliest).

Original contractors must file a lien **within 120 days of completion** of work to keep the lien alive. All other claimants must file within 90 days. If the lien claimant is not paid, they must file suit to foreclose. The foreclosure suit must be filed within 2 years after the claim of the lien has been recorded.

■ SUBDIVISION LAW

The New Mexico Subdivision Act applies to land being subdivided for the purpose of sale or lease under a common name or promotional plan. Exemptions are:

- Subdivisions where parcels are 140 acres or greater
- Land being sold pursuant to court order or is owned by the government
- Cemetery lots
- Time-shares and campground memberships (covered under other laws)

Developer submits to division a Statement of Record, including detailed information about the property and the marketing plan. A plat of the proposed subdivision certified by a registered, licensed New Mexico surveyor must be prepared and all corners staked. The subdivision plat must be acknowledged by the landowner to state that the subdivision is in accordance with their desire.

The subdivision plat must be approved by the board of county commissioners in each county in which the subdivision is located. Approval of the plat dedicates the land designated on the plat for public use and the fee vests in the municipality county. The acknowledged subdivision plat must be filed with the county clerk. If the land is in more than one county, it must be filed with the county clerk in each county.

■ NEW MEXICO WELL AND WATER RIGHTS

Anyone wanting to use water in New Mexico must have a permit from the state engineer (*see* IAW 72-12 NMSA 1978).

When evaluating an application for a new appropriation or to change the place or purpose of use of an existing water right, the state engineer must determine that water is available, that the appropriation will not impair existing rights, that the intended use meets state water conservation efforts, and that the intended use is not detrimental to the public welfare.

Note that information is available regarding the permitting and filing of wells and water rights on the RANM form 2307 Information Sheet Water Rights and Domestic Wells.

A new permit for a domestic well typically allows for an amount not to exceed one (1) acre foot of water for residential usage per year.

New Mexico Office of State Engineer Regulations for Use of Underground Water for Domestic Use

Among other provisions, these regulations contain provisions increasing application fees and limiting the total diversion for domestic wells. The document is available at www.ose.state.nm.us/PDF/RulesRegsGuidelines/72-12-1.1_DraftRules_2006-01-03.pdf.

■ MANUFACTURED HOUSING

New Mexico state law (14-12 NMSA 1978) authorizes the Manufactured Housing Division to license all dealers, manufacturers, brokers, salespeople, and repair workers/installers in the state of New Mexico. Being licensed is mandatory for any individual who wants to sell or work on manufactured homes in the state.

New Mexico law exempts real estate brokerages that sell no more than one (1) unit per year from licensure by the manufactured housing division.

■ TRUTH IN LENDING ACT (REGULATION Z) RELATED TO SELLER FINANCING

How the New Loan Originator Definition Under TILA Impacts Seller Financing

The Dodd-Frank Wall Street Reform and Consumer Protection Act (act) was signed into law on July 21, 2010. The act amended TILA by adding provisions that define and govern loan originators. The term *loan originator* is defined as a person who, for or in expectation of direct or indirect compensation or other monetary gain performs any of the following activities related to a residential mortgage loan: takes an application; offers, arranges, or assists a consumer in obtaining or applying to obtain; negotiates, or otherwise obtains or makes an extension of consumer credit for another person; or through advertising or other means of communication represents to the public that such person can or will perform any of these activities. The term does not include seller financiers who provide **seller financing** on three or less dwellings in a 12-month period provided that certain criteria are met.

A *seller financier* is defined as a person who extends credit through his/her own resources. The set of criteria that applies depends on the number of dwellings for which the seller is providing seller financing in a 12-month period. There are specific requirements for a seller providing seller financing for no more than one dwelling in a 12-month period (1-in-12 Exclusion) and additional requirements for those sellers providing seller financing for two or three dwellings in a 12-month period (3-in-12 Exclusion). These new provisions are effective as of January 1, 2014.

The exclusionary provisions further discussed apply equally to all types of seller financing: (1) real estate contracts in which equitable title is transferred at the time of sale and legal title is transferred at some future date when the buyer has satisfied all conditions of the real estate contract; and (2) mortgages and deeds of trust in which both equitable and legal title is transferred at the time of sale and the buyer's agreement to pay the seller as set forth in a promissory note is secured by a lien on the real property.

1-in-12 Exclusion

The 1-in-12 Exclusion is only available to natural persons, estates, and trusts. Corporations, including limited liability corporations, may not utilize the 1-in-12 Exclusion. Under the 1-in-12 Exclusion, the following criteria apply: (1) the person providing the seller financing must not have constructed or acted as a contractor for the construction of the dwelling in the ordinary course of business of the person; (2) the payment schedule must not result in negative amortization (however, balloon payments, as defined below, are permitted under the 1-in-12 exclusion); and (3) the interest rate may be a fixed or adjustable rate, but if the rate adjusts, it must not adjust any sooner than five years, must be determined by the addition of a margin to an index that is widely available, such as indices for U.S. Treasury securities or the London Interbank Offered Rate (LIBOR), and must be subject to reasonable adjustment limitations.

Safe harbors under TILA allow an annual rate increase of up to two percentage points with a lifetime limitation of an increase of six percentage points, subject to a minimum floor as negotiated by the buyer and seller and a maximum ceiling that does not exceed the usury limit applicable to the transaction.

3-in-12 Exclusion

The 3-in-12 Exclusion is available to natural persons, estates, trusts, and corporations. It has the same restrictions as the 1-in-12 Exclusion as set forth above with two additional criteria. Under the 3-in-12 Exclusion, there can be no balloon payments. In addition, the seller must make a good-faith determination of the buyer's ability to make the required payments. A *balloon payment* is defined as a payment that is more than two times a regular periodic payment. A seller may opt to generally review the buyer's current or expected income from employment, government benefits and entitlements, incoming earning assets, and monthly financial obligations or may utilize the specific ability-to-repay criteria set forth in Regulation Z of TILA, which includes the following criteria:

- (1) The buyer's current or reasonably expected income or assets, other than the value of the dwelling that secures the loan;
- (2) The buyer's current employment status;
- (3) The new monthly loan payment;
- (4) The monthly payment on any simultaneous loan;
- (5) The buyer's monthly payment for loan-related obligations;
- (6) The buyer's current debt obligations;
- (7) The buyer's monthly debt-to-income ratio, or residual income; and
- (8) The buyer's credit history.

Under the new regulations, sellers are not required to retain evidence that they conducted an ability-to-repay analysis; however, it is highly recommended that they do so.

■ FEDERAL AND STATE LAW GOVERNING LOAN ORIGINATORS

Mortgage Loan Originators in New Mexico are licensed through the New Mexico Regulation and Licensing Department's Financial Institutions Division.

The New Mexico Appraisal Act and New Mexico Brokers

A change to the appraisal act allows for real estate brokers licensed in New Mexico to charge a fee for preparation of a broker's price opinion, as long as they meet specific requirements as outlined in the law. An excerpt of the act is provided:

16.62.1.15 BROKER PRICE OPINIONS:

- A. A person may prepare a broker's price opinion and charge and collect a fee for such opinion for:
- (1) An existing or potential seller for the purposes of listing and selling a parcel of real property;
 - (2) An existing or potential buyer of a parcel of real property;
 - (3) A third party making decisions or performing due diligence related to the potential listing, offering, sale, exchange, option, lease or acquisition price of a parcel of real property; or
 - (4) An existing or potential lienholder or other third party for any purpose other than as the basis to determine the value of a parcel of real property, for a mortgage loan origination, including first and second mortgages, refinances, or equity lines of credit. The provisions of this subsection do not 16.62.1 NMAC 3preclude the preparation of a broker's price opinion to be used in conjunction with or in addition to an appraisal.
- B. A broker's price opinion shall conform to the standards and guidelines published by a nationally recognized association of providers of broker price opinions.
- C. A broker's price opinion shall be in writing and contain the following:
- (1) A statement of the intended purpose of the price opinion;
 - (2) A brief description of the subject property and property interest to be priced;
 - (3) The basis of reasoning used to reach the conclusion of the price, including the applicable market data and/or capitalization computation;
 - (4) Any assumptions or limiting conditions;
 - (5) A disclosure of any existing or contemplated interest of the broker or salesperson issuing the opinion;
 - (6) The effective date of the price opinion;
 - (7) The name and signature of the broker issuing the price opinion;
 - (8) The name of the real estate brokerage firm for which the broker is acting;
 - (9) The signature date;
 - (10) A disclaimer stating that, "This opinion is not an appraisal of the market value of the property, and may not be used in lieu of an appraisal. If an appraisal is desired, the services of a licensed or certified appraiser must be obtained. This opinion may not be used by any party as the primary basis to determine the value of a parcel of real property for a mortgage loan origination, including first and second mortgages, refinances or equity lines of credit."; and
 - (11) A certification that the licensee is covered by errors and omissions insurance, to the extent required by state law, for all liability associated with the preparation of the broker's price opinion.

D. A person licensed pursuant to this chapter may not prepare a broker's price opinion for any purpose in lieu of an appraisal when an appraisal is required by federal or state statute. A broker's price opinion which attempts to estimate the value of a parcel of real estate rather than sales price shall be deemed to be an appraisal and may not be prepared by a qualifying broker or sales agent under the authority of their license but may only be prepared by a duly licensed appraiser and must meet the regulations promulgated by the Board.

E. A broker's price opinion **may not** under any circumstances be referred to as a valuation or appraisal.

Quiz 5

1. Under commission rules, which of the following is *NOT TRUE* of Errors & Omissions insurance
 - a. it is required of all brokers whose licenses are active
 - b. it covers fraud and misrepresentation
 - c. it must include certain minimum levels of coverage
 - d. it cannot be cancelled for any reason except nonpayment of premiums
2. How much water is a single household allowed to use from a newly permitted domestic well
 - a. 1-acre foot per year
 - b. 3-acre feet per year
 - c. as much as they want
 - d. it depends upon the date on the permit
3. A claim against the Real Estate Recovery Fund is limited to *NOT* more than
 - a. \$10,000
 - b. \$6,600
 - c. \$3,300
 - d. none of the above
4. New Mexico Human Rights Act differs from Federal Fair Housing laws because *ONLY* the New Mexico's Act
 - a. prohibits discrimination due to familial status
 - b. allows discrimination on the basis of marital status
 - c. prohibits discrimination due to age
 - d. prohibits discrimination due to sexual orientation
5. The amount of the Real Estate Recovery Fund must be maintained at a minimum balance is
 - a. \$100,000
 - b. \$150,000
 - c. \$300,000
 - d. \$400,000
6. The developer of a time share shall not record a conveyance instrument until after the expiration of the purchaser's right of rescission, which is
 - a. 3 days
 - b. 5 days
 - c. 7 days
 - d. 10 days
7. Mandated by the Real Estate Commission, Errors and Omission insurance deductible per claim shall not be greater than
 - a. \$500
 - b. \$1,000
 - c. \$5,000
 - d. no set amount
8. A real estate broker is in compliance with fair housing practice in which of the following situations
 - a. refusing to make reasonable changes in property management rules or policies for a disabled person
 - b. failing to permit a disabled person to make reasonable modifications to a rental unit at their own expense
 - c. enforcing a policy that people with children can rent a unit only in a designated section or building
 - d. refusing to rent to an alcoholic classified as mentally disabled based on a record of abusive and dangerous behavior

9. Complaints of violations against the New Mexico Human Rights Act may be filed with the commission or with the district court, within
- a. 30 days after the alleged violation
 - b. 60 days after the alleged violation
 - c. 90 days after the alleged violation
 - d. 180 days after the alleged violation
10. New Mexico law exempts real estate brokerages from licensure by the manufactured housing division that sell not more than
- a. 1 unit per year
 - b. 5 units per year
 - c. they can sell as many as they want because they have a real estate license
 - d. no exemption allowed

Unit 6: Purchase Agreements

■ PRE-READING ASSIGNMENT

None

■ LEARNING OBJECTIVES *When you have completed this unit, you will be able to*

- **list** three common clauses in a purchase agreement,
- **develop** good contract writing techniques,
- **identify** the most common pitfalls in writing purchase agreements, and
- **define** the following *key terms*:

buyer beware clause
default clause
earnest deposit clause
Improvement Location Report (ILR)
property description clause
settlement date
surveyors inspection report (SIR)

Putting the desires of the parties into writing in the proper way is critical to a transaction and requires the use of a type of preprinted purchase agreement. Real estate brokers are limited to using preprinted forms that have been preapproved by an attorney. (See RANM Form 2104, Residential; RANM Form 4101, Vacant Land; RANM Form 3101, Commercial; and RANM Form 4102, Farm-Ranch.)

A broker's expertise is tested in this phase of a transaction because the broker is exposed to considerable liability.

For this reason, brokers should obtain their qualifying broker's approval of the preprinted or computer-generated forms they use when putting the agreement of the parties into writing.

Brokers are expected to possess the knowledge and skills necessary to create a purchase agreement that is free of ambiguities, omissions, mistakes, vagueness, and improprieties.

Brokers are also expected to be thoroughly familiar with the preprinted forms they use, as well as knowing and understanding the basic rules of good contract writing.

■ STUDYING THE PURCHASE AGREEMENT

A purchase agreement is a contract, and like many other contracts, is subject to scrutiny under basic contract law. Brokers are not expected to be contract attorneys, but they are expected to know enough about contract law to do their job using the preprinted forms. They are expected to know the basic elements the contract should contain.

A well-constructed purchase agreement should contain, at a minimum, the various clauses discussed in this session, using the purchase agreement provided.

■ ENFORCEABILITY OF CONTRACTS

The technical letter of contract law implies that a contract becomes fully enforceable when:

It contains the essential elements required by law

It has been put in writing

All parties signed and received legible copies

The offeror has received notice of acceptance of the agreement by the offeree

No party has entered into the contract under circumstance wherein a legal avoidance of the contract exist

Anything less may affect the enforceability of the contract

Let's take a look at the Realtor Association New Mexico (RANM) Purchase Agreement (Form 2104)

■ COUNTEROFFERS

A counteroffer is a new offer made in response to an offer received from an offeror. A counteroffer has the effect of rejecting the original offer, which can no longer be accepted unless it is repeated by the offeror.

Once the buyer submits an offer for the seller's acceptance, and the seller makes any changes to the offer, no matter how slight, this constitutes a counteroffer and terminates the original offer.

Unit 7: Common Forms

■ PRE-READING ASSIGNMENT

None

■ LEARNING OBJECTIVES *When you have completed this unit, you will be able to*

- **differentiate** between common real estate forms,
- **explain** the purposes of addendums and amendments,
- **describe** the purpose of an exhibit, and
- **define** the following *key terms*:

addendum
amendment
buyer's occupancy agreement
counter offer
distribution of earnest money
exhibit
extension agreement
seller occupancy agreement
termination agreement

Many preprinted forms are available to brokers for use in the practice of real estate. Qualifying brokers are responsible for determining what forms are to be used by their firm. Brokers are urged to seek legal advice before using any form.

Brokers are not permitted to draft forms unless they are licensed to practice law in New Mexico. They are only permitted to use existing forms that have been approved by attorneys.

Brokers may fill in the blank spaces and make minor amendments and additions to the forms necessary for their endeavors.

■ EXHIBIT, ADDENDUM, AMENDMENT

Exhibits, addenda, and amendments are very often found in use with purchase agreements. Each is distinctly different from the other. Each has a specific purpose and should only be used for the purpose intended.

Brokers should have a clear understanding of both the purpose and the proper usage of these three types of documents.

Exhibit

An **exhibit** is a document or section of a document presented as a part of the supporting data for the purchase agreement.

An exhibit in itself is not contractual in nature; it tends to support the purchase agreement. An exhibit normally does not require the signatures of the parties.

Some of the most commonly encountered exhibits are as follows:

- Copies of house plans
- Plot plans
- Surveys
- Legal descriptions

A good contract-writing practice is to specifically title the exhibit as to its nature. Exhibits may also be titled alphabetically or numerically.

■ **FOR EXAMPLE** An exhibit used for the purpose of containing the legal description of the property is too lengthy to fit into the space provided in the preprinted purchase agreement. It would be most appropriately titled Legal Description Exhibit. It could also be titled Exhibit A or Exhibit I. An exhibit should always be referred to in the purchase agreement by its title. When referring to an exhibit, such as a Legal Description Exhibit, on the purchase agreement, the verbiage used should be similar to “see Legal Description Exhibit attached hereto.”

By making the referral in this manner, confusion and difficulty in identifying the exhibit is minimized.

Exhibits should always be attached to the purchase agreement.

Addendum

An **addendum** is a document containing contractual material that is additional to the contractual material contained in the purchase agreement. (*See* RANM Form 5101.)

An addendum should be used when there is not sufficient space in the purchase agreement for the insertion of all the details of agreement between the parties.

Contract law dictates that all details of an agreement be put into writing and be legible for the contract to be fully enforceable.

An addendum should be properly titled to reflect its purpose. An addendum used for a specific purpose, such as for the expression of the parties’ agreement concerning the payment of closing costs, should be titled Closing Costs Addendum.

An addendum used to express multiple, nonrelated items of agreement between the parties should be titled General Addendum.

An addendum should be incorporated into the purchase agreement by specific reference.

Amendment

An **amendment** is a document containing contractual material which has been agreed upon after the creation, acceptance, acknowledgment, and deliverance of the original agreement between the parties. An amendment should always be used when events subsequent to the original agreement alter that agreement.

Commonly Used Amendments

Waivers, Objections, and Resolutions The waivers, objections, and resolutions form should be utilized for the parties to waive, or put in writing that the parties are satisfied, or even to agree to resolve inspection reports or documents that were negotiated within the purchase agreement no later than the dates that were identified and agreed upon by the parties.

Extension agreements -Some circumstances might require the extension of specific dates called for in an executory purchase agreement, such as the following:

- Closing date—when it becomes apparent that a transaction will not close on the closing date specified in the contract, and the parties are in agreement to extend.
- Proration date—if the closing date is extended, normally the proration date will also require extension, or if the parties agree to a proration date other than the specified closing date.
- Possession date—if the closing date is extended, normally the possession date will also require extension, or if the parties decide on early or carry-over occupancy after the purchase agreement has been fully signed.

Should these dates require extension, the broker should obtain a signed extension agreement amending the original agreement of the parties. (*See* RANM Form 5104.) This should be done in a timely manner. It must be done before the expiration of the date of closing expressed in the original purchase agreement.

Extension agreements may provide space for an explanation of the extension.

An extension agreement should contain language stating that all other terms and conditions of the original purchase agreement remain the same.

An extension agreement is contractual in nature because it amends the original agreement of the parties.

It should be signed by all parties to the original agreement and legible copies should be given to the signing parties when they sign.

The original extension agreement should be attached to the original purchase agreement.

Termination agreement -Occasionally a party to an executory purchase agreement may wish to terminate the agreement. On such occasions, the broker should prepare a written termination agreement.

Termination agreements are considered amendments because they amend the original agreement between the parties. (*See* RANM Form 5105.) Like other amendments, tie-to language is necessary.

Some termination agreements also provide space to insert the agreed sale/purchase price and the names of the broker(s) and associate broker(s) involved in the transaction.

Termination agreements often contain provisions for agreement between the parties in two major areas:

- Provisions to terminate the purchase agreement
- Provisions for the disbursement of the earnest deposit

Provisions to terminate The provisions to terminate found in many termination agreements contain preprinted verbiage that, when accepted by all parties, declares the original purchase agreement null and void and relieves all parties, including brokers, from further obligation and responsibility. (*See* RANM Form 5105.)

Parties should be advised to seek legal counsel before signing this type of agreement because they may be forfeiting all rights to any earnest money deposit and pursuit of specific performance.

All parties signing the original purchase agreement must sign the provision to terminate.

Space may also be provided to include reason(s) for termination. Brokers should take care not to misstate reasons. The actual reason should be clearly written and fully disclosed.

Provisions to disburse earnest deposit -Termination agreements may also provide for the disbursement of the earnest deposit. This section is usually in the form of an account balance sheet, showing the amount of the deposit, nature and amounts of any expenses, and disbursements with check numbers and names of disbursees.

When enumerating expenses, the broker should include the amounts that will be paid to the seller and retained by the purchaser.

Termination agreements are contractual in nature, and must be signed by all parties to the original purchase agreement. (*See* RANM Form 5105b.)

Copies of the termination agreement must be given to all parties signing it at the time they sign. The original should be attached to the original purchase agreement.

Occupancy agreements -Occupancy coupled with sale always requires a written occupancy agreement.

The need for an occupancy agreement automatically arises when the occupancy date differs from the funding date on the purchase agreement. When this occurs, tenancy is created. The New Mexico Real Estate Commission requires that all tenancy arrangements be in writing.

Occupancy agreements can be either addenda or amendments, as follows:

- The agreement is an addendum if it is signed at the same time as the purchase agreement.
- The agreement would be an amendment if it were created and signed subsequent to the signing of the purchase agreement.

Occupancy can be either

- purchaser's occupancy, wherein the purchaser of the property occupies prior to funding (*see* RANM Form 2201), or
- seller's occupancy, wherein the seller remains in occupancy after funding (*see* RANM Form 2202).

When either of these arises, the broker should complete the appropriate occupancy agreement between the parties.

Purchaser's occupancy agreements should never be used in a lease/purchase or lease/option situation. In such situations, the broker should use a document appropriate to the specific type of transaction.

APPENDIX

UNIFORM LICENSING ACT

1-1. Short title

Sections 61-1-1 through 61-1-31 NMSA 1978 may be cited as the "Uniform Licensing Act".

61-1-2. Definitions

As used in the Uniform Licensing Act:

A. "board" means:

- (1) the construction industries commission, the construction industries division and the electrical bureau, mechanical bureau and general construction bureau of the construction industries division of the regulation and licensing department;
- (2) the manufactured housing committee and manufactured housing division of the regulation and licensing department;
- (3) a board, commission or agency that administers a profession or occupation licensed pursuant to Chapter 61 NMSA 1978; and
- (4) any other state agency to which the Uniform Licensing Act is applied by law;

B. "applicant" means a person who has applied for a license;

C. "license" means a certificate, permit or other authorization to engage in each of the professions and occupations regulated by the boards enumerated in Subsection A of this section;

D. "revoke a license" means to prohibit the conduct authorized by the license;

E. "suspend a license" means to prohibit, for a stated period of time, the conduct authorized by the license. "Suspend a license" also means to allow, for a stated period of time, the conduct authorized by the license, subject to conditions that are reasonably related to the grounds for suspension; and

F. "emergency" includes any man-made or natural disaster causing or threatening widespread physical or economic harm that is beyond local control and requires the resources of the state.

61-1-3. Opportunity for licensee or applicant to have hearing

Every licensee or applicant shall be afforded notice and an opportunity to be heard, before the board has authority to take any action which would result in:

A. denial of permission to take an examination for licensing for which application has been properly made as required by board rule;

B. denial of a license after examination for any cause other than failure to pass an examination;

C. denial of a license for which application has been properly made as required by board rule on the basis of reciprocity or endorsement or acceptance of a national certificate of qualification;

D. withholding the renewal of a license for any cause other than:

- (1) failure to pay the required renewal fee;
- (2) failure to meet continuing education requirements; or
- (3) issuance of a temporary license extension if authorized by statute;

E. suspension of a license;

F. revocation of a license;

G. restrictions or limitations on the scope of a practice;

H. the requirement that the applicant complete a program of remedial education or treatment;

I. monitoring of the practice by a supervisor approved by the board;

J. the censure or reprimand of the licensee or applicant;

K. compliance with conditions of probation or suspension for a specific period of time;

L. payment of a fine for a violation not to exceed one thousand dollars (\$1,000) for each violation, unless a greater amount is provided by law;

M. corrective action, as specified by the board; or

N. a refund to the consumer of fees that were billed to and collected from the consumer by the licensee.

61-1-3.1. Limitations

A. An action that would have any of the effects specified in Subsections D through N of Section 61-1-3 NMSA 1978 or an action related to unlicensed activity shall not be initiated by a board later than two years after the discovery by the board of the conduct that would be the basis for the action, except as provided in Subsection C of this section.

B. The time limitation contained in Subsection A of this section shall be tolled by any civil or criminal litigation in which the licensee or applicant is a party arising from substantially the same facts, conduct or transactions that would be the basis for the board's action.

C. The New Mexico state board of psychologist examiners shall not initiate an action that would result in any of the actions specified in Subsections D through N of Section 61-1-3 NMSA 1978 later than five years after the conduct of the psychologist or psychologist associate that is the basis for the action. However, if the conduct that is the basis for the action involves a minor or a person adjudicated incompetent, the action shall be initiated, in the case of a minor, no later than one year after the minor's eighteenth birthday or five years after the conduct, whichever is last and, in the case of a person adjudicated incompetent, one year after the adjudication of incompetence is terminated or five years after the conduct, whichever is last.

D. The New Mexico public accountancy board shall not initiate an action under the 1999 Public Accountancy Act that would result in any of the actions specified in Subsections D through N of Section 61-1-3 NMSA 1978 later than two years following the discovery by the board of a violation of that act.

61-1-3.2. Unlicensed activity; disciplinary proceedings; civil penalty

A. A person who is not licensed to engage in a profession or occupation regulated by a board is subject to disciplinary proceedings by the board.

B. A board may impose a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against a person who, without a license, engages in a profession or occupation regulated by the board. In addition, the board may assess the person for administrative costs, including investigative costs and the cost of conducting a hearing.

61-1-4. Notice of contemplated board action; request for hearing; notice of hearing

A. For the purpose of investigating complaints against licensees, the board may issue investigative subpoenas prior to the issuance of a notice of contemplated action as provided in this section.

B. When a board contemplates taking any action of a type specified in Subsection A, B or C of Section 61-1-3 NMSA 1978, it shall serve upon the applicant a written notice containing a statement:

(1) that the applicant has failed to satisfy the board of his qualifications to be examined or to be issued a license, as the case may be;

(2) indicating in what respects the applicant has failed to satisfy the board;

(3) that the applicant may secure a hearing before the board by depositing in the mail within twenty days after service of the notice a certified return receipt requested letter addressed to the board and containing a request for a hearing; and

(4) calling the applicant's attention to his rights under Section 61-1-8 NMSA 1978.

C. In any board proceeding to take any action of a type specified in Subsection A, B or C of Section 61-1-3 NMSA 1978, the burden of satisfying the board of the applicant's qualifications shall be upon the applicant.

D. When a board contemplates taking any action of a type specified in Subsections D through N of Section 61-1-3 NMSA 1978, it shall serve upon the licensee a written notice containing a statement:

(1) that the board has sufficient evidence that, if not rebutted or explained, will justify the board in taking the contemplated action;

(2) indicating the general nature of the evidence;

(3) that unless the licensee within twenty days after service of the notice deposits in the mail a certified return receipt requested letter addressed to the board and containing a request for a hearing, the board will take the contemplated action; and

(4) calling the licensee's attention to his rights as provided in Section 61-1-8 NMSA 1978.

E. If the licensee or applicant does not mail a request for a hearing within the time and in the manner required by this section, the board may take the action contemplated in the notice and such action shall be final and not subject to judicial review.

F. If the licensee or applicant does mail a request for a hearing as required by this section, the board shall, within twenty days of receipt of the request, notify the licensee or applicant of the time and place of hearing, the name of the person who shall conduct the hearing for the board and the statutes and regulations authorizing the board to take the contemplated action. The hearing shall be held not more than sixty nor less than fifteen days from the date of service of the notice of hearing.

G. Licensees shall bear all costs of disciplinary proceedings unless they are excused by the board from paying all or part of the fees or if they prevail at the hearing and an action specified in Section 61-1-3 NMSA 1978 is not taken by the board.

61-1-5. Method of service

Any notice required to be served by Section 61-1-4 or 61-1-21 NMSA 1978 and any decision required to be served by Section 61-1-14 or 61-1-21 NMSA 1978, may be served either personally or by certified mail, return receipt requested, directed to the licensee or applicant at his last known address as shown by the records of the board. If the notice or decision is served personally, service shall be made in the same manner as is provided for service by the Rules of Civil Procedure for the District Courts. Where the notice or decision is served by certified mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery or the last attempted delivery of the notice or decision to the addressee or refusal of the addressee to accept delivery of the notice or decision.

61-1-6. Venue of hearing

Board hearings held under the Uniform Licensing Act shall be conducted in the county in which the person whose license is involved maintains his residence, or at the election of the board, in any county in which the act or acts complained of occurred; except that, in cases involving initial licensing, hearings shall be held in the county where the board maintains its office. In any case, however, the person whose license is involved and the board may agree that the hearing is to be held in some other county.

61-1-13. Decision

A. After a hearing has been completed, the members of the board shall proceed to consider the case and as soon as practicable shall render their decision, provided that the decision shall be rendered by a quorum of the board. In cases in which the hearing is conducted by a hearing officer, all members who were not present throughout the hearing shall familiarize themselves with the record, including the hearing officer's report, before participating in the decision. In cases in which the hearing is conducted by the board, all members who were not present throughout the hearing shall thoroughly familiarize themselves with the entire record, including all evidence taken at the hearing, before participating in the decision.

B. A decision based on the hearing shall be made by a quorum of the board and signed by the person designated by the board within sixty days after the completion of the preparation of the record or submission of a hearing officer's report, whichever is later. In any case, the decision must be rendered and signed within ninety days after the hearing.

TIME SHARE ACT

ARTICLE 11- TIME SHARES

RELATING TO TIME SHARES; PROVIDING FOR LICENSING AND REGULATING OF SALES. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

47-11-1. Short Title.

This act [47-11-1 to 47-11-13 NMSA 1978] may be cited as the “New Mexico Time Share Act.”

47-11-2. Definitions.

As used in the New Mexico Time Share Act:

A. “commission” means the New Mexico real estate commission;

B. “developer” means any person creating or engaged in the business of selling ten or more of its own time shares and includes any person who controls, is controlled by or is in common control with the developer and who is engaged in creating or selling time shares for the developed;

C. “enrolled” means having a paid membership in an exchange program or a membership in an exchange program evidenced by written acceptance or confirmation of membership;

D. “exchange company” means any person operating an exchange program;

E. “exchange program” means any opportunity or procedure for the assignment or exchange of time shares among purchasers in the same or another time share project;

F. “managing agent” means a person who undertakes the duties, responsibilities and obligations of the management of a time share program;

G. “Person” means one or more natural persons, corporations, partnerships, associations, trusts, other entities or any combination thereof;

H. “purchaser” means any persons, other than a developer or lender, who owns or acquires an interest or proposes to acquire an interest in a time share.

I. “timeshare” means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with a freehold estate or an estate for years in a time share project or a specified portion thereof, including, but not limited to, a vacation license, prepaid hotel reservation, club membership, limited partnership interest or vacation bond;

J. “time share program” means any arrangement for time shares whereby real property has been made subject to a time share;

K. “time share project” means any real property that is subject to a time share program;

L. “time share salesperson” means a person, other than a person who has at least a fifteen percent interest in the developer, who sells or offers to sell on behalf of a developer a time share to a purchaser; and

M. "time share unit" or "unit" means a living space in a time share project that is divided into time shares and designed for separate occupancy or use.

47-11-2.1 Registration required of time share projects; real estate salesperson license required.

A. It shall be unlawful for any person in this state to engage or attempt to engage in the business of a time shares salesperson without first obtaining a real estate broker or salesperson license issued by the New Mexico real estate commission under the provisions of Section 61-29-1 NMSA 1978.

B. It shall be unlawful for a time share developer to sell or offer to sell time shares located in this state without first obtaining a certificate of registration for the time share project to be offered for sale issued by the New Mexico real estate commission under the provisions of the New Mexico Time Share Act.

47-11-3. Time shares deemed real estate; partition.

A. A time share is deemed to be an interest in real estate and shall be governed by the law of this state relating to real estate.

B. A purchaser of a time share may, in accordance with Section 14-9-1 NMSA 1978, record the instrument by which he acquired his interest and upon such recordation shall be entitled to the protection provided by Section 14-9-2 NMSA 1978 for the recordation of other real property instruments.

C. A document transferring or encumbering a time share shall not be rejected for recordation because of the nature or duration of that estate, provided all other requirements necessary to make an instrument recordable are complied with.

D. When a time share is owned by two or more persons as tenants in common or as joint tenants, either may seek a partition by sale of that interest but no purchaser of a time share may maintain an action for partition from the time share project of the unit in which such time share is held.

47-11-4. Disclosure statement.

Each developer shall fully and conspicuously disclose to each purchaser in a disclosure statement at least the following information:

A. the total financial obligation of the purchaser, including the initial purchase price and any additional charges to which the purchaser may be subject;

B. any person who has or may have the right to alter, amend or add to charges to which the purchaser may be subject and the terms and conditions under which such charges may be imposed;

C. the nature and duration of each agreement between the developer and the person managing the time share program or its facilities;

D. the date of availability of each amenity and facility of the time share program which is not completed at the time of sale of a time share;

E. the specific term of the time share;

F. the purchaser's right to cancel within seven days of execution of the contract and how that right may be exercised under the New Mexico Time Share Act; and

G.a statement that under New Mexico law an instrument conveying a time share must be recorded in the office of the clerk of the county where the real property is located to protect that interest.

47-11-5. Purchaser's right to cancel; escrow; violation.

A.A developer shall, before conveyance of a time share and not later than the execution of any contract of sale, provide a purchaser with a copy of a disclosure statement containing the information required by the New Mexico Time Share Act. The contract of sale is voidable by the purchaser within seven days after execution of the contract of sale. The contract shall conspicuously disclose the purchaser's right to cancel under this subsection and how that right may be exercised. An instrument transferring a time share shall not be recorded until seven days after the execution of the contract of sale.

B.A purchaser may elect to cancel within the time period set out in Subsection A of this section by hand-delivering or by mailing notice to the developer or to his agent for service of process. Cancellation under this section is without penalty and upon receipt of the notice all payments made prior to cancellation shall be refunded within thirty days.

C.Any payments received by a time share developer or real estate licensee in connection with the sale of a time share shall be handled in accordance with Subsections E, H and I of Section 61-29-12 NMSA 1978 and applicable rules and regulations of the commission. These payments shall be held in such manner until:

- (1)delivered to the developer at closing;
- (2)delivered to the developer because of the purchaser's default under a contract of sale; or
- (3)refunded to purchase.

D.The commission may waive the requirements of Subsection C of this section for a time share project if:

- (1)the time share developer submits to the commission information sufficient to allow the commission to determine the total cost of completing the time share project; and
- (2)the time share developer delivers to the commission a performance bond, with a surety acceptable to the commission, in an amount sufficient to complete the time share project. If the developer does not complete the project, the commission may use funds received from the bond to complete the project.

47-11-6. Prizes

An advertisement or promotion of a time share which includes the offer of a prize or other inducement shall fully comply with the provisions of the Unfair Practices Act.

47-11-7. Time share proxy.

No proxy, power of attorney or similar device given by the purchaser of a time share regarding the management of the time share program or its facilities shall exceed one year in duration, but the same may be renewed from year to year.

47-11-8. Exchange programs.

A.If a purchaser is offered the opportunity to subscribe to an exchange program, the developer shall, except as provided in Subsection C of this section, deliver to the purchaser, prior to the execution of the sales contract or any contract between the purchaser and the exchange company, at least the following information regarding such exchange program:

- (1)the name and address of the exchange company;
- (2)the names of all officers, directors and share holders owning five percent or more of the outstanding stock of the exchange company;
- (3)whether the exchange company or any of its officers or directors has any legal or beneficial interest in any developer or managing agent for any time share project participating in the exchange program and, if so, the name and location of the time share project and the nature of the interest;
- (4)unless the exchange company is also the developer, a statement that the purchaser's contract with the exchange company is a contract separate and distinct from the sales contract;
- (5)whether the purchaser's participation in the exchange program is dependent upon the continued affiliation of the time share project with the exchange program;
- (6)whether the purchaser's membership or participation, or both, in the exchange program is voluntary or mandatory;
- (7)a complete and accurate description of the terms and conditions of the purchaser's contractual relationship with the exchange company and the procedure by which changes thereto may be made;
- (8)a complete and accurate description of the procedure to qualify for and effectuate exchanges;
- (9)a complete and accurate description, expressed in boldface type, of all imitations, restrictions or priorities employed in the operation of the exchange program, including but not limited to limitations on exchanges based on seasonality, unit size or levels of occupancy and, in the event that such limitations, restrictions or priorities are not uniformly applied by the exchange program, a clear description of the manner in which they are applied;
- (10)whether exchanges are arranged on a space available basis and whether any guarantees of fulfillment of specific requests for exchanges are made by the exchange program;
- (11)whether and under what circumstances an owner, in dealing with the exchange company, may lose the use and occupancy of his time share in any properly applied-for exchange without substitute accommodations being provided or arranged for by the exchange company;

(12)the expenses, fees or range of fees for participation by owners in the exchange program, whether any such fees may be altered by the exchange company and the circumstances under which alterations may be made;

(13)the name and address of the site of each time share project or other property which is participating in the exchange program;

(14)the number of units in each project or other property participating in the exchange program which are available for occupancy and qualify for participation in the exchange program, expressed within the following numerical groupings, 1-5, 6-10, 11-20, 21-50 and 51 and over;

(15)the number of owners with respect to each time share project or other property which are eligible to participate in the exchange program expressed within the following numerical groupings, 1-100, 101-249, 250-499, 500-999 and 1,000 and over, and the criteria used to determine those owners who are currently eligible to participate in the exchange program;

(16)the disposition made by the exchange company of time shares deposited with the exchange program by owners eligible to participate in the exchange program and not used by the exchange company in effecting exchanges;

(17)the following information which, except as provided in Subparagraph (b) of this paragraph, shall be independently audited by a certified public accountant in accordance with the standards of the accounting standards board of the American institute of certified public accountants and reported for each year no later than July 1 of the succeeding year:

(a)the number of owners enrolled in the exchange program and the relationship between the exchange company and owners as being either fee paying or gratuitous in nature;

(b)the number of time share projects or other properties eligible to participate in the exchange program indicating those having a contractual relationship between the developer or the association and the exchange company and those having solely a contractual relationship between the exchange company and owners directly;

(c)the percentage of confirmed exchanges, which shall be the number of exchanges confirmed by the exchange company divided by the number of exchanges properly applied for, together with a complete and accurate statement of the criteria used to determine whether an exchange request was properly applied for;

(d)the number of time shares or other intervals for which the exchange company has an outstanding obligation to provide an exchange to an owner who relinquished a time share or interval during the year in exchange for a time share or interval in any future year; and

(e)the number of exchanges confirmed by the exchange company during the year; and

(18)a statement in boldfaced type to the effect that the percentage described in Subparagraph (c) of Paragraph (17) of this subsection is a summary of the exchanges properly applied for in the period reported and that the percentage does not indicate the likelihood of confirmation of a purchaser's specific choice or

range of choices, since availability at individual locations may vary. The developer shall obtain the purchaser's written certification of receipt of the information required by this subsection.

B.The information required by Paragraphs (2), (3), (13), (14), (15) and (17) of Subsection A of this section shall be accurate as of December 31 of the year preceding the year in which the information is delivered, except for information delivered within the first one hundred eighty days of any calendar year which shall be accurate as of December 31 of the year two years preceding the year in which the information is delivered to the purchaser. The remaining information required by Subsection A of this section shall be accurate as of a date which is no more than thirty days prior to the date on which the information is delivered to the purchaser.

C.In the event an exchange company offers an exchange program directly to the purchaser, the exchange company shall deliver to each purchaser, concurrently with the offering and prior to the execution of any contract between the purchaser and the exchange company, the information set forth in Subsection A of this section. The requirements of this subsection shall not apply to any renewal of a contract between a purchaser and an exchange company.

D.All promotional brochures, pamphlets, advertisements or other materials disseminated by the exchange company to purchasers in this state which contain the percentage of confirmed exchanges described in Subparagraph (c) of Paragraph (17) of Subsection A of this section must include the statement set forth in Paragraph (18) of Subsection A of this section.

47-11-9. Service of process on exchange company.

Any exchange company offering an exchange program to a purchaser shall be deemed to have made an irrevocable appointment of the commission to receive service of lawful process in any proceeding against the exchange company arising under the New Mexico Time Share Act.

47-11-10. Securities laws apply.

The Securities Act of New Mexico shall apply to time shares deemed to be investment contracts or to other securities offered with or incident to a time share.

Application for registration of time share project; denial of registration; renewal; reinstatement; termination of developer's interest.

A.Prior to the offering in this state of any time share located in this state, the developer of the time share project shall make written application to the commission for the registration of the project. The application shall be accompanied by a fee in an amount fixed by the commission, based upon the number of time shares to be offered for sale, but not to exceed one thousand five hundred dollars (\$1,500). The application shall include a description of the project, copies of proposed time share instruments including disclosure statements, sale contracts and deeds, information pertaining to any marketing or managing entity to be employed by the developer for the sale of time shares in the time share project or for the management of the project, information regarding any exchange program available to the purchaser, an irrevocable appointment of

the commission to receive service of any lawful process in any proceeding against the developer or the developer's salespersons arising under the New Mexico Time Share Act and any other information or documentation required by the commission. Upon receipt of a properly completed application and fee and upon a determination by the commission that the sale and management of the time shares in the time share project will be directed and conducted by persons of good moral character, the commission shall issue to the developer a certificate of registration authorizing the developer to offer time shares in the project for sale. The commission shall, within fifteen days after receipt of an incomplete application, notify the developer by mail that the commission has found deficiencies, which shall be specified in the notice, and shall, within forty-five days after the receipt of a properly completed application, either issue the certificate of registration or notify the developer by mail of any specific objections to the registration of the project. The certificate shall be prominently displayed in the office of the developer on the site of the project. The developer shall promptly report to the commission any and all changes in the information required to be submitted for the purpose of the registration. The developer shall also immediately furnish the commission complete information regarding any change in its interest in a registered time share project. In the event a developer disposes of or otherwise terminates its interest in a time share project, the developer shall certify to the commission in writing that its interest in the time share project is terminated and shall return the certificate of registration to the commission for cancellation.

B. In the event the commission finds that there is substantial reason to deny the application for registration as a time share project, the commission shall notify the applicant that such application has been denied and shall afford the applicant an opportunity for a hearing before the commission to show cause why the application should not be denied. The provisions of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978] shall apply in all proceedings to deny a certificate of registration.

C. The acceptance by the commission of an application for registration shall not constitute the approval of its contents or waive the authority of the commission to take disciplinary action as provided by the New Mexico Time Share Act.

Register of applicants; roster of registrants; registered projects; financial report to secretary of state.

A. The executive secretary of the commission shall keep a register of all applicants for certificates of registration, showing for each the date of application, name, business address and whether the certificate was granted or refused.

B. The executive secretary of the commission shall also keep a current roster showing the name and address of all time share projects registered with the commission. The roster shall be kept on file in the office of the commission and be open to public inspection.

C. On or before the first day of September of each year, the commission shall file with the secretary of state a copy of the roster of time share projects registered with the commission and a report containing a complete statement of income received by the commission in connection with the registration of time share

projects for the preceding fiscal year ending June 30 attested by the affidavit of the executive secretary of the commission.

47-11-11.2. Disciplinary action by commission.

A. The commission shall have power to take disciplinary action, upon its own motion, or on the verified complaint of any person, the commission may investigate the actions of any time share broker or salesperson or any developer of a time share project registered under the New Mexico Time Share Act or any other person or entity who shall assume to act in such capacity. If the commission finds probable cause that a time share broker, salesperson or developer has violated any of the provisions of this act, the commission may hold a hearing on the allegations of misconduct. All such hearings shall be conducted in accordance with the provisions of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978].

The commission shall have power to suspend or revoke a real estate license issued to a time share broker or salesperson, suspend or revoke a certificate of registration of a time share project issued, reprimand or censure such broker, salesperson or developer, or fine such developer in the amount of five hundred dollars (\$500) for each violation of the New Mexico Time Share Act, if, after a hearing, the commission adjudges that broker, salesperson or developer to be guilty of:

- (1) making any willful or negligent misrepresentation or any willful or negligent omission of material fact about any time share or time share project;
- (2) making any false promise of a character likely to influence, persuade or induce;
- (3) pursuing a course of misrepresentation or making of false promises through agents, salespersons, advertising or otherwise;
- (4) failing, within a reasonable time, to account for all money received from others in a time share transaction and failing to remit such money as may be required in Section 6 [47-11-5 NMSA 1978] of the New Mexico Time Share Act;
- (5) paying a commission, salary or other valuable consideration to any person for acts or services performed in violation of the New Mexico Time Share Act;
- (6) any other conduct which constitutes improper, fraudulent or dishonest dealing;
- (7) performing or undertaking to perform the practice of law as set forth in Section 36-2-27 NMSA 1978;
- (8) failing to deposit and maintain in a trust or escrow account in an insured bank or savings and loan association in New Mexico all money received from others in a time share transaction as may be required in Section 6 [47-11-5 NMSA 1978] of the New Mexico Time Share Act;
- (9) failing to deliver to a purchaser a disclosure statement containing the information required by Section 5 [47-11-4 NMSA 1978] of the New Mexico Time Share Act and any other disclosures that the commission may be regulation require;
- (10) failing to comply with the provisions of Section 7 [47-11-6 NMSA 1978] of this act in the advertising or promotion of time shares for sale or failing to assure such compliance by persons engaged on behalf of a developer;

(11)failing to comply with the provisions of Section 9 [47-11-8 NMSA 1978] of this act in furnishing complete and accurate information to a purchaser concerning any exchange program which may be offered to such purchaser; or

(12)making any false or fraudulent representation on an application for registration.

B.Following a hearing, the commission shall also have power to suspend or revoke any certificate of registration issued under the provisions of the New Mexico Time Share Act or to reprimand or censure any developer when the registrant has been convicted or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this state, or any other state, of any felony or any one or more of the criminal offenses of embezzlement, obtaining money under false pretense, fraud, forgery, conspiracy to defraud or other offense involving moral turpitude which would reasonably affect the developer's performance in the time share business.

C.The commission may appear in its own name in district court in actions for injunctive relief to prevent any person or entity from violating the provisions of the New Mexico Time Share Act or rules promulgated by the commission. The district court shall have the power to grant an injunction even if criminal prosecution has been or may be instituted as a result of the violations and regardless of whether the person or entity has been registered by the commission.

D.Each developer shall maintain or cause to be maintained complete records of every time share transaction including records pertaining to the deposit, maintenance and withdrawal of money required to be held in a trust or escrow account pursuant to Section 6 [47-11-5 NMSA 1978] or the New Mexico Time Share Act, or as otherwise required by the commission. The commission may inspect these records periodically without prior notice and may also inspect these records whenever the commission determines that they are pertinent to an investigation of any specific complaint against a time share project.

E.Nothing the New Mexico Time share Act precludes any enforcement authority provided pursuant to the Unfair Practices Act or other enforcement authority provided by law.

47-11-12. Private enforcement.

The provisions of the New Mexico Time Share Act shall not be construed to limit in any manner the right of a purchaser or other person injured by a violation of the New Mexico Time Share Act to bring a private action.

47-11-13. Release of liens.

A.Prior to the recordation of any instrument transferring a time share, the developer shall record or furnish to the purchaser a release of all liens affecting that time share or shall provide a surety bond or insurance against the lien from a company acceptable to the commission as provided for liens on real estate in this state, and such underlying lien document shall contain a provision wherein the lien holder subordinates its rights to that of a time share purchaser who fully complies with all of the provisions and terms of the contract of sale.

B.Unless a time share purchaser or a time share purchaser's predecessor in title has agreed otherwise with the lienholder, if a lien other than a mortgage or deed

of trust becomes effective against more than one time share in a time share project, any time share purchaser is entitled to a release of his time share from a lien upon payment of the amount of the lien attributable to his time share. The amount of the payment shall be proportionate to the ratio that the time share purchaser's liability bears to the liabilities of all time share purchasers whose interests are subject to the lien. Upon receipt of payment, the lien holder shall promptly deliver to the time share purchaser a release of the lien covering that time share. After payment, the managing agent may not assess or have a lien against that time share for any portion of the expenses incurred in connection with that lien.