

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 An Act to amend and reenact § 55.1-321 of the Code of Virginia, relating to foreclosure procedures;
3 subordinate mortgage; affidavit required.

4 [H 184]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**

7 **1. That § 55.1-321 of the Code of Virginia is amended and reenacted as follows:**

8 **§ 55.1-321. Notices required before sale by trustee to owners, lienors, etc.; if note lost.**

9 A. In addition to the advertisement required by § 55.1-322, the trustee or the party secured shall give
10 written notice of the time, date, and place of any proposed sale in execution of a deed of trust, and such
11 notice shall include either (i) the instrument number or deed book and page numbers of the instrument
12 of appointment filed pursuant to § 55.1-320, or (ii) a copy of the executed and notarized appointment of
13 substitute trustee by personal delivery or by mail to (a) the present owner of the property to be sold at
14 his last known address as such owner and address appear in the records of the party secured; (b) any
15 subordinate lienholder who holds a note against the property secured by a deed of trust recorded at least
16 75 days, in the case of a deed of trust conveying owner-occupied residential real estate, or 30 days, in
17 the case of all other deeds of trust, prior to the proposed sale and whose address is recorded with the
18 deed of trust; (c) any assignee of such a note secured by a deed of trust, provided that the assignment
19 and address of assignee are likewise recorded at least 75 days, in the case of a deed of trust conveying
20 owner-occupied residential real estate, or 30 days, in the case of all other deeds of trust, prior to the
21 proposed sale; (d) any condominium unit owners' association that has filed a lien pursuant to
22 § 55.1-1966; (e) any property owners' association that has filed a lien pursuant to § 55.1-1833; and (f)
23 any proprietary lessees' association that has filed a lien pursuant to § 55.1-2148. Written notice shall be
24 given pursuant to clauses (d), (e), and (f) only if the lien is recorded at least 75 days, in the case of a
25 deed of trust conveying owner-occupied residential real estate, or 30 days, in the case of all other deeds
26 of trust, prior to the proposed sale. If the secured party has received notification that the owner of the
27 property to be sold is deceased, the notice required by clause (a) shall be given to (1) the last known
28 address of such owner as such address appears in the records of the party secured; (2) any personal
29 representative of the deceased's estate whose appointment is recorded among the records of the circuit
30 court where the property is located, at the address of the personal representative that appears in such
31 records; and (3) any heirs of the deceased who are listed on the list of heirs recorded among the records
32 of the circuit court where the property is located, at the addresses of the heirs that appear in such
33 records. Mailing of a copy of the advertisement or a notice containing the same information to the
34 owner by certified or registered mail no less than 60 days prior to such sale, in the case of a deed of
35 trust conveying owner-occupied residential real estate, or 14 days prior to such sale, in the case of all
36 other deeds of trust, and to lienholders, the property owners' association or proprietary lessees'
37 association, their assigns, and the condominium unit owners' association, at the address noted in the
38 memorandum of lien, by ordinary mail no less than 60 days prior to such sale, in the case of a deed of
39 trust conveying owner-occupied residential real estate, or 14 days prior to such sale, in the case of all
40 other deeds of trust, shall be a sufficient compliance with the requirement of notice. The written notice
41 of proposed sale when given as provided in this subsection shall be deemed an effective exercise of any
42 right of acceleration contained in such deed of trust or otherwise possessed by the party secured relative
43 to the indebtedness secured. The inadvertent failure to give notice as required by this subsection shall
44 not impose liability on either the trustee or the secured party. The foreclosure sale cannot go forward
45 unless the trustee has proof that the notice has been sent.

46 *A1. If the proposed sale is initiated due to a default in payment under a security instrument that (i)*
47 *was, at the time it was recorded, subordinate to another security interest encumbering the same real*
48 *property and (ii) has not subsequently been elevated to a first priority lien by a recorded voluntary*
49 *subordination agreement, such subordinate mortgage lienholder shall submit to the trustee an affidavit*
50 *affirming whether monthly statements were sent to the property owner for each period that any interest,*
51 *fees, or other charges were assessed. No such interest, fees, or other charges shall be assessed or*
52 *charged for any period during which periodic statements were not sent unless the subordinate mortgage*
53 *lienholder identifies a specific exemption pursuant to applicable law for which such subordinate*
54 *mortgage lienholder was not required to send such specific statements for any period of time*
55 *enumerated in the affidavit. Such affidavit shall also include an itemized list of the current amount*
56 *owed, including any periods in which interest, fees, and other charges were waived because no monthly*

57 statements were sent during such period. The subordinate mortgage lienholder shall provide a copy of
58 such affidavit to the person required to pay the instrument with written notice that a request for sale
59 shall be made of the trustee upon the expiration of 60 days from the day of mailing such notice. Such
60 notice shall be sent by certified mail, return receipt requested, to the last known mailing address of such
61 person required to pay the instrument. Such notice shall advise the person required to pay the
62 instrument that if such person believes that such interest, fees, or other charges have been assessed in
63 error, such person may, prior to the sale, petition the circuit court of the city or county where such
64 property or some part thereof lies for an accounting and order declaring the proper balance secured by
65 the subordinate mortgage. If the court determines that charges were assessed in error, such person shall
66 be entitled to recover attorney fees and costs against the subordinate mortgage lienholder. The
67 provisions of this subsection shall not apply to subordinate lienholders who are either (a) the original
68 creditor, (b) a mortgage servicer acting on behalf of the original creditor, (c) a national or state
69 chartered bank, or (d) a federal or state chartered credit union.

70 A2. Any purchaser at a foreclosure sale shall provide certification that such purchaser shall pay off
71 any priority security instruments no later than 90 days from the date that the trustee's deed conveying
72 the property pursuant to such sale is recorded in the land records. The person originally required to
73 pay the instrument shall have the right to petition the circuit court of the city or county where the
74 property or some part thereof lies to recover from the purchaser any payments toward such priority lien
75 amounts made by such person required to pay the instrument after the date of the foreclosure sale, plus
76 any attorney fees and costs.

77 B. If a note or other evidence of indebtedness secured by a deed of trust is lost or for any reason
78 cannot be produced and the beneficiary submits to the trustee an affidavit to that effect, the trustee may
79 nonetheless proceed to sale, provided that the beneficiary has given written notice to the person required
80 to pay the instrument that the instrument is unavailable and a request for sale will be made of the
81 trustee upon expiration of 60 days from the date of mailing of the notice, in the case of a deed of trust
82 conveying owner-occupied residential real estate, or 14 days from the date of mailing of the notice, in
83 the case of all other deeds of trust. The notice shall be sent by certified mail, return receipt requested, to
84 the last known address of the person required to pay the instrument as reflected in the records of the
85 beneficiary and shall include the name and mailing address of the trustee. The notice shall further advise
86 the person required to pay the instrument that if he believes he may be subject to a claim by a person
87 other than the beneficiary to enforce the instrument, he may petition the circuit court of the county or
88 city where the property or some part thereof lies for an order requiring the beneficiary to provide
89 adequate protection against any such claim. If deemed appropriate by the court, the court may condition
90 the sale on a finding that the person required to pay the instrument is adequately protected against loss
91 that might occur by reason of a claim by another person to enforce the instrument. Adequate protection
92 may be provided by any reasonable means. If the trustee proceeds to sale, the fact that the instrument is
93 lost or cannot be produced shall not affect the authority of the trustee to sell or the validity of the sale.

94 C. When the written notice of proposed sale is given as provided in this section, there is a rebuttable
95 presumption that the lienholder has complied with any requirement to provide notice of default
96 contained in a deed of trust. Failure to comply with the requirements of notice contained in this section
97 shall not affect the validity of the sale, and a purchaser for value at such sale shall be under no duty to
98 ascertain whether such notice was validly given.

99 D. In the event of postponement of sale, which may be done in the discretion of the trustee, no new
100 or additional notice is required to be given pursuant to this section.

101 E. In the case of a deed of trust conveying owner-occupied residential real estate, the notice to the
102 owner in subsections A and B shall include the website address of the U.S. Housing and Urban
103 Development's (HUD) Office of Housing Counseling with a listing of HUD-certified housing counseling
104 agencies, the website address and telephone number of the statewide legal aid center, and the following
105 language, or language that is substantially similar, in at least 12-point type: "This is NOT a notice to
106 vacate the premises. You should consider contacting an attorney or your local legal aid or housing
107 counseling agency."

108 F. In the case of a deed of trust conveying owner-occupied residential real estate, the notice to the
109 owner in subsections A and B shall include the date of the last payment received and the amount
110 received; the total amount of principal, interest, costs, and fees due in arrears; and the remaining total
111 principal balance due on the instrument.