REPORT OF THE
VIRGINIA CODE COMMISSION ON

The Revision of Chapters 1 and 2 of Title 13.1 Of The Code of Virginia

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

House Document No. 13

COMMONWEALTH OF VIRGINIA
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Report of the

Virginia Code Commission

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To

The Governor and the General Assembly of Virginia

Richmond, Virginia

January, 1985

To The Honorable Charles S Robb,

Governor of Virginia

and

The General Assembly of Virginia

House Joint Resolution No. 3 of the 1983 Acts of Assembly directed the Virginia Code Commission to make a careful study of Chapters 1 and 2 of Title 13.1 of the Code of Virginia and report its findings in the form of a revision of such chapters to the Governor and General Assembly Pursuant to such mandate, the study has been completed and a revision of those chapters is included in this report.

The study resolution was initially brought to the attention of the 1983 General Assembly by Mr. Speaker Philpott and Delegate Morrison who were both interested in *The 1983 Revised Model Business Corporation Act* that was being proposed by The Committee on Corporate Laws of the American Bar Association's Section of Corporation, Banking and Business Law The Virginia study pursuant to House Joint Resolution No 3 was continued from 1983 to 1984 in order to allow the Code Commission and interested parties the opportunity to review additional changes that were being made by the American Bar Association to its model bill

Mr Allen C Goolsby, III, Esq served as the chief draftsman of the revision of the Stock Corporation Act and was advised by Mr George B Gibson, Esq. and Mr John W Riely, Esq, all three of whom are with the Richmond law firm of Hunton and Williams C William Cramme', III, Esq., Senior Attorney with the Division of Legislative Services, provided the staff support for this project, assisted Mr Goolsby in his drafting and drafted the revision to the Virginia Non-Stock Act. Joan W Smith, of the Division provided administrative and technical support

Those responsible for preparing the drafts were assisted by representatives of the following the State Corporation Commission, the Virginia State Bar and the Virginia Bar Association Mr F Claiborne Johnston, Jr, Esq, Mr Stephen R Larson, Esq, and Mr Thomas C Brown, Jr., Esq., representing the bar associations, assisted the Commission in its efforts These representives and many others regularly attended Commission meetings and further advised the Commission Copies of proposed chapter drafts were liberally distributed to and comments requested from, the groups and individuals having substantial interest in the corporation laws of the Commonwealth

The revision of Chapters 1 and 2 of Title 13 1 of the Code of Virginia, which was referred to as the "Virginia Draft" throughout the Commission's meetings in order to distinguish the revision from current law, follows this text as Appendix 1 While the Virginia Draft represents a complete rewrite of the Stock Corporation Act with conforming amendments to the Non-Stock Corporation Act, the principal changes include

1 The adoption of a statutory standard of conduct for directors

2 A new article requiring a special shareholder vote for significant transactions between a corporation and any holder of more than ten percent of its voting shares unless the transaction has been approved by an independent board of directors or the other shareholders will receive a "fair price" for their shares

3. For corporations with more than thirty five shareholders only the Chairman of the Board, the President and the Board of Directors may call a special meeting of the shareholders unless the articles of incorporation or bylaws provide otherwise For closely held corporations, the holders of twenty percent of the outstanding shares may call a special meeting unless otherwise provided in the articles of incorporation

4 For major corporate transactions the affirmative vote of more than two-thirds of the outstanding shares will still be required A corporation will have the authority to amend to articles of incorporation to reduce the required vote to any level which shall not be less than a simple majority of those present and entitled to vote at a meeting at which a quorum exists

5 A corporation will be allowed to provide in its articles of incorporation that directors may be removed only for cause

6 Par value, stated capital, capital surplus and treasury shares are some of the traditional concepts that are eliminated

7 The role of the Clerk of the State Corporation Commission is essentially unchanged and the limited review of any order entered by the Commission will remain entact

8 Approval by the shareholders of the surviving corporation in a merger will no longer be required if the increase in the number of outstanding voting shares is less than twenty percent.

9. In a derivative suit the court will have statutory authority to appoint a committee of two or more disinterested directors or other disinterested persons to determine whether continuation of the suit is in the best interest of the corporations On the basis of the committee's report the court may elect to dismiss the proceeding

Cross-reference tables follow the Virginia Draft, appearing as Appendix 2 to this report, and indicate the equivalent sections in the proposed new chapters of Title 13.1 to those in present chapters 1 and 2 of Title 13.1 and vice versa

Because the concept of par value was eliminated by the Virginia Draft, changes in Title 58 1 were necessary. Traditionally, charter, entrance and annual registration fees and annual franchise taxes of stock corporations had been based on the amount of maximum authorized capitol stock The Virginia Draft changes that concept and bases those fees and taxes on number of authorized shares of a stock corporation This change necessitated amendments to Chapter 28 of Title 58 1 of the Code of Virginia and those changes are reflected in a separate draft which appears in Appendix 3 of this report

The last attachment to this report, Appendix 4, is the Virginia Bar Association's and the Virginia State Bar's comments to the Virginia Code Commission's proposed revision of the Virginia Stock Corporation Act The Code Commission has included this joint bar committee review of the proposed revision without comment

The Virginia Code Commission recommends that the General Assembly enact legislation at the 1985 Session to effect this revision

Respectfully submitted,

Theodore V Morrison, Jr., Chairman

Dudley J Emick, Jr , Vice-Chairman

John A. Banks, Jr., Secretary

William G Broaddus

Russell M Carneal

James P Jones

John Wingo Knowles

A. L. Philpott

CONCURRING OPINION OF SENATOR

DUDLEY J EMICK, JR.

I concur in the adoption of this report, but abstain from the recommendations dealing with (i) directors' responsibilities, and (ii) the corporate franchise tax changes made in Chapter 28 of Title 58.1.

I am not satisfied that the changes in these two areas as recommended are in the public's best interest. Regarding the tax changes, I am not convinced that the revenues collected will remain the same. The innovative lawyers, acting in their corporate client's best interest, will prove to be a critical element, and I believe that there will be a revenue decrease both in the general fund and the special funds under which the State Corporation Commission operates. Further, I am not convinced that the State Corporation Commission will not raise its fees next year.

APPENDIX 1

Title 13.1 Draft

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 12.1-20 and 12 1-43 of the Code of Virginia, to amend the Code of Virginia by adding in Title 13.1 a chapter numbered 9, consisting of articles numbered 1 through 21, containing sections numbered 13.1-601 through 13.1-800, a chapter numbered 10, consisting of articles numbered 1 through 15, containing sections numbered 13 1-801 through 13.1-980 and a chapter numbered 11, consisting of sections numbered 13.1-981 through 13.1-998, and by adding a section numbered 56-249.7, and to repeal Chapter 1 of Title 13 1 of the Code of Virginia, consisting of articles numbered 1 through 14, containing sections numbered 13.1-1 through 13.1-200, and Chapter 2 of Title 13.1 of the Code of Virginia, consisting of articles numbered 1 through 11, containing sections numbered 13.1-201 through 13.1-300, all relating to the revision of the Virginia Stock and Nonstock Corporation Acts, penalties

Be it enacted by the General Assembly of Virginia:

1. That §§ 12 1-20 and 12.1-43 of the Code of Virginia are amended and reenacted, that the Code of Virginia is amended by adding in Title 13 1 a chapter numbered 9, consisting of articles numbered 1 through 21, containing sections numbered 13.1-601 through 13.1-800, a chapter numbered 10, consisting of articles numbered 1 through 15, containing sections numbered 13.1-801 through 13.1-980 and a chapter numbered 11, consisting of sections numbered 13.1-981 through 13.1-998, and by adding a section numbered 56-249.7 as follows:

§ 12 1-20 Facts to be certified by clerk upon request, signing and sealing; fees.—The clerk of the Commission shall, when requested, certify any one or more of the following facts:

(1) That a named domestic corporation is organized and existing under and by virtue of the laws of Virginia and is in good standing. ~~By "in good standing" is meant that the corporation has paid all registration fees and franchise taxes due from it and that an annual report delivered by it to the Commission has been filed by the Commission.~~

(2) That a named foreign corporation of a named state is authorized to do business in Virginia.

(3) That a named domestic corporation has ~~been dissolved~~ *terminated its corporate existence*, together with the date of ~~dissolution~~ *termination* and the reason for the ~~dissolution~~ *termination*

(4) That a named domestic corporation has filed ~~statement of intent to dissolve~~ *articles of dissolution*, together with the date thereof, and whether or not voluntary dissolution proceedings have been revoked

(5) That a named domestic corporation ~~that~~ *whose corporate existence* was automatically ~~dissolved~~ *terminated* has been reinstated, together with the dates thereof

(6) That a named foreign corporation of a named state is not authorized to do business in Virginia, and, if it was previously authorized to do business in Virginia, the date when it ceased to be so authorized, and the reason therefor

(7) That a name alleged or supposed to be the name of a corporation is not the name of a domestic corporation or of a foreign corporation authorized to do business in Virginia

(8) The names and addresses of the officers and directors of a corporation contained in its annual report of a particular date

(9) The name and address of the registered agent and registered office of a corporation, together with the date of his appointment.

(10) The name and address of a former registered agent and registered office of a corporation, together with the date of his appointment and the date when the corporation filed a

statement appointing a new registered agent

(11) That a particular security has or has not been registered for sale in Virginia pursuant to the provisions of the Securities Act

(12) That a statement or other document required or permitted by law to be filed in the office of the clerk of the Commission has not been filed in his office

(13) The existence or nonexistence of any other fact appearing from the official records of the Commission, unless the disclosure of such fact is forbidden by law

The certificate shall be signed by the clerk or the first assistant clerk or an assistant clerk and shall be sealed with the seal of the Commission When so sealed, the certificate shall be admitted in evidence in all cases, civil and criminal, as prima facie evidence of the facts contained in it

Except as otherwise provided in § 12 1-21 ~~below~~ , the clerk shall charge and collect a fee of six dollars for each certificate If a certificate requires more than two pages, there shall be an additional fee of two dollars for each page in excess of two

§ 12.1-43 Tax assessments, report forms and correspondence mailed by Commission deemed delivered; resignation of registered agent.--Tax assessments, report forms and correspondence directed to a corporation and mailed by the Commission by first-class mail addressed to the registered agent of the corporation at its registered office shall be deemed to have been delivered to the corporation

~~The registered agent of a corporation who notifies it and the Commission in writing that he resigns effective as of a specific date shall not be liable to the corporation for damages resulting from his failure to forward process or other papers after said date. In the absence of acceptance in writing by the corporation, the effective date of such registration shall not be less than thirty days from the date of the mailing by first class registered or certified mail, or delivery in person, of such notice to the president, vice president or secretary, of the corporation and to the Commission.~~ *If the corporation has no registered agent, such mailing shall be deemed to have been delivered to the corporation when mailed by the Commission by first-class mail addressed to, or delivered in person to, the president, vice-president or secretary of the corporation* The names and addresses of such officers on record with the Commission shall be conclusive for the purposes of this section

CHAPTER 9

VIRGINIA STOCK CORPORATION ACT

Article 1

General Provisions

§ 13 1-601 Short title.--This chapter shall be known as the Virginia Stock Corporation Act

Comment This section has been taken from Virginia Code § 13 1-1 It is substantially similar to Model Act § 1.01 The Model Act has one law for business corporations and another for nonprofit corporations The Virginia Code and the Virginia Draft have one law for stock corporations and another for corporations that are not authorized to issue shares

§ 13 1-602 Reservation of power to amend or repeal.--The General Assembly shall have power to amend or repeal all or part of this Act at any time and all domestic and foreign corporations subject to this Act shall be governed by the amendment or repeal

Comment. This provision has been taken from Model Act § 1 02 with minor language changes It is similar to Virginia Code § 13.1-129

§ 13.1-603 Definitions--In this chapter

"Articles of incorporation" means all documents constituting, at any particular time, the charter of a corporation It includes the original charter issued by the General Assembly, a court or the Commission and all amendments including certificates of merger, except a certificate of merger with a subsidiary pursuant to § 13 1-719, consolidation, serial designation, reduction or correction It excludes articles of exchange filed by an acquiring corporation When the articles of incorporation have been restated pursuant to any articles of amendment or merger, it includes only the restated articles of incorporation, including any articles of serial designation, without the accompanying articles of amendment or merger

"Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue

"Certificate," when relating to articles filed with the Commission, means the order of the Commission that makes the articles effective, together with the articles.

"Commission" means the State Corporation Commission of Virginia

"Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous

"Corporation" or "domestic corporation" means a corporation authorized by law to issue shares, irrespective of the nature of the business to be transacted, organized under this Act or existing pursuant to the laws of this Commonwealth on January 1, 1986, or merged with a corporation of this Commonwealth in such manner as thereby to become a domestic corporation of this Commonwealth, even though also remaining a corporation of another state or states

"Deliver" includes mail

"Distribution" means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares A distribution may be in the form of a declaration or payment of a dividend, a purchase, redemption, or other acquisition of shares, a distribution of indebtedness of the corporation, or otherwise.

"Effective date of notice" is defined in § 13 1-610

"Employee" includes an officer but not a director A director may accept duties that make him also an employee

"Entity" includes corporation and foreign corporation, nonstock corporation, profit and not-for-profit unincorporated association, business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest, and state, United States and foreign government

"Foreign corporation" means a corporation authorized by law to issue shares, organized under laws other than the laws of this Commonwealth

"Government subdivision" includes authority, county, district, and municipality

"Includes" denotes a partial definition

"Individual" includes the estate of an incompetent or deceased individual

"Means" denotes an exhaustive definition

"Notice" is defined in § 13 1-610

"Person" includes individual and entity

"Principal office" means the office, in or out of this Commonwealth, where the principal executive offices of a domestic or foreign corporation are located, or, if there are no such offices, the office, in or out of this Commonwealth, so designated by the board of directors The designation of the principal office in the most recent annual report filed pursuant to § 13.1-775 shall be conclusive for purposes of this chapter

"Proceeding" includes civil suit and criminal, administrative, and investigatory action conducted by a governmental agency.

"Record date" means the date established under Article 7 (§ 13.1-638 et seq.) or Article 8 (§ 13 1-654 et seq) of this chapter on which a corporation determines the identity of its shareholders for purposes of this chapter

"Share" means the unit into which the proprietary interests in a corporation are divided

"Shareholder" means the person in whose name shares are registered in the records of the corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation

"State" when referring to a part of the United States, includes a state and commonwealth, and their agencies and governmental subdivisions, and a territory and insular possession, and their agencies and governmental subdivisions, of the United States

"Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

"United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

"Voting group" means all shares of one or more classes or series that under the articles or incorporation or this chapter are entitled to vote and be counted together collectively on a matter at a meeting of shareholders All shares entitled by the articles of incorporation or this chapter to vote generally on the matter are for that purpose a single voting group

Comment. There are four terms in this section that have been defined in both Virginia Code § 13.1-2 and Model Act § 1 40. With regard to these four terms, the Virginia Draft adopts the Virginia Code definition of "corporation or domestic corporation," "foreign corporation" and "articles of incorporation" with minor changes. It adopts the Model Act definition of "subscriber," which differs from the Virginia Code version in form only The Model Act definition of "principal office" has been modified to provide for corporations that do not have executive offices, such as a name-holding corporation. The Model Act definition of the term "secretary" has been deleted. In contrast to the Model Act, the Virginia Draft requires a corporation to have a president and a secretary Because of the change, retention of the Model Act definition would create an inconsistency in the Virginia Draft.

While articles of consolidation, articles of reduction and articles of serial designation will not be used after the Virginia Draft is enacted, the articles of incorporation will include certificates of consolidation, reduction and serial designation issued prior to the effective date

The Virginia Draft does not adopt the following definitions found in the Virginia Code § 13.1-2(f) - treasury shares; § 13.1-2(g) - stated capital, § 13.1-2(h) - surplus, § 13 1-2(i) - earned surplus, § 13.1-2(j) - capital surplus; § 13.1-2(k) - insolvent.

§ 13.1-604. Filing requirements—A A document shall satisfy the requirements of this section, and of any other section that adds to or varies these requirements, to be entitled to be filed with the Commission

B The document shall be one that this chapter requires or permits to be filed with the Commission

C. The document shall contain the information required by this chapter It may contain other information as well

D The document shall be typewritten or printed The typewritten or printed portion shall be in black. Manually signed photocopies, or other reproduced copies, of typewritten or printed

documents may be filed

E The document shall be in the English language A corporate name need not be in English if written in English letters or Arabic or Roman numerals The articles of incorporation, duly authenticated by the official having custody of corporate records in the state or country under whose law the corporation is incorporated, which are required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation

F The document shall be executed in the name of the corporation.

1 By the chairman or any vice chairman of the board of directors, the president or any vice president,

2 If directors have not been selected or the corporation has not been formed, by an incorporator, or

3 If the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary

G Notwithstanding subsection F of this section, any annual report required to be filed by § 13.1-775 may be executed in the name of the corporation by any officer or director listed in such report

H The person executing the document shall sign it and state beneath or opposite his signature his name and the capacity in which he signs The document may but need not contain the corporate seal, an attestation by the secretary or an assistant secretary, and an acknowledgement, verification, or proof.

I If, pursuant to any provision of this chapter, the Commission has prescribed a mandatory form for the document, the document shall be in or on the prescribed form

J The document shall be delivered to the Commission for filing and shall be accompanied by the required filing fee, and any franchise tax, charter or entrance fee or registration fee required by this chapter or by Chapter 28 (§ 58 1-2800 et seq) of Title 58.1

Comment Subsections A-F, H and I have been taken from Model Act § 1.20 with minor changes including a change in subsection F to allow only specified corporate officers to execute documents. Subsection G provides greater flexibility to the corporation than the Model Act or Virginia Code § 13.1-120 Subsection J is taken from the Virginia Code

§ 13.1-605 Issuance of certificate by Commission, recordation of documents—A Whenever this chapter conditions the effectiveness of a document upon the issuance of a certificate by the Commission to evidence the effectiveness of the document, the Commission shall by order issue the certificate if it finds that the document complies with the requirements of law and that all required fees and franchise taxes have been paid The Commission shall admit any such certificate to record in its office and shall forward the certificate for recordation in the office for the recording of deeds in the city or county in which is located the registered office of each corporation that is a party to the document, except that no such further recordation shall be required in the City of Richmond or the County of Henrico

B Whenever the Commission is directed to admit any document to record in its office, it shall cause it to be spread upon its record books or to be reproduced in microfilm or in any other manner the Commission may deem suitable The Commission shall reproduce and sell, upon request, an entire roll of microfilm containing public records, documents, instruments and papers, or facsimiles thereof, copies of which could otherwise be obtained from the clerk of the Commission, and shall prescribe, charge and collect a reasonable and uniform fee for each roll, however, such fee shall not exceed the approximate actual cost connected with processing the request and reproducing the roll of microfilm

Comment. This section combines the provisions throughout the Virginia Code relating to the issuance of various types of certificates by the Commission See, e g., §§ 13 1-59, 13 1-61, 13.1-73 and 13.1-90 It is more efficient to cover all types of certificates in one section There do not appear to be any substantive reasons not to do so

Section 1.25 of the Model Act makes the Secretary of State's duty to file documents a ministerial

task This concept has not been adopted in the Virginia Draft.

§ 13 1-606 Effective time and date of document—A A certificate issued by the Commission is effective at the time such certificate is issued, unless the certificate relates to articles filed with the Commission and the articles state that the certificate shall become effective at a later time and date specified in the articles In that event the certificate shall become effective at the time and date so specified, so long as the effective date is not more than fifteen days after the date on which the certificate is issued by the Commission Any other document filed with the Commission shall be effective when accepted for filing unless otherwise provided for in this chapter

B Notwithstanding subsection A of this section, any certificate that has a delayed effective time and date shall not become effective if, prior to the effective time and date, the parties to the articles to which the certificate relates file a request for cancellation with the Commission and the Commission, by order, cancels the certificate

C Notwithstanding subsection A of this section, for purposes of §§ 13 1-630 and 13 1-762 any certificate that has a delayed effective date shall be deemed to be effective when the certificate is issued

Comment This section of the Virginia Draft is new but contains concepts found in Model Act § 1.23 and the Virginia Code The Virginia Draft follows the Virginia Code in making most documents effective upon issuance of the appropriate certificate by the Commission This procedure gives the Commission greater authority than is contemplated by the Model Act, which makes documents effective upon filing Such broad discretion increases the burden imposed on the clerk and his staff The discretionary authority of the Commission is necessary if orders of the Commission are to have the finality contemplated by § 13 1-614.

The Virginia Draft follows Model Act § 1 23 in providing for a delayed effective date, but reduces the maximum delay from 90 days to 15 days

For a certificate with a delayed effective date, subsection B establishes a procedure for cancelling the certificate between the date of issuance and the effective date Subsection C makes clear that for purposes of determining whether a corporate name is available, the date of issuance of a certificate shall be controlling even if the articles provide for a delayed effective date

§ 13 1-607. Correcting filed articles.— A The Board of Directors of a domestic or foreign corporation may authorize correction of any articles filed with the Commission if the articles (i) contain an incorrect statement or (ii) were defectively executed, attested, sealed, verified, or acknowledged.

B. Articles are corrected.

1. By preparing articles of correction that describe the articles to be corrected, including their effective date, and that correct the incorrect statement or defective execution, and

2. By filing the articles of correction with the Commission

C Upon the issuance of a certificate of correction by the Commission, the articles of correction shall become effective as of the effective date of the articles they correct except as to persons relying on the uncorrected articles and adversely affected by the correction As to those persons, articles of correction are effective upon the issuance of the certificate of correction

D No articles of correction shall be accepted by the Commission when received more than nine days after the effective date of the certificate relating to the articles to be corrected

Comment The Virginia Draft adopts Model Act § 1.24 with the addition of subsection D, which has been added to make this section consistent with § 13.1-614 The Virginia Code does not contain a provision similar to this section

§ 13 1-608 Evidentiary effect of copy of filed document—A certificate attached to a copy of any document admitted to the records of the Commission, bearing the signature of the clerk or an assistant clerk of the Commission and the seal of the Commission, is conclusive evidence that the document has been admitted to the records of the Commission

Comment This section has been taken from Model Act § 1.27 with minor language changes There is no comparable provision in the Virginia Code.

§ 13.1-609 Certificate of good standing.—A. Anyone may apply to the Commission to furnish a certificate of good standing for a domestic or foreign corporation

B. The certificate shall state that the corporation is in good standing in this Commonwealth and shall set forth.

1 The domestic corporation's corporate name or the foreign corporation's corporate name used in this Commonwealth,

2 That (i) the domestic corporation is duly incorporated under the law of this Commonwealth, the date of its incorporation, and the period of its duration if less than perpetual, or that (ii) the foreign corporation is authorized to transact business in this Commonwealth, and

3 If requested, a list of all certificates relating to articles filed with the Commission that have been issued by the Commission with respect to such corporation and their respective effective dates

C A domestic corporation or a foreign corporation authorized to transact business in this Commonwealth shall be deemed to be in good standing if.

1 All registration fees and franchise taxes owed to this Commonwealth have been paid, if payment is required to be reflected in the records of the Commission,

2. An annual report required by § 13.1-775 has been delivered to and accepted by the Commission within the preceding fourteen months, and

3 No certificate of dissolution or certificate of withdrawal has been issued or such certificate no longer is in effect.

D. The certificate may state any other facts of record in the office of the clerk of the Commission that may be requested by the applicant

E. Subject to any qualification stated in the certificate, a certificate of good standing issued by the Commission may be relied upon as conclusive evidence that the domestic or foreign corporation is in good standing in this Commonwealth

Comment: The Virginia Draft is similar to Model Act § 1.28, but the Model Act calls the certificate a certificate of existence if the corporation is domestic and a certificate of authorization if the corporation is foreign.

Virginia Code § 12.1-20 is similar to the Virginia Draft.

§ 13 1-610 Notice.—For purposes of this chapter

A. Notice shall be in writing except that oral notice of any meeting of the board of directors may be given if expressly authorized by the articles of incorporation or bylaws

B Notice may be communicated in person, by telephone, telegraph, teletype, or other form of wire or wireless communication, or by mail or private carrier If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where the notice is intended to be given, or by radio, television or other form of public broadcast communication

C. Written notice by a domestic or foreign corporation to its shareholder, if in a comprehensible form, is effective when mailed, if mailed postpaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders

D. Written notice to a domestic or foreign corporation, authorized to transact business in this Commonwealth, may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report or, in

the case of a foreign corporation that has not yet filed an annual report, in its application for a certificate of authority

E Except as provided in subsections B and C of this section, written notice, if in a comprehensible form, is effective at the earliest of the following

1 When received,

2 Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed,

3 On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee

F Oral notice is effective when communicated if communicated in a comprehensible manner

G When this chapter prescribes notice requirements for particular circumstances, those requirements govern If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this chapter, those requirements govern

Comment. This section has been taken from Model Act § 1 41 except that oral notice is not permitted except as provided in subsection A The Model Act permits oral notice whenever it is "reasonable under the circumstances" The Virginia Code does not attempt to define effective notice in a single statute

§ 13 1-611 Number of shareholders—A For purposes of this chapter, the following identified as a shareholder in a corporation's current record of shareholders constitutes one shareholder:

1 Two or more co-owners,

2 A corporation, partnership, trust estate, or other entity, or

3 The trustees, guardians, custodians, or other fiduciaries of a single trust, estate, or account

B For purposes of this chapter, shareholdings registered in substantially similar names constitute one shareholder if it is reasonable to believe that the names represent the same person

Comment This section is taken from Model Act § 1 42 with a change in paragraph 1 of subsection A. The Model Act treats three or fewer co-owners as a single shareholder This section is new to the Virginia Code Under §§ 13 1-655A2, 13 1-727A2 and 13.1-730A2, it may be necessary to determine the number of shareholders that a corporation has

§ 13 1-612. Penalty for signing false documents—A It shall be unlawful for any person to sign a document he knows is false in any material respect with intent that the document be delivered to the Commission for filing

B Anyone who violates the provisions of this section shall be guilty of a Class 1 misdemeanor

Comment Model Act § 1 29 has been adopted in this section of the Virginia Draft rather than Virginia Code § 13 1-134 Under the Virginia Code, signing a document delivered to the Commission knowing it to contain a "misstatement of fact" constitutes perjury

§ 13-613 Unlawful to transact or offer to transact business as a corporation unless authorized—It shall be unlawful for any person to transact business in this Commonwealth as a corporation or to offer or advertise to transact business in this Commonwealth as a corporation unless the alleged corporation is either a domestic corporation or a foreign corporation authorized to transact business in this Commonwealth Any person who violates this section shall be guilty of a Class 1 misdemeanor

Comment This section adopts Virginia Code § 13 1-135 with minor changes

§ 13.1-614 Rehearing and finality of Commission action, injunctions—A The Commission

shall have no power to grant a rehearing with respect to any certificate issued by the Commission with respect to any articles filed with the Commission except on a petition by a shareholder filed with the Commission and the corporation within ten days after the effective date of the certificate, in which the shareholder asserts that the certification of corporate action contained in the articles contains a misstatement of a material fact as to compliance with statutory requirements, specifying the particulars thereof After hearing, on notice in writing to the corporation and the shareholder, the Commission shall determine the issues and revoke or refuse to revoke its order accordingly

B No court within or without this Commonwealth shall have jurisdiction to enjoin or delay the holding of any meeting of directors or shareholders for the purpose of authorizing or consummating any amendment, merger, exchange or dissolution or the execution or filing with the Commission of any articles or other documents for such purpose, except pursuant to subsection C of § 13.1-661 or for fraud. No court within or without this Commonwealth, except the Supreme Court by way of appeal as authorized by law, shall have jurisdiction to review, reverse, correct or annul any action of the Commission, within the scope of its authority, with regard to any articles, certificate, order, objection or petition, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties.

Comment The Virginia Draft adopts Virginia Code § 13.1-125 with minor language changes

Section 1.26 of the Model Act, which gives a circuit court broad authority to review action by the Secretary of State, is in conflict with the Virginia Code, and is not included in the Virginia Draft.

The following Model Act section has not been adopted in the Virginia Draft

§ 1.21–Forms This provision allows the Secretary of State to prescribe and furnish forms for specific documents that may be filed under the Model Act.

The Virginia Draft has adopted the approach used in the Virginia Code of providing for forms prescribed by the Commission on a section-by-section basis rather than consolidating this authorization in one general provision

Article 2

Fees

§ 13.1-615. Fees, taxes and charges to be collected by Commission–The Commission shall assess the registration fees and franchise taxes and shall charge and collect the charter fees and entrance fees imposed by law

Comment This section has been taken from Virginia Code § 13.1-122. There is no similar provision in the Model Act.

§ 13 1-616 Fees for filing documents or issuing certificates–The Commission shall charge and collect the following fees.

A For filing any one of the following, the fee shall be ten dollars

1. Articles of incorporation

2. Articles of amendment or restatement

3. Articles of merger or share exchange

4. Articles of correction

5. An application to reserve a corporate name

6. A notice of transfer of a reserved corporate name

7. Articles of dissolution

8. Articles of revocation of dissolution.

9 Articles of termination of corporate existence

10 An application of a foreign corporation for a certificate of authority to transact business in this Commonwealth

11 An application of a foreign corporation for an amended certificate of authority to transact business in this Commonwealth

12 A statement of withdrawal of a foreign corporation

13 An application for use of an indistinguishable name

B For issuing a certificate of change of name the fee shall be five dollars.

C For filing a statement of change of address of registered office or change of registered agent or both the fee shall be five dollars. Except in the case of the City of Richmond or the County of Henrico, the Commission, in respect of domestic corporations, shall collect and remit to the clerk of the court for the recording of deeds in the city or county in which the registered office is located an additional fee of five dollars If the location of the registered office is changed from one city or county to another the Commission shall collect and remit fees of five dollars for each of the clerks to which it is required to give notice.

D A domestic or a foreign corporation that (i) has failed to comply with § 13.1-634 or § 13 1-763, and (ii) has been sent a written notice by the Commission to file the statement required by § 13 1-635 or § 13.1-764, and (iii) delivers such statement to the Commission for filing more than thirty days after the notice was sent, but prior to the date of the Commission order of dissolution or of revocation of authority to transact business in this Commonwealth shall pay a filing fee of twenty-five dollars instead of the filing fee prescribed by the first sentence of subsection C of this section

E Whenever the Commission is required to admit any document to record in its office, it shall collect a fee of two dollars a page plus two dollars for the order of the Commission, or a fee of ten dollars, whichever is greater Whenever any such document shall also be recorded in the office of any clerk, the Commission shall collect and transmit to the clerk a fee in the same amount plus two dollars for the certification fee

Comment: This section is taken from Virginia Code §§ 13.1-123 and 13.1-124 1 with modifications to reflect changes in filing requirements in the Virginia Draft, including the addition of paragraphs 4, 9 and 13 of subsection A

§ 13 1-617 Miscellaneous charges--A The Commission shall charge and collect for furnishing a certified copy of any document, instrument or paper one dollar per page and three dollars for the certificate and affixing the seal thereto

B. The clerk of the Commission shall charge and collect at the time of any service of process on him with respect to any domestic or foreign corporation, thirty dollars, which amount may be recovered as taxable costs by the party to the suit or action causing such service to be made if such party prevails in the suit or action

C. For making up, certifying and transmitting a record on appeal the clerk shall charge and collect fifty dollars

Comment Virginia Code § 13 1-124 is the source of this provision The Virginia Code currently provides that the charge for preparing a record on appeal is one dollar per page for the papers to be copied in addition to the sum of fifty dollars After consultation with the clerk of the Commission, the one dollar per page charge has been eliminated. The Model Act addresses the subject of service and copying fees in § 1.22(b)-(c), but those subsections have not been adopted in the Virginia Draft

Article 3

§ 13 1-618 Incorporators.—One or more persons may act as incorporators of a corporation by signing and filing articles of incorporation with the Commission.

Comment This section adopts Virginia Code § 13.1-48 except that the Virginia Draft allows a corporation to act as an incorporator Model Act § 2 01 contains a substantially similar provision

§ 13.1-619 Articles of incorporation.—A The articles of incorporation must set forth.

1 A corporate name for the corporation that satisfies the requirements of § 13 1-630,

2 The number of shares the corporation is authorized to issue,

3 If more than one class of shares is authorized, the number of authorized shares of each class and a distinguishing designation for each class, and

4. The address of the corporation's initial registered office, including (i) the post office address with street and number, if any, and (ii) the name of the county or city in which it is located, and (iii) the name of its initial registered agent at that office, and that the registered agent meets the requirements of § 13.1-634

B The articles of incorporation may set forth:

1 The names and addresses of the individuals who are to serve as the initial directors,

2 Any provision defining or denying the preemptive right of shareholders to acquire unissued shares of the corporation;

3. Provisions not inconsistent with law

a Stating the purpose or purposes for which the corporation is organized,

b Regarding the management of the business and regulation of the affairs of the corporation;

c Defining, limiting, and regulating the powers of the corporation, its directors, and shareholders,

d Establishing a par value for authorized shares or classes of shares; and

4. Any provision that under this chapter is required or permitted to be set forth in the bylaws

C The articles of incorporation need not set forth any of the corporate powers enumerated in this chapter

Comment The Virginia Draft adopts Model Act § 2.02 with the following changes

1 Subsection A3 has been inserted to conform this section with the requirements of Virginia Draft § 13.1-638 (a),

2 The requirements in subsection A4 regarding registered office and registered agent have been conformed to Virginia Code § 13.1-49 (h) and 13.1-9 (b1),

3. Subsection B2, dealing with preemptive rights, is similar to Virginia Code § 13.1-49 (f) The treatment of preemptive rights in the Model Act is not adopted in the Virginia Draft, and

4. Model Act § 2.02 (b) (2) (v), which would permit the articles to impose personal liability on shareholders as specified in the articles, is not included in the Virginia Draft.

The Virginia Draft differs from Virginia Code § 13.1-49 by making discretionary some of the provisions that the Virginia Code requires to be set forth in the articles of incorporation. For example, the Virginia Draft makes it optional to include· (1) the names and addresses of the initial directors, (2) the purpose for which the corporation is organized, and (3) the par value of authorized shares or classes of shares

Subsections B3c and B4 are also new

§ 13 1-620 Special kinds of business—A If any corporation is to conduct the business of a bank or trust company, that shall be stated in the articles of incorporation and the corporation shall not have power to conduct other business except as may be related to or incidental to the banking or trust company business

B If any corporation is to conduct the business of an insurance company, that shall be stated in the articles of incorporation and the articles shall further set forth the class or classes of insurance the corporation proposes to undertake and the corporation shall not have power to conduct other business except as may be related to or incidental to the insurance business

C If any corporation is to conduct the business of a savings and loan association or an industrial loan association, that shall be stated in the articles of incorporation and the corporation shall not have power to conduct other business except as may be related to or incidental to the stated business

D If any corporation is to conduct the business of a railroad or other public service company, that shall be stated in the articles of incorporation and a brief description of the business shall be included Otherwise the corporation shall not have the power to conduct a public service business or to exercise any of the privileges of a public service company No corporation shall be organized under this chapter for the purpose of conducting in this Commonwealth more than one kind of public service business except that the telephone and telegraph businesses or the water and sewer businesses may be combined, but this provision shall not limit the powers of domestic corporations existing on January 1, 1986 No corporation organized under this chapter to conduct the business of a public service company shall have general business powers in this Commonwealth Corporations organized under this chapter to conduct the business of a public service company may, however, conduct in this Commonwealth other public service business or nonpublic service business so far as may be related to or incidental to its stated business as a public service company and in any other state such business as may be authorized or permitted by the laws thereof Nothing in this paragraph shall limit the powers of such corporation in respect of the securities of other corporations

E. If one or more of the purposes set forth in the articles of incorporation is to own, manage or control any plant or equipment or any part of a plant or equipment within the Commonwealth for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, power or water, including heated or chilled water, or sewerage facilities, either directly or indirectly, to or for the public, the Commission shall not issue a certificate of incorporation unless the articles of incorporation expressly state that the corporation is to conduct business as a public service company.

F. Whether or not classified elsewhere in the Code as public service companies the following businesses are not required to incorporate as public service companies household goods carriers, petroleum tank truck carriers, bottled gas companies, taxicab companies, community television companies, charter party carriers, restricted parcel carriers and sight-seeing carriers

G. A water or sewer company that proposes to serve more than fifty customers shall incorporate as a public service company A water or sewer company shall not serve more than fifty customers unless its articles of incorporation state that the corporation is to conduct business as a public service company The two preceding sentences shall not apply to a water or sewer company incorporated before and operating a water or sewer system on January 1, 1970, however, as to any water or sewer system serving more than fifty customers, upon application to the Commission by a majority of the customers or by the company, a hearing may be held after thirty days' notice to the company and the system's customers or a majority thereof, and the Commission may order such, if any, improvements or rate changes or both as are just and reasonable Upon ordering into effect any rate changes or improvements found to be just and reasonable, the water or sewer system shall remain subject to the Commission's regulatory authority in the same manner as a public utility for such reasonable period as the Commission may direct

Comment: This section has been taken from Virginia Code § 13 1-50 and has not been modified There is no comparable section in the Model Act

§ 13 1-621 Issuance of certificate of incorporation –If the Commission finds that the articles of incorporation comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of incorporation When the certificate of incorporation is effective, the corporate existence shall begin Upon becoming effective, the certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter

Comment Virginia Code §§ 13.1-51 and 13.1-52 have been followed in this section

The Virginia Draft and Model Act § 2 03 differ in the following ways

1 The Virginia Draft makes corporate existence begin when the certificate of incorporation is effective The Model Act makes corporate existence begin when the articles of incorporation are filed, and

2 The Model Act limits the effect of the clause making filing conclusive proof by stating that this clause does not apply "in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation" This exception is not contained in the Virginia Draft

§ 13 1-622 Liability for preincorporation transactions –All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting except for any liability to any person who also knew that there was no incorporation

Comment The Virginia Draft follows Model Act § 2.04 with the addition of the exception for persons who also knew that there was no incorporation There is no comparable Virginia Code provision

§ 13.1-623 Organization of corporation –A. After incorporation.

1 If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting, or

2 If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incoporators.

a To elect a board of directors and complete the organization of the corporation, or

b To elect directors who shall complete the organization of the corporation

B Action required or permitted by this Act to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator

C An organizational meeting may be held in or out of this Commonwealth

Comment The Virgina Draft follows Model Act § 2.05

The Virginia Draft differs from Virginia Code § 13 1-54 in the following ways

1 Va. Code § 13.1-54 requires three days' notice by mail to initial directors while § 13.1-675 of the Virginia Draft provides that the individual's consent to election is required in every case; and

2 The Virginia Draft allows an organizational meeting of the incorporators if initial directors have not been named The Virginia Code has no comparable provision

§ 13 1-624 Bylaws –A The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation

B The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation

Comment The Virginia Draft has adopted § 2 06 of the Model Act without change

The Virginia Draft differs from Virginia Code § 13 1-24 by allowing incorporators to adopt initial bylaws

§ 13 1-625 Emergency bylaws –A. Unless the articles of incorporation provide otherwise, the

board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in subsection D of this section The emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all provisions necessary for managing the corporation during the emergency, including

1 Procedures for calling a meeting of the board of directors,

2 Quorum requirements for the meeting, and

3 Designation of additional or substitute directors

B All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency The emergency bylaws are not effective after the emergency ends

C Corporate action taken in good faith in accordance with the emergency bylaws

1 Binds the corporation, and

2. May not be used to impose liability on a corporate director, officer, employee, or agent

D An emergency exists for purposes of this section if a quorum of the corporation's board of directors cannot readily be assembled because of some catastrophic event

Comment: The Virginia Draft adopts § 2.07 of the Model Act. It differs from Virginia Code § 13.1-24.1 in the following ways

1. The Virginia Draft provides that directors may adopt emergency bylaws "unless the articles of incorporation provide otherwise" Virginia Code § 13.1-24.1 states that directors may adopt emergency bylaws "notwithstanding any different provision elsewhere in this title or in the articles of incorporation or bylaws"
2. The Virginia Draft adds the concept that an emergency exists if a quorum of the directors cannot be readily assembled because of some catastrophic event. The Virginia Code limits an emergency as an "attack on the United States or any nuclear or atomic disaster"
3. The listing of permissible provisions in the emergency bylaws is similar to Virginia Code § 13.1-24.1, but the Virginia Draft is a simpler and more flexible statute.

Article 4.

Purposes and Powers

§ 13.1-626 Purposes.–Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is (i) set forth in the articles of incorporation, or (ii) required to be set forth in the articles of incorporation by § 13.1-620, or any other law of this Commonwealth

Comment. The source of this section is § 3 01 of the Model Act. One substantive change has been made by adding subsection (ii)

Virginia Code § 13 1-49 (b) allows a corporation to state in its articles of incorporation that its purpose is to conduct "any or all lawful business" if the corporation's purpose is not "required to be specifically stated in the articles of incorporation."

§ 13.1-627 General powers.–A Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including, without limitation, power

1 To sue and be sued, complain and defend in its corporate name,

2 To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it,

3 To make and amend bylaws, not inconsistent with its articles of incorporation or with

the laws of this Commonwealth, for managing the business and regulating the affairs of the corporation,

4 To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located,

5 To sell, convey, mortgage, pledge lease, exchange, and otherwise dispose of all or any part of its property,

6 To purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of, and deal in and with shares or other interests in, or obligations of, any other entity,

7 To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the corporation, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income,

8 To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment,

9 To conduct its business, locate offices, and exercise the powers granted by this Act within or without this Commonwealth,

10 To elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit,

11 To pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, share purchase plans and benefit and incentive plans for any or all of the current or former directors, officers, employees, and agents of the corporation or any of its subsidiaries,

12 To make donations for the public welfare or for religious, charitable, scientific, literary or educational purposes, except that corporations subject to regulation as to rates by the Commission shall not have power to make donations in excess of five percent of net income computed before federal and state taxes on income and without taking into account any deduction for gifts,

13 To make payments or donations, or do any other act, not inconsistent with this section or any other applicable law, that furthers the business and affairs of the corporation,

14 To pay compensation, or to pay additional compensation, to any or all directors, officers and employees on account of services previously rendered to the corporation, whether or not an agreement to pay such compensation was made before such services were rendered,

15 To insure for its benefit the life of any of its directors, officers or employees, to insure the life of any shareholder for the purpose of acquiring at his death shares owned by such shareholder and to continue such insurance after the relationship terminates,

16 To cease its corporate activities and surrender its corporate franchise, and

17 To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized

B Each corporation other than a public service company, a banking corporation, an insurance corporation, a savings and loan association, a credit union or an industrial loan association shall have power to enter into partnership agreements, joint ventures, or other association of any kind with any person or persons The term "public service company" as used in this paragraph shall not apply to railroads, which shall have the power given other corporations generally by this paragraph The foregoing limitation on public service companies shall not apply to partnership agreements, joint ventures or other associations between gas

companies and gas companies or electric companies and electric companies where the purposes of such partnerships, joint ventures or other associations are found by the Commission to be in direct furtherance of the certificated business of such gas or electric companies and are otherwise found by the Commission to be in the public interest The foregoing limitation on public service companies shall not apply to partnership agreements, joint ventures or other associations between telephone companies and telephone companies, whether in corporate or other form, or between telephone companies and commonly owned affiliates of telephone companies for the purpose of providing domestic cellular radio telecommunication service

C Privileges and powers conferred and restrictions and requirements imposed by other titles of the Code on railroads or other public service companies, banking corporations, insurance corporations, savings and loan associations, credit unions, industrial loan associations or other special types of corporations, shall not be deemed repealed or amended by any provision of this Act except where specifically so provided

D Each corporation which is deemed a private foundation, as defined in § 509 of the Internal Revenue Code, unless its articles of incorporation expressly provide otherwise, shall distribute its income and, if necessary, principal, for each taxable year at such time and in such manner as not to subject such corporation to tax under § 4942 of the Internal Revenue Code Such corporation shall not engage in any act of self-dealing, as defined in § 4941 (d) of the Internal Revenue Code, retain any excess business holdings, as defined in § 4943 (c) of the Internal Revenue Code, make any investments in such manner as to give rise to liability for the tax imposed by § 4944 of the Internal Revenue Code or make any taxable expenditures, as defined in § 4945 (d) of the Internal Revenue Code This subsection shall apply to any corporation organized after December 31, 1969, under this chapter or under the Virginia Stock Corporation Act enacted by Chapter 428 of the 1956 Acts of General Assembly, and to any corporation organized before January 1, 1970, only for its taxable years beginning on and after January 1, 1972, unless the exceptions provided in § 508 (e) (2) (A) or (B) of the Internal Revenue Code shall apply or unless the board of directors of such corporation shall elect that such restrictions as contained in this subsection shall not apply by filing written notice of such election with the Attorney General and the clerk of the Commission on or before December 31, 1971 Each reference to a section of the Internal Revenue Code made in this paragraph shall include future amendments to such Code sections and corresponding provisions of future internal revenue laws

Comment. The Virginia Draft adopts portions of Model Act § 3 02 and Virginia Code § 13 1-2.1 Model Act § 3 02 has been revised in the Virginia Draft in the following ways

1. In paragraph 11 of subsection A the Virginia Draft adds "share purchase plans." This phrase was taken from the Virginia Code
2. In paragraph 12 of subsection A the limit set on permissible donations by corporations subject to regulation as to rates by the Commission is taken from Virginia Code § 13 1-2 1 (m) and is not found in the Model Act
3. Paragraph 15 of subsection A of the Model Act has been deleted as an unnecessary provision. It provides corporations with power "to transact any lawful business that will aid governmental policy."

Provisions which are found in the Model Act but not in the Virginia Code and which have been adopted in the Virginia Draft include

1. The first subsection of this section which gives a corporation perpetual duration and the same powers as an individual to do all things necessary or convenient to carry out its business and affairs

2 Paragraph 13 of subsection A

Provisions found in Code § 13 1-2 1 but not in the Model Act which have been adopted in the Virginia Draft include

1. The power to pay compensation to directors, officers and employees for previously rendered services whether or not there was a prior agreement regarding these services (paragraph 14 of subsection A)
2 The power to obtain life insurance on directors, officers or employees and also on any shareholder to acquire the shareholder's shares in the event of his death (paragraph 15 of subsection A)
3 The power to cease its corporate activities and surrender its corporate franchise (paragraph 16 of subsection A)
4 The power to enter into partnership agreements, joint ventures, or other association of any kind with other corporations, but limiting this authority for special purpose corporations

5. All of the provisions regarding special purpose corporations.

6 A provision regarding distribution of income by private foundations This paragraph has been modified to update the references to the Internal Revenue Code

7 A provision giving corporations the power to "have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized"

The Virginia Draft has not adopted the portion of Virginia Code § 13 1-2 1 (i) that ties the power to lend money to the corporation's "corporate purposes."

§ 13 1-628 Emergency powers—A In anticipation of or during an emergency defined in subsection D of this section, the board of directors of a corporation may

1. Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent, and

2. Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so

B During an emergency defined in subsection D of this section, unless emergency bylaws provide otherwise·

1. Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio, and

2. One or more officers of the corporation present at a meeting of the board of directors may be deemed by a majority of the directors present at the meeting to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

C Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation

1. Binds the corporation, and

2 May not be used to impose liability on a corporate director, officer, employee, or agent

D An emergency exists for purposes of this section if a quorum of the corporation's board of directors cannot readily be assembled because of some catastrophic event

Comment This section adopts Model Act § 3 03 with minor changes.

The principal differences between the Virginia Draft and Virginia Code § 13.1-24 1 are as follows

1 Under Virginia Code § 13.1-24 1 (c) the board of directors must approve a list of officers "or other persons" to be deemed directors in an emergency before the emergency occurs Prior approval is not required by the Virginia Draft.

2 The Virginia Code requires a ranking of persons deemed to be directors in an emergency "in order of priority" and subject to conditions or time periods as provided in the emergency bylaws or by board resolution The Virginia Draft provides for designation of officers as directors "in order of rank and within the same rank in order of seniority"

3 The Virginia Code limits an emergency to an attack on the United States or a nuclear disaster

§ 13.1-629 Ultra vires—A Except as provided in subsection B of this section, corporate action may not be challenged on the ground that the corporation lacks or lacked power to act

B A corporation's power to act may be challenged

1. In a proceeding by a shareholder against the corporation to enjoin the act,

2 In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent or the corporation; or

3 In a proceeding against a corporation before the Commission

C In a shareholder's proceeding under paragraph 1 of subsection B of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act and may award damages for loss, except anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act.

Comment The Virginia Code (§ 13 1-5) and Model Act sections regarding ultra vires are substantially similar The Virginia Draft adopts Model Act § 3.04, except that paragraph 3 of subsection B authorizes any proceeding before the Commission, while the Model Act authorizes a proceeding by the Attorney General.

Article 5

Name

§ 13.1-630 Corporate name--A A corporate name shall contain the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp ," "inc ," "co.," or "ltd " Such words and their corresponding abbreviations may be used interchangeably for all purposes

B A corporate name shall not contain·

1 Any language stating or implying that it will transact one of the special kinds of businesses listed in § 13 1-620 unless it proposes in fact to engage in such special kind of business; or

2 Any word or phrase that is prohibited by law for such corporation.

C Except as authorized by subsection D of this section, a corporate name shall be distinguishable upon the records of the Commission from

1 The corporate name of a domestic corporation or a foreign corporation authorized to transact business in this Commonwealth,

2 A corporate name reserved or registered under §§ 13.1-631, 13.1-632, 13.1-830 or 13 1-831,

3. The designated name adopted by a foreign corporation, whether issuing or not issuing shares, because its real name is unavailable, and

4. The corporate name of a nonstock corporation incorporated or authorized to transact business in this Commonwealth

D A domestic corporation may apply to the Commission for authorization to use a name that is not distinguishable upon its records from one or more of the names described in subsection C of this section The Commission shall authorize use of the name applied for if.

1 The other entity consents to the use in writing and submits an undertaking in form satisfactory to the Commission to change its name to a name that is distinguishable upon the records of the Commission from the name of the applying corporation, or

2 The applicant delivers to the Commission a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this Commonwealth

E The use of assumed names or fictitious names, as provided for in Chapter 5 (§ 59 1-69 et seq.) of Title 59.1, is not affected by this chapter

Comment The Virginia Draft adopts § 4.01 of the Model Act with the following modifications

1 Subsection A includes a provision found in the Virginia Code that allows specified words and corresponding abbreviations to be used interchangeably Not adopted is a provision in the Model Act that permits foreign words of like import to satisfy the requirements of subsection A

2 The Model Act prohibits use of language in a corporate name that states or implies that the corporation is organized for a purpose other than permitted by the Act or by the corporation's articles of incorporation Subsection B1 of the Virginia Draft only prohibits language falsely implying that the corporation will engage in one of the special kinds of businesses listed in § 13 1-620 as these are the only businesses required by statute to list certain purposes in their articles of incorporation

3 Subsection B2 has been taken from Virginia Code § 13.1-6 (b).

4 Subsection D of the Model Act has been deleted as an unnecessary provision. It would allow one corporation to use the name of another if the proposed user corporation has merged with, been formed by reorganization of, or acquired all or substantially all of the assets of the other corporation

5 Subsection E has been added to make clear that the Virginia Draft does not control the use of assumed or fictitious names In particular, use of a designated name in order to qualify to transact business as a foreign corporation, as provided for in Va Draft § 13.1-762 A2, does not affect any obligation to comply with Chapter 5 of Title 59.1 in order to use an assumed or fictitious name to transact business

The Virginia Draft differs from Virginia Code § 13.1-6 as follows

1 Subsection C provides that a corporate name is available for use if the name is "distinguishable upon the records of the Commission" The Virginia Code uses a broader test, providing that a corporate name "shall not be the same as, or confusingly similar to" another corporate name

2 Subsections C3 and D are new.

§ 13.1-631 Reserved name—A A person may apply to the Commission to reserve the exclusive use of a corporate name, including a designated name for a foreign corporation whose corporate name is not available If the Commission finds that the corporate name applied for is available, it shall reserve the name for the applicant's exclusive use for a 120-day period

B The owner of a reserved corporate name may renew the reservation for successive periods of 120 days each

C The owner of a reserved corporate name may transfer the reservation to another person by delivering to the Commission a notice of the transfer, executed by the applicant for whom the name was reserved, and specifying the name and address of the transferee

Comment: The Virginia Draft adopts Model Act § 4.02 with one change The Model Act allows reservation of a name for a nonrenewable 120-day period. The Virginia Draft allows renewal of the reservation.

Subsection A provides for reservation of a designated name for a foreign corporation whose corporate name is not available. Reservation of a designated name is not authorized in the Virginia Code.

The Virginia Code (§ 13 1-7) allows a reservation to be revoked if an application or transfer was not made in good faith The Virginia Draft does not have such a provision

§ 13 1-632 Registered name—A A foreign corporation may register its corporate name, or its corporate name with any addition required by § 13 1-762, if the name is distinguishable upon the records of the Commission from the corporate names that are not available under subsection C of § 13.1-630

B A foreign corporation registers its corporate name, or its corporate name with any addition required by § 13 1-762, by

1 Filing with the Commission (i) an application setting forth its corporate name, or its corporate name with any addition required by § 13.1-762, the state or country and date of its incorporation, and a brief description of the nature of the business in which it is engaged, and (ii) a certificate setting forth that such corporation is in good standing, or a document of similar import, from the state or country of incorporation, executed by the official who has custody of the records pertaining to corporations, and

2 Paying to the Commission a registration fee in the amount of one dollar for each month, or fraction of a month, between the date of filing such application and December 31 of the calendar year in which such application is filed

C If the Commission finds that the corporate name applied for is available, it shall register the name for the applicant's exclusive use Such registration shall expire at the end of the calendar year in which it became effective.

D A foreign corporation whose registration is effective may renew it for the succeeding year by filing with the Commission between October 1 and December 31 a renewal application, which complies with the requirements of subsection B of this section, and paying a renewal fee of twenty dollars The renewal application is effective when filed in accordance with this section and renews the registration for the following calendar year

E A foreign corporation whose registration is effective may thereafter obtain a certificate of authority to transact business in this Commonwealth under that name or consent in writing to the use of that name by a corportion thereafter incorporated under this chapter or by another foreign corporation thereafter authorized to transact business in this Commonwealth The registration terminates when the domestic corporation is incorporated or the foreign corporation obtains a certificate of authority to transact business in this Commonwealth or consents to the authorization of another foreign corporation to transact business in this Commonwealth under the registered name

F. A foreign corporation which has in effect a registration of its corporate name may release such name by filing a notice of release of a registered name with the Commission and by paying a fee of five dollars

Comment The Virginia Draft adopts Model Act § 4.03 with minor changes and the following additions from Virginia Code § 13.1-8

1. The provisions for a registration fee and renewal fees and
2. Subsection F

Subsection E of the Virginia Draft is new to the Virginia Code

§ 13.1-633 Property title records—Whenever by merger or amendment to the articles of incorporation the name of any domestic or foreign corporation is changed or another domestic or foreign corporation succeeds to the ownership of its property, a certificate reciting such change or succession shall be issued by the clerk of the Commission upon request and such certificate may be admitted to record in any recording office within the jurisdiction of which any property of the corporation is located in order to maintain the continuity of title records upon paying the fee of the clerk of the court, but no tax shall be due thereon If such corporation is not a domestic corporation or a foreign corporation authorized to do business in this Commonwealth, a similar certificate by any competent authority of the state of incorporation, may be admitted to record in any recording office within the jurisdiction of which any property of the corporation is located in order to maintain the continuity of title records upon paying the fee of the clerk of the court, but no tax shall be due thereon

Comment· This section was taken from Virginia Code § 13.1-127 There is no similar provision in the Model Act.

Provisions not covered in the Virginia Draft

The Virginia Draft has not adopted Virginia Code § 13.1-6.1, which prohibits the use of the word "Nazi" or "National Socialist" in an assumed name or in the name of a domestic corporation

Article 6

Office and Agent

§ 13 1-634 Registered office and registered agent—A Each corporation shall continuously maintain in this Commonwealth

1 A registered office that may be the same as any of its places of business, and

2 A registered agent, who shall be

a An individual who resides in this Commonwealth, is an officer or director of the corporation or a member of the Virginia State Bar, and whose business office is identical with

the registered office; or

b A professional corporation registered under the provisions of § 54-42.2, the business office of which is identical with the registered office

B The sole duty of the registered agent is to forward to the corporation at its last known address any notice that is served on the registered agent

Comment. Subsection A of the Virginia Draft adopts Virginia Code § 13.1-9 but deletes the requirement that a registered agent be at least eighteen years of age. The provisions of § 5 01 of the Model Code which would allow any domestic corporation or foreign corporation to serve as a registered agent have not been adopted in the Virginia Draft

Subsection B is new to the Virginia Code and new to the Model Act The subsection makes clear the limited responsibility of the registered agent to the corporation or any other person

§ 13 1-635 Change of registered office or registered agent.—A. A corporation may change its registered office or registered agent, or both, upon filing in the office of the Commission a statement of change on a form supplied by the Commission that sets forth

1 The name of the corporation,

2 The address of its current registered office,

3 If the current registered office is to be changed, the post office address, including the street and number, if any, of the new registered office, and the name of the city or county in which it is to be located,

4 The name of its current registered agent,

5 If the current registered agent is to be changed, the name of the new registered agent, and

6 That after the change or changes are made, the corporation will be in compliance with the requirements of § 13 1-634

B i The Commission shall mail to the clerk in whose office deeds are recorded in the city or county in which the then registered office is located a notice giving the name of the corporation, the address of the registered office and the name and address of the registered agent If the location of the registered office is changed to a different city or county, the Commission shall mail a similar notice to the proper clerk of that city or county. But no such notice shall be sent to the clerk of any court in the City of Richmond or the County of Henrico. The clerk, on receiving the notice, shall record it in a book for the recordation of charters Every statement shall be accompanied by the fees prescribed by law

2 A new statement shall forthwith be executed by the corporation whenever it changes its name or whenever its registered agent dies, resigns or ceases to satisfy the requirements of § 13 1-634

C If a registered agent changes his business address to another place within this Commonwealth, he shall change the address of the registered office of any corporation of which he is a registered agent by filing a statement as required above except that it need be signed, either manually or in facsimile, only by the registered agent and must recite that a copy of the statement has been mailed to the corporation

Comment Subsection A follows § 5 02 (a) of the Model Act, with the addition of language taken from Va Code § 13 1-10 Subsections B and C follow Virginia Code § 13 1-10

The Virginia Draft deletes the requirement in Virginia Code § 13 1-10 (g) that the statement of change filed with the Commission show that such change was authorized by resolution duly adopted by the corporation's board of directors.

The Virginia Draft does not include the requirement in § 5 02 (a) (5) of the Model Act that a statement of change of a registered agent include the new agent's written consent

§ 13.1-636 Resignation of registered agent—A A registered agent may resign his agency appointment by signing and filing with the Commission his statement of resignation

accompanied by his certification that he has mailed a copy thereof to the principal office of the corporation by certified mail The statement may include a statement that the registered office is also discontinued

B The agency appointment is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed

Comment This provision adopts § 5 03 of the Model Act with the following modifications

1 Language has been inserted in subsection A requiring the resigning agent to certify to the Commission that he has mailed a copy of his statement of resignation to the principal office of the corporation by certified mail

2 Subsection (b) of the Model Act has not been adopted It would have required the Commission to mail copies of the statement of resignation to the registered and principal offices of the corporation

Va Code § 13 1-10.1, which provided for resignation of a registered agent, was repealed by the General Assembly in 1981

§ 13 1-637 Service on corporation—A A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation The registered agent may by instrument in writing, acknowledged before a notary public, designate a person or persons in the office of the registered agent upon whom any such process, notice or demand may be served Whenever any such person accepts service of process, a photographic copy of such instrument shall be attached to the return

B Whenever a corporation fails to appoint or maintain a registered agent in this Commonwealth, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the clerk of the Commission shall be an agent of the corporation upon whom may be served any process, notice, order or demand except one issued by the Commission. Service may be made on the clerk or any of his staff at his office. He shall keep a record of any process, notice, order or demand so served and shall forthwith cause it to be sent by registered or certified mail addressed to the corporation at its principal office unless the Commission does not have a record of its principal office, in which event it shall be addressed to the corporation at its registered office

C This section does not prescribe the only means, or necessarily the required means, of serving a corporation

D The name of the registered agent, the address of the registered office and the principal office, and the names and addresses of the officers and directors of the corporation as last filed with the Commission pursuant to the provisions of this title shall be conclusive for the purpose of service of process

Comment. The Virginia Draft adopts subsections A and C of § 5.04 of the Model Act with the addition of the last two sentences of subsection A, which are new Subsections B and D are taken from Virginia Code § 13 1-11, but subsection B modifies that Code section by providing for the clerk of the Commission to mail the papers to the principal office, rather than the registered office, of the corporation if it has a record of that office

In contrast to service on the clerk of the State Corporation Commission, as provided for in subsection B, the Model Act provides for serving the corporation at its principal office by registered or certified mail

Article 7

Shares and Distributions

§ 13 1-638 Authorized shares—A The articles of incorporation shall prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue If more than one class of shares is authorized, the articles of incorporation shall prescribe a distinguishing designation for each class, and prior to the issuance of shares of a class the preferences, limitations and relative rights of that class shall be described in the articles of incorporation. All shares of a class shall have preferences, limitations and relative rights identical with those of other shares of the same class except to the extent otherwise permitted

by § 13 1-639

B The articles of incorporation shall authorize (i) one or more classes of shares that together have unlimited voting rights, and (ii) one or more classes of shares, which may be the same class or classes as those with voting rights, that together are entitled to receive the net assets of the corporation upon dissolution

C The articles of incorporation may authorize one or more classes of shares that

1 Have special, conditional or limited voting rights, or no right to vote, except to the extent prohibited by this Act,

2 Are redeemable or convertible as specified in the articles of incorporation (i) at the option of the corporation, the shareholder, or another person or upon the occurrence of a designated event, (ii) for cash, indebtedness, securities, or other property, and (iii) in a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events,

3 Entitle the holders to distributions, calculated in any manner, including dividends that may be cumulative, noncumulative or partially cumulative,

4 Have preference over any other class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation, or

5 Entitle the holders to other specified rights, including a right that no transaction of a specified nature shall be consummated while any such shares remain outstanding except upon the assent of all or a specified proportion of such shares

D The description of the designations, preferences, limitations and relative rights of share classes in subsection C is not exhaustive

Comments: **The Virginia Draft adopts § 6.01 of the Model Act except that subsection C 5 is taken from Virginia Code § 13.1-13 (f)**

This section is similar to Virginia Code §§ 13.1-12 and 13.1-13, except for subsection B which is new Subsection C 2 provides considerably greater flexibility than Virginia Code § 13.1-13

13 1-639 Terms of class or series determined by board of directors—A If the articles of incorporation so provide, the board of directors may determine, in whole or part, the preferences, limitations and relative rights, within the limits set forth in § 13.1-638, of (i) any class of shares before the issuance of any shares of that class or (ii) one or more series within a class before the issuance of any shares of that series

B Each series of a class shall be given a distinguishing designation

C All shares of a series shall have preferences, limitations and relative rights identical with those of other shares of the same series and, except to the extent otherwise provided in the description of the series, of those of other series of the same class

D When the board of directors has adopted an amendment of the articles of incorporation pursuant to subsection A of this section, the corporation shall file with the Commission articles of amendment, which may become effective without shareholder action, that set forth

1 The name of the corporation,

2 The text of the amendment determining the terms of the class or series of shares,

3 The date it was adopted, and

4 A statement that the amendment was duly adopted by the board of directors

If the Commission finds that the articles comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of amendment Shares of any class or series that are the subject of the articles of amendment shall not be issued until the certificate

of amendment is effective

E Unless the articles of incorporation otherwise provide, the board of directors may redesignate any shares of any series theretofore established that have not been issued, or that have been issued and reacquired, as shares of some other series. Such redesignation or change of designation shall be set forth in articles of amendment, which may become effective without shareholder action

Comment The Virginia Draft adopts Model Act § 6.02 with minor changes and with the following additions taken from Virginia Code § 13.1-14

1 The next to last sentence of subsection D

2 Subsection E

§ 13 1-640 Issued and outstanding shares—A. A corporation may issue the number of shares of each class or series authorized by the articles of incorporation Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or cancelled

B The reacquisition, redemption or conversion of outstanding shares is subject to the limitations of subsection C of this section and to § 13 1-653

C At all times that shares of the corporation are issued and outstanding, one or more shares that together have unlimited voting rights and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution shall be outstanding.

Comment· This section of the Virginia Draft adopts Model Act § 6 03. There is no comparable section in the Virginia Code.

§ 13 1-641. Fractional shares—A A corporation may, if authorized by its board of directors

1 Issue fractions of a share or pay in money the value of fractions of a share,

2. Arrange for dispositon of fractional shares by the shareholders, or

3 Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share

B Each certificate representing scrip shall be conspicuously labeled "Scrip" and shall contain the information required by subsection B of § 13.1-647

C The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon dissolution The holder of scrip is not entitled to any of these rights unless the scrip provides for them

D The board of directors may authorize the issuance of scrip subject to any condition considered desirable, including

1 That the scrip will become void if not exchanged for full shares before a specified date, and

2 That the shares for which the scrip is exchangeable may be sold by the corporation and the proceeds paid to the scripholders

E When a corporation is to pay in money the value of fractions of a share such value shall be determined by the board of directors A good faith judgment of the board as to the value of a fractional share is conclusive

Comment: This section of the Virginia Draft adopts Model Act § 6.04 with minor language changes and two additions

1. In subsection D 2 the words "by the corporation" have been added This language is taken from Virginia Code § 13.1-21
2. Subsection E also is taken from Virginia Code § 13 1-21, but the Virginia Draft makes the determination of the board conclusive if made in good faith, while the Virginia Code makes the determination final in the absence of fraud Throughout the Model Act and the Virginia Draft the concept of good faith is used instead of fraud

Substantive differences between this section and Virginia Code § 13.1-21 include

1 Issuance of fractions of a share is prohibited by the Virginia Code except in the case of open-end investment trusts

2 The Virginia Draft allows a holder of scrip to exercise the rights of a shareholder if the scrip so provides The Virginia Code provides that the holder of scrip shall not exercise voting rights and shall only have such other rights as are provided in the scrip

§ 13 1-642 Subscription for shares before incorporation—A A subscription for shares entered into before incorporation is irrevocable for six months unless the subscription agreement provides otherwise or all the subscribers agree to revocation

B The board of directors may determine the payment terms of subscriptions for shares that were entered into before incorporation, unless the subscription agreement specifies them. A call for payment by the board of directors must be uniform so far as practicable as to all shares of the same class or series, unless the subscription agreement specifies otherwise

C Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when the corporation receives the consideration specified in the subscription agreement

D. If a subscriber defaults in payment of money or property under a subscription agreement entered into before incorporation, the corporation may collect the amount owed as any other debt The articles of incorporation, bylaws or the subscription agreement may prescribe other penalties for nonpayment but a subscription and the installments already paid on it may not be forfeited unless the corporation demands the amount due by written notice to the subscriber and it remains unpaid for at least twenty days after the effective date of the notice

E If a subscription for unissued shares is forfeited for nonpayment under paragraph D of this section, the corporation may sell the shares subscribed for If the shares are sold by reason of any forfeiture for more than the amount due on the subscription, the corporation shall pay the excess, after deducting the expense of sale, to the subscriber or his representative.

F A subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to § 13 1-643.

Comment This section has been taken from Model Act § 6.20 with minor changes. Virginia Code § 13.1-15 is similar, but makes no distinction between subscriptions made before and after incorporation.

§ 13 1-643 Issuance of shares—A. The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation

B Any issuance of shares must be authorized by the board of directors. Shares may be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation

C A good faith determination by the board of directors that the consideration received or to be received for the shares to be issued is adequate is conclusive insofar as the adequacy of consideration relates to whether the shares are validly issued, fully paid and nonassessable When the board of directors has made such a determination and the corporation has received the consideration, the shares issued therefor are fully paid and nonassessable

D. The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the benefits are received or the note is paid If the services are not performed, the benefits are not received or the note is not paid, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part.

E. Where it cannot be determined that outstanding shares are fully paid and nonassessable, there shall be a conclusive presumption that such shares are fully paid and nonassessable if the board of directors makes a good faith determination that there is no substantial evidence that

the full consideration for such shares has not been paid

Comment The Virginia Draft adopts Model Act § 6.21 with (i) a change in subsection C to eliminate a requirement in the Model Act that the board determine the adequacy of consideration whenever shares are issued, and (ii) the addition of subsection E Subsection E, which is not found in the Model Act or the Virginia Code, is designed to provide a mechanism for determining that shares issued in years past are fully paid and nonassessable even if that fact cannot be verified A comparable provision in Virginia Code § 13 1-22 cannot be retained because it is based on stated capital, a concept that is not adopted in the Virginia Draft.

Substantive differences between the Virginia Draft and Virginia Code §§ 13 1-15 and 13 1-17 include the following

1 The concepts of "par value," "stated capital," "capital surplus" and "treasury shares" are eliminated from the Virginia Draft

2 The Virginia Draft expressly provides that consideration for the issuance of shares can include promissory notes and contracts for future services

3 Subsection C provides that if the board of directors determines that the consideration for shares to be issued is adequate, that determination is conclusive insofar as the adequacy of consideration relates to whether the shares are fully paid and nonassessable The Virginia Code states that when shares are issued the consideration "expressed in dollars" shall be as fixed by the board.

4 In contrast to subsection C, Virginia Code § 13.1-15 states that "shares are deemed to be issued on the date they are fully paid or on the date their issuance is authorized, whichever occurs last." Virginia Code § 13.1-15 also states that no certificate shall be issued for any share until the share is fully paid.

Va. Code § 13.1-17 allows the shareholders by resolution to place restrictions on the issuance of shares by the board of directors. Such a resolution would only require a majority vote of the shares represented at the meeting rather than the two-thirds vote required to include such a restriction in the articles of incorporation.

§ 13.1-644. Liability for shares issued before payment.—A. A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued as provided in § 13.1-643 or specified in the subscription agreement under § 13.1-642.

B A person who becomes a transferee of shares in good faith and without knowledge that the consideration determined for the shares pursuant to § 13.1-643 or specified in the subscription agreement pursuant to § 13.1-642 has not been paid is not personally liable for any unpaid portion of the consideration, but the initial transferor remains liable therefor

C An executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver shall not, in any event, be personally liable to the corporation as transferee of a purchaser from the corporation of its own shares but the estate of the purchaser and his assets in the hands of such personal representative shall be so liable.

D No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder

Comment: Subsection A of the Virginia Draft follows Model Act § 6.22 and is similar to provisions in Virginia Code § 13.1-22.

Subsections B, C, and D are taken from Virginia Code § 13.1-22 and are additions to the Model Act.

The Virginia Draft has not adopted a provision in the Model Act that states that a shareholder is not liable for the debts of the corporation except "by reason of his own acts or conduct"

§ 13.1-645 Share dividends.—A. Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the shareholders of one or more classes or series An issuance of shares under this subsection is a share dividend.

B Shares of one class or series may not be issued as a share dividend in respect of shares of another class or series unless (i) the articles of incorporation so authorize, (ii) a majority of the votes entitled to be cast by the class or series to be issued approve the issue, or (iii) there are no outstanding shares of the class or series to be issued. For purposes of this subsection, if

a security convertible into or carrying a right to subscribe for or acquire shares of the class or series to be issued is outstanding, the holders shall be deemed to be holders of the class or series

C If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend
Comment The Virginia Draft adopts Model Act § 6.23 with the addition of the last sentence in subsection B

§ 13 1-646 Share options—A. Rights, options or warrants for the purchase of shares of the corporation may be issued upon such terms and conditions and for such consideration as may be approved by the board of directors, provided that the issuance of any right, option or warrant to any officer or employee of the corporation or any of its subsidiaries shall be authorized by the shareholders of the corporation who are entitled to vote generally in the election of directors unless the articles of incorporation provide that shareholder approval is not required
Comment The Virginia Draft follows Virginia Code § 13.1-17 Model Act § 6.24 eliminates any requirement of shareholder approval for issuance of rights, options or warrants

§ 13 1-647 Form and content of certificates evidencing shares and form of bonds—A Shares may but need not be represented by certificates. Unless this Act or another statute expressly provides otherwise, the rights and obligations of shareholders are identical whether or not their shares are represented by certificates

B At a minimum each share certificate shall state on its face.

1 The name of the issuing corporation and that it is organized under the law of this Commonwealth,

2 The name of the person to whom issued, and

3 The number and class of shares and the designation of the series, if any, the certificate represents

C. If the issuing corporation is authorized to issue different classes of shares or different series within a class, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences, and limitations determined for each series (and the authority of the board of directors to determine variations for future series) shall be summarized on the front or back of each certificate for shares of such class or series Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder this information on request in writing and without charge.

D. Each share certificate (i) shall be signed by two officers designated in the bylaws or by the board of directors and (ii) may bear the corporate seal or its facsimile The signatures of the officers upon a certificate may be facsimiles if the certificate is countersigned by a transfer agent, or registered by a registrar, other than the corporation or an employee of the corporation.

E. On any bond, note or debenture issued by a corporation which is countersigned or otherwise authenticated by the manual signature of a trustee, the signatures of the officers of the corporation and its seal may be facsimiles

F. If the person who signed, either manually or in facsimile, a share certificate or bond, note or debenture no longer holds office when the certificate or bond, note or debenture is issued, the certificate or bond, note or debenture is nevertheless valid
Comment The Virginia Draft adopts Model Act § 6.25 with the addition of the the last sentence of subsection D and of subsection E, taken from Virginia Code § 13 1-20, and the addition of the words "or bond, note or debenture" in subsection F The Model Act permits the facsimile signatures of officers even if the certificates are not countersigned or registered

§ 13.1-648. Shares without certificates—A Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or

all of the shares of any or all of its classes or series without certificates The authorization does not affect shares already represented by certificates until they are surrendered to the corporation

B Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by subsections B and C of § 13 1-647, and, if applicable, § 13 1-649
Comment This provision is taken from Model Act § 6.26 without change. The Virginia Code was amended in 1984 to permit issuance of shares without certificates.

§ 13 1-649 Restriction on transfer of shares and other securities—A The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction

B A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by subsection B of § 13.1-648 Unless so noted, a restriction is not enforceable against a person without knowledge of the restriction

C A restriction on the transfer or registration of transfer of shares is authorized

1 To maintain the corporation's status when it is dependent on the number or identity of its shareholders;

2. To preserve exemptions under federal or state securities law, and

3 For any other reasonable purpose

D A restriction on the transfer or registration of transfer of shares may:

1 Obligate the shareholder first to offer the corporation or other persons (separately, consecutively, or simultaneously) an opportunity to acquire the restricted shares,

2. Obligate the corporation or other persons (separately, consecutively, or simultaneously) to acquire the restricted shares,

3 Require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable, or

4 Prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable

E For purpose of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares
Comment The source for this section is Model Act § 6 27 There is no comparable section in the Virginia Code

§ 13.1-650. Expense of issue—A corporation may pay the expenses of selling or underwriting its shares, and of organizing or reorganizing the corporation, from the consideration received for shares
Comment This section was taken from Model Act § 6.28 There is no similar provision in the Virginia Code.

§ 13 1-651 Shareholders' preemptive rights—A Unless limited or denied in the articles of incorporation and subject to the limitation in subsection C of this section, the shareholders of a corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors to provide a fair and reasonable opportunity to exercise the right, to

acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them

B Except to the extent that the articles of incorporation expressly provide otherwise, a shareholder may waive his preemptive right A waiver evidenced by a writing is irrevocable even though it is not supported by consideration

C Unless expressly conferred in the articles of incorporation, there is no preemptive right with respect to

1 Shares issued to officers or employees of the corporation or of its subsidiaries pursuant to a plan approved by the shareholders, or

2 Shares sold other than for money.

D Holders of shares of any class with preferential rights to distributions or assets have no preemptive rights with respect to shares of any class.

E Holders of shares of any class without preferential rights to distributions or assets have no preemptive rights with respect to shares of any class with preferential rights to distributions or assets unless the shares with preferential rights are convertible into, or carry a right to subscribe for or acquire, shares without preferential rights.

F Holders of shares without general voting rights and without preferential rights to distributions or assets have no preemptive rights with respect to shares of any class with general voting rights but without preferential rights to distributions or assets.

G. Except to the extent that the articles of incorporation expressly provide otherwise, shares subject to preemptive rights that are not acquired by shareholders may be issued to any person for a period of one year after being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights An offer at a lower consideration or after the expiration of one year is subject to the shareholders' preemptive rights

H For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares

Comment The Virginia Draft follows Virginia Code § 13.1-23 in preserving preemptive rights except as provided in the articles of incorporation or as expressly provided in the section. Model Act § 6.30 eliminates preemptive rights except as provided in the articles of incorporation. Subsections B, G, and H are new to the Virginia Code and are taken from Model Act § 6.30. The exceptions in subsection C follow Virginia Code § 13.1-23

§ 13 1-652 Corporation's acquisition of its own shares—A. A corporation may acquire its own shares and shares so acquired constitute authorized but unissued shares of the same class, but undesignated as to series

B If the articles of incorporation prohibit the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon the issuance of a certificate of amendment The corporation shall file with the Commission articles of amendment setting forth

1 The name of the corporation,

2 The reduction in the number of authorized shares, itemized by class and series,

3 The total number of authorized shares, itemized by class and series, remaining after reduction of the shares, and

4 A statement that the reduction in the number of authorized shares was authorized by the board of directors. The articles of amendment may be adopted by the board of directors without shareholder action

C If the Commission finds that the articles of amendment comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of amendment

Comment Subsections A and B have been taken from Model Act § 6 31 with minor changes In subsection A the phrase "of the same class, but undesignated as to series" has been added This phrase is found in Virginia Code § 13 1-66 Subsection C has been taken from Virginia Code § 13 1-65.

The information required in articles of amendment is similar to that required by the Virginia Code for articles of reduction However, the following differences exist

1 Va. Code § 13 1-63 requires a copy of the resolution of the board of directors providing for the cancellation of shares in the articles of reduction

2 Va Code § 13 1-63 (d) requires a statement of the number of authorized shares only "if the articles of incorporation provide that the cancelled shares shall not be reissued"

§ 13 1-653 Distributions to shareholder—A A board of directors may authorize and the corporation may make distributions to its shareholders, subject to restriction by the articles of incorporation and the limitation in subsection C of this section

B If the board of directors does not fix the record date for determining shareholders entitled to a distribution, other than one involving a repurchase or reacquisition of shares, it is the date the board of directors authorizes the distribution

C No distribution may be made if, after giving it effect·

1 The corporation would not be able to pay its debts as they become due in the usual course of business, or

2 The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution

D The board of directors may base a determination that a distribution is not prohibited under subsection C of this section either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

E The effect of a distribution under subsection C of this section is measured.

1. In the case of a distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of (i) the date money or other property is transferred or debt incurred by the corporation or (ii) the date the shareholder ceases to be a shareholder with respect to the acquired shares,

2. In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed,

3 In all other cases, as of (i) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization or (ii) the date payment is made if it occurs more than 120 days after the date of authorization.

F A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement

Comment This section of the Virginia Draft adopts Model Act § 6.40 without change It differs from the Virginia Code in the following ways

1 The Virginia Draft is a general provision applying to all distributions to shareholders including redemptions and acquisitions of shares The Virginia Code has a section on dividends (§ 13.1-43) and provisions regarding the redemption or purchase of shares at §§ 13 1-4 and 13.1-62

2 Subsection C is similar to Virginia Code § 13-1-62, which prohibits a redemption when the corporation "is insolvent or when such redemption or purchase would render it insolvent, or

which would reduce the net assets below the aggregate amount payable to the holders of shares having prior or equal rights to the assets of the corporation upon involuntary dissolution." See also Virginia Code § 13.1-4, which provides that a corporation may not purchase its own stock when it is insolvent or the purchase would render it insolvent. Virginia Code § 13.1-43 permits the payment of dividends "except when the corporation is insolvent or when the payment thereof would render the corporation insolvent."

Article 8

Shareholders

§ 13.1-654 Annual meeting.—A. A corporation shall hold annually at a time stated in or fixed in accordance with the bylaws a meeting of shareholders.

B. Annual shareholders' meetings may be held at such place, in or out of this Commonwealth, as may be provided in the bylaws or, where not inconsistent with the bylaws, in the notice of the meeting

C. The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action.

Comment. The Virginia Draft adopts § 7.10 (a) and (c) of the Model Act. Subsection B is taken form Virginia Code § 13.1-25. Subsection (b) of the Model Act requires annual meetings to be held at the corporation's principal office if no place is stated in or fixed by the bylaws Subsection C is new to the Virginia Code.

§ 13.1-655 Special meeting.—A. A corporation shall hold a special meeting of shareholders,

1. On call of the chairman of the board of directors, the president, the board of directors, or the person or persons authorized to do so by the articles of incorporation or bylaws, or

2. In the case of corporations having thirty-five or fewer shareholders of record, if the holders of at least twenty percent of all votes entitled to be cast on any issue proposed to be considered at the special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

B. The articles of incorporation may provide for an increase or decrease in the percentage stated in paragraph 2 of subsection A of this section.

C. If not otherwise fixed under § 13.1-656 or § 13.1-660, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

D. Special shareholders' meetings may be held at such place in or out of this Commonwealth as may be provided in the bylaws or, where not inconsistent with the bylaws, in the notice of the meeting

E. Only business within the purpose or purposes described in the meeting notice required by subsection C of § 13.1-658 may be conducted at a special shareholders' meeting.

Comment: The Virginia Draft adopts § 7.02 of the Model Act with the following modifications

1 The Model Act and the Virginia Code allow holders of ten percent of the votes to call a special meeting Subsection B of the Virginia Draft increases the ten percent threshold to twenty percent for closely held corporations. For public corporations shareholders only can call a special meeting if authorized by the articles of incorporation or bylaws as is the case under the Delaware Business Corporation Act. Subsection B states that the articles of incorporation may provide for an increase or decrease in the percentage of the votes entitled to call a special meeting

2 The Virginia Draft adopts language in Virginia Code § 13.1-25 that allows special shareholder meetings to be held in a place specified in the notice of the meeting if not inconsistent with the bylaws The Model Act requires special meetings to be held at the corporation's principal

office if no place is stated or fixed in the bylaws.

The Virginia Draft includes the following provisions that are not in Virginia Code § 13 1-25

1 Language in subsection A 2 requiring the shareholders to sign and deliver written demands to the corporation's secretary in order to call a meeting, and

2 Subsections B and C

§ 13 1-656 Court-ordered meeting—A The circuit court of the city or county where a corporation's principal office is located or, if none in this Commonwealth, where its registered office is located, may, after notice to the corporation, order a meeting to be held

1 On petition of any shareholder of the corporation entitled to participate in an annual meeting if an annual meeting was not held within fifteen months after its last annual meeting or, if there has been no annual meeting, the date of its incorporation, or

2 On petition of a shareholder who signed a demand for a special meeting that satisfies the requirements of § 13 1-655 if

a. Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary, or

b The special meeting was not held in accordance with the notice.

B. The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

Comment This section was taken from Model Act § 7.03. In contrast to the Model Act, the Virginia Draft requires notice to the corporation before a court can order a meeting and eliminates a Model Act provision that allows a court to order a meeting if one has not been held within six months of the corporation's last fiscal year In addition, the Virginia Draft has not adopted a provision in the Model Act that authorizes the court to fix a quorum for the meeting. Such authorization would appear to give the court unnecessary authority There is no comparable Virginia Code provision.

§ 13.1-657 Action without meeting—A Action required or permitted by this Act to be taken at a shareholders' meeting may be taken without a meeting and without action by the board of directors if the action is taken by all the shareholders entitled to vote on the action The action shall be evidenced by one or more written consents describing the action taken, signed by all the shareholders entitled to vote on the action, and delivered to the secretary of the corporation for inclusion in the minutes or filing with the corporate records Any action taken by unanimous written consent shall be effective according to its terms when all consents are in possession of the corporation. A shareholder may withdraw consent only by delivering a written notice of withdrawal to the corporation prior to the time that all consents are in the possession of the corporation Action taken under this section is effective as of the date specified therein provided the consent states the date of execution by each shareholder

B. If not otherwise determined under § 13.1-660, the record date for determining shareholders entitled to take action without a meeting is the date the first shareholder signs the consent under subsection A of this section.

C A consent signed under this section has the effect of a unanimous vote of voting shareholders and may be described as such in any document filed with the Commission under this chapter

D If this chapter requires that notice of proposed action be given to nonvoting shareholders and the action is to be taken by unanimous consent of the voting shareholders, the corporation shall give its nonvoting shareholders written notice of the proposed action at least ten days before the action is taken The notice shall contain or be accompanied by the same material that under this Act would have been required to be sent to nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted to the shareholders for action.

Comment This section of the Virginia Draft follows § 7 04 of the Model Act except for the last

three sentences of subsection A, which are new, and except that the Virginia Draft eliminates any requirement for board approval when shareholders act by unanimous consent

Virginia Code § 13 1-28 authorizes action by shareholders by unanimous consent Differences between the Virginia Draft and the Virginia Code include the following

1 Subsection A eliminates any requirement for board approval when shareholders act by unanimous consent

2. The Virginia Draft adds the requirement that the written consents of the shareholders be delivered to the secretary of the corporation to be included in the minutes or filed with the corporate records.

§ 13.1-658 Notice of meeting--A A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting Such notice shall be given no less than ten nor more than sixty days before the meeting date except that notice of a shareholders' meeting to act on an amendment of the articles of incorporation, a plan of merger or share exchange, a proposed sale of assets pursuant to § 13.1-724, or the dissolution of the corporation shall be given not less than twenty-five nor more than sixty days before the meeting date Unless this chapter or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting

B Unless this chapter or the articles of incorporation require otherwise, notice of an annual meeting need not state the purpose or purposes for which the meeting is called

C Notice of a special meeting shall state the purpose or purposes for which the meeting is called

D If not otherwise fixed under § 13.1-656 or § 13 1-660, the record date for determining shareholders entitled to notice of and to vote at an annual or special meeting is the close of business on the day before the effective date of the notice to shareholders

E Unless the bylaws require otherwise, if an annual or special meeting is adjourned to a different date, time, or place notice need not be given if the new date, time, or place is announced at the meeting before adjournment If a new record date for the adjourned meeting is or shall be fixed under § 13 1-660, however, notice of the adjourned meeting shall be given under this section to persons who are shareholders as of the new record date

F Notwithstanding the foregoing, no notice of a shareholder's meeting need be given to a shareholder if (i) an annual report and proxy statements for two consecutive annual meetings of shareholders or (ii) all, and at least two, checks in payment of dividends or interest on securities during a twelve-month period, have been sent by first-class United States mail, addressed to the shareholder at his address as it appears on the share transfer books of the corporation, and returned undeliverable. The obligation of the corporation to give notice of shareholders' meetings to any such shareholder shall be reinstated once the corporation has received a new address for such shareholder for entry on its share transfer books

Comment Subsections A-E follow § 7.05 of the Model Act except that in subsection A the time period in which notice is to be given of any meeting to act on an amendment of the articles, a plan of merger or share exchange, a sale of assets or dissolution has been changed to require not less than 25 days' notice.

Subsection F is taken from Virginia Code § 13.1-26.

The principal differences between the Virginia Draft and Virginia Code § 13.1-26 are (i) notice of shareholders' meeting can be given up to 60 days prior to the meeting, rather than 50 days, (ii) the special notice requirement for a shareholders' meeting to act on dissolution of the corporation is new, and (iii) subsection E is new

§ 13 1-659 Waiver of notice--A A shareholder may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time of the meeting that is the subject of such notice The waiver shall be in writing, be signed by the shareholder entitled to the notice, and be delivered to the secretary of the corporation for inclusion in the minutes or filing with the corporate records

B A shareholder's attendance at a meeting

1. Waives objection to lack of notice or defective notice of the meeting, unless the

shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and

2 Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented

Comment This section follows Model Act § 7.06 A comparable provision is found in Virginia Code § 13.1-27

Subsection B is more detailed than Virginia Code § 13 1-27 which provides that a shareholder will be deemed to have had proper notice unless "he attends for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened "

§ 13.1-660. Record date.—A The bylaws may fix or provide the manner of fixing in advance the record date for one or more voting groups in order to make a determination of shareholders for any purpose If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date

B A record date fixed under this section may not be more than seventy days before the meeting or action requiring a determination of shareholders

C A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it shall do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting

D If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date

Comment: Section 7.07 of the Model Act has been adopted in the Virginia Draft with minor changes Substantive differences between the Virginia Draft and Virginia Code § 13.1-29 include the following

1. In the Virginia Code the number of days by which the record date may precede the date on which a particular action is to be taken may not exceed 50 days. In the Virginia Draft this time frame is lengthened to 70 days Because many shares of public companies are held today by depositaries at least two steps removed from the beneficial owners, the extra 20 days provides additional time that corporations may find helpful.
2. The Virginia Code makes the record date applicable to any adjournment of a meeting
3. Subsection D is new.
4. Va. Code § 13.1-29 contains a provision for closing of transfer books as an alternative to the fixing of a record date Such an alternative is not provided for in the Virginia Draft

§ 13 1-661 Shareholders' list for meeting—A. The officer or agent having charge of the share transfer books of a corporation shall make, at least ten days before each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting or any adjournment thereof, with the address of and the number of shares held by each The list shall be arranged by voting group and within each voting group by class or series of shares

B For a period of ten days prior to the meeting, the list of shareholders shall be kept on file at the registered office of the corporation or at its principal office or at the office of its transfer agent or registrar and shall be subject to inspection by any shareholder at any time during usual business hours Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting for the purposes thereof The original share transfer books shall be prima facie evidence as to who are the shareholders entitled to examine such list or transfer books or to vote at any meeting of shareholders The right of the holder of shares of a corporation any of whose securities are registered under the Securities Exchange Act of 1934, as amended, to inspect such list prior to a meeting of shareholders shall be subject to the limitations set forth in subsection C of § 13 1-771

C If the requirements of this section have not been substantially complied with, the meeting shall, on the demand of any shareholder in person or by proxy, be adjourned until the

requirements are complied with Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting prior to the making of any such demand, but any action taken by the shareholders after the making of any such demand shall be invalid and of no effect

Comment This section of the Virginia Draft is taken from Virginia Code § 13.1-30 with (i) the addition of the last sentence in subsection A, which is taken from Model Act § 7.20, (ii) a change in the last sentence of subsection B to make the sentence applicable to all corporations registered under the Securities Exchange Act of 1934, rather than all corporations registered on a national securities exchange, and (iii) the addition of the last sentence in subsection C

Differences between the Virginia Draft and Model Act § 7.20 include

1 The Model Act requires that the list of shareholders be available beginning two business days after notice of the meeting is given while the Virginia Draft requires the list to be available at least ten days before the meeting.

2 The Model Act allows the shareholder, his agent or attorney to inspect the voting list, while the Virginia Draft identifies the shareholder as the person entitled to inspect the list.

3 The Model Act requires the shareholder to make a written demand before he is entitled to inspect and copy the list. The Virginia Draft requires the list to be subject to inspection by any shareholder at any time during usual business hours.

4 The following provisions in the Virginia Draft are not in the Model Act.

i. A statement that the original share transfer books shall be prima facie evidence as to who are the shareholders entitled to examine such list or to vote at any meeting; and

ii A statement that the inspection right of the holder of shares of a corporation registered under the Securities Exchange Act of 1934 is subject to the limitations set forth in § 13 1-771 C Virginia Code § 13 1-771 C requires that a shareholder have been of record for at least six months or be a record holder of at least five percent of all outstanding shares. Further, there must be a proper purpose for the shareholder's demand

§ 13.1-662 Voting entitlement of shares—A Except as provided in subsections B, C, D and E or unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting

B. Unless the articles of incorporation provide otherwise, in the election of directors each outstanding share, regardless of class, is entitled to one vote for as many persons as there are directors to be elected at that time and for whose election the shareholder has a right to vote.

C. Redeemable shares are not entitled to vote on any matter and, except as to any right of conversion, shall not be deemed outstanding shares after notice of redemption is mailed to the holders and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution with irrevocable instruction and authority to pay the holders the redemption price on surrender of the shares. Such instruction may provide that the amount so deposited and any interest thereon not claimed within five years after the redemption date shall be repaid to the corporation whose shares are so redeemed, and the persons entitled thereto shall thereafter have only the right to receive the redemption price as unsecured creditors of such corporation

D. The shares of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns, directly or indirectly a majority of the shares entitled to vote for directors of the second corporation

E. If a corporation holds in a fiduciary capacity its own shares or shares of a second corporation that owns directly or indirectly a majority of shares entitled to vote for directors of the first corporation, such shares shall not be deemed to be outstanding and entitled to vote unless

1. The corporation has authority to vote the shares only in accordance with directions of the principal or beneficiary, or

2. A co-fiduciary exists, pursuant to § 6 1-31 2 or otherwise, in which event the co-fiduciary may vote the shares

F. Shares standing in the name of another corporation domestic or foreign, may be voted

by such officer, agent or proxy as the bylaws of such corporation may prescribe, or, in the absence of such provision, as the board of directors of such corporation may determine

G Shares standing in the name of a partnership may be voted by any partner

H Shares held by two or more persons as joint tenants or tenants in common or tenants by the entirety may be voted by any of such persons If more than one of such tenants votes such shares, the vote shall be divided among them in proportion to the number of such tenants voting

I Shares held by an administrator, executor, guardian, committee or curator representing the shareholder may be voted by him without a transfer of such shares into his name Shares standing in the name of a trustee may be voted by him, but no trustee is entitled to vote shares held by him without a transfer of such shares into his name

J Shares standing in the name of a receiver or a trustee in proceedings under the Bankruptcy Reform Act of 1978 may be voted by him. Shares held by or under the control of a receiver or a trustee in proceedings under the Bankruptcy Reform Act of 1978 may be voted by him without the transfer thereof into his name if authority to do so is contained in an order of the court by which he was appointed

K Nothing herein contained shall prevent trustees or other fiduciaries holding shares registered in the name of a nominee pursuant to § 6 1-31 from causing such shares to be voted by such nominee as the trustee or other fiduciary may direct Such nominee may vote shares as directed by a trustee or other fiduciary without the necessity of transferring the shares to the name of the trustee or other fiduciary

L A shareholder whose shares are pledged is entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee is entitled to vote the shares so transferred

M The articles of incorporation may provide that the holders of bonds or debentures shall be entitled to vote on specified matters and such right shall not be terminated except upon consent of the holders of two-thirds in aggregate principal amount

Comment This section draws from both Model Act § 7 21 and Virginia Code § 13 1-32

Subsections A and D have been taken from the Model Act with the elimination from subsection D of the introductory clause "absent special circumstances" Subsections A and D are similar to Virginia Code § 13 1-32. Subsection E, which permits a corporation to vote its own shares held in a fiduciary capacity in certain situations, is new The Model Act does not restrict a corporation from voting its shares held in a fiduciary capacity, while Virginia Code § 13.1-32 permits a corporation to count its own shares held in a fiduciary capacity for purposes of determining a quorum but prohibits the corporation from voting the shares Under Virginia Code § 6.1–31 1 a bank is, in certain situations, precluded from voting its own shares that are held in a fiduciary capacity

Va Code § 13 1-32 is the source for subsections B, C, and F-M In subsection B, the Virginia Draft has added the phrase "unless the articles of incorporation provide otherwise"

This section of the Virginia Draft does not address how shares held by two or more fiduciaries are to be voted, but § 13.1-665 B 5 of the Virginia Draft permits a corporation to accept the signature of one of the fiduciaries if he appears to be acting on behalf of all fiduciaries In contrast, Virginia Code § 13.1-32 generally provides that shares are voted as determined by a majority of the fiduciaries

§ 13 1-663 Proxies—A A shareholder may vote his shares in person or by proxy

B A shareholder may appoint a proxy to vote or otherwise act for him by signing an appointment form, either personally or by his attorney-in-fact

C An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes An appointment is valid for eleven months unless a longer period is expressly provided in the appointment form

D An appointment of a proxy is revocable by the shareholder unless the appointment form

conspicuously states that it is irrevocable and the appointment is coupled with an interest Appointments coupled with an interest include the appointment of·

1 A pledgee,

2 A person who purchased or agreed to purchase the shares,

3 A creditor of the corporation who extended it credit under terms requiring the appointment,

4 An employee of the corporation whose employment contract requires the appointment, or

5 A party to a voting agreement created under § 13.1-671

E The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises his authority under the appointment

F An appointment made irrevocable under subsection D of this section is revoked when the interest with which it is coupled is extinguished

G A transferee for value of shares subject to an irrevocable appointment may revoke the appointment if he did not know of its existence when he acquired the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates

H Subject to § 13 1-665 and to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment

I Any fiduciary who is entitled to vote any shares may vote such shares by proxy

Comment This section is taken from Model Code § 7.22 and is more comprehensive than the language concerning proxies found in Virginia Code § 13.1-32. Subsection I has been added and reflects a concept found in Virginia Code § 13.1-32

Subsections A and B, and the second sentence of subsection C are substantially similar to § 13.1-32 The first sentence of subsection C and all of subsections D through G are new to the Virginia Code.

The Virginia Code establishes a presumption of validity for proxies that apparently have been executed (i) in the name of another corporation; (ii) in the partnership name, or (iii) by one of several fiduciaries In contrast, subsection H of the Virginia Draft cross-references to § 13.1-665, which governs the corporation's acceptance of votes.

A provision in Virginia Code § 13.1-32 that makes any authorization of an attorney-in-fact invalid after ten years is not included in the Virginia Draft.

§ 13.1-664 Shares held by nominees—A A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The extent of this recognition may be determined in the procedure

B The procedure may set forth

1 The types of nominees to which it applies,

2 The rights or privileges that the corporation recognizes in a beneficial owner,

3 The manner in which the procedure is selected by the nominee,

4 The information that must be provided when the procedure is selected,

5 The period for which selection of the procedure is effective, and

6 Other aspects of the rights and duties created

Comment This provision adopts Model Act § 7.23 There is no comparable section in the Virginia Code

§ 13 1-665. Corporation's acceptance of votes—A If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation, if acting in good faith, is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder

B If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the name of its shareholder, the corporation, if acting in good faith, is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder if.

1 The shareholder is an entity and the name signed purports to be that of an officer, partner or agent of the entity,

2. The name signed purports to be that of an administrator, executor, guardian, or conservator representing the shareholder and if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment,

3 The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence acceptable to the corporation that such receiver or trustee has been authorized to vote the shares in an order of the court by which he was appointed has been presented with respect to the vote, consent, waiver, or proxy appointment,

4 The name signed purports to be that of a pledgee, beneficial owner, or attorney-in-fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, consent, waiver, or proxy appointment, or

5. Two or more persons are the shareholder as fiduciaries and the name signed purports to be the name of at least one of the fiduciaries and the person signing appears to be acting on behalf of all the fiduciaries.

C. Notwithstanding the provisions of paragraphs 2 and 5 of subsection B of this section, in any case in which the will, trust agreement, or other instrument under which a fiduciary purports to act contains directions for the voting of shares in any corporation, or for the execution and delivery of proxies for the voting thereof, such directions shall be binding upon the fiduciary and upon the corporation if a copy thereof has been furnished to the corporation.

D. The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder

E. The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

F. Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise

Comment This section has been taken from Model Act § 7.24 with minor language changes and the addition of subsection C taken from Virginia Code § 13.1-32 The substance of this section is new to the Virginia Code, except that the Virginia Code does establish presumptions in favor of the validity of proxies in certain situations See the comment to § 13.1-663.

§ 13.1-666 Quorum and voting requirements for voting groups—A Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those

shares exists with respect to that matter. Unless the articles of incorporation or this chapter provides otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter

B Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or shall be set for that adjourned meeting

C If a quorum exists, action on a matter, other than the election of directors, by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or this chapter requires a greater number of affirmative votes

D Less than a quorum may adjourn a meeting

E The election of directors is governed by § 13 1-669

Comment This section follows Model Act § 7.25 with minor changes Subsection D has been taken from Virginia Code § 13.1-31

Subsection B is new to the Virginia Code Subsection C is the same as Virginia Code § 13.1-31 except that abstentions are not counted.

§ 13 1-667 Action by single and multiple voting groups.—A If the articles of incorporation or this chapter provides for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in § 13 1-665.

B If the articles of incorporation or this chapter provides for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in § 13.1-666 Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter

Comment This section has been taken from Model Act § 7.26 It is new to the Virginia Code

§ 13 1-668 Greater quorum or voting requirements—A The articles of incorporation may provide for a greater quorum or voting requirement for shareholders, or voting groups of shareholders, than is provided by this chapter

B An amendment to the articles of incorporation that adds, changes, or deletes a greater quorum or voting requirement shall meet the quorum requirement and be adopted by the vote and voting groups required to take action under the quorum and voting requirements then in effect

Comment. The Virginia Draft adopts Model Act § 7.27 with one significant change Subsection B of the Model Act states that any proposal to amend a quorum or voting requirement must meet the greater of the then existing or proposed quorum or voting requirement.

Virginia Code § 13.1-33 allows a corporation to set a greater voting requirement in its articles of incorporation than required by the Act. Virginia Code § 13 1-31 provides that the articles of incorporation may provide for a greater or lesser quorum but not less than one-third of the shares entitled to vote at the meeting. Subsection B is new to the Virginia Code.

§ 13 1-669 Voting for directors, cumulative voting—A. Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

B Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide

C A statement included in the articles of incorporation that "all of a designated voting group of shareholders are entitled to cumulate their votes for directors" or words of similar import means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates

D Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless

1 The meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized, or

2 A shareholder who has the right to cumulate his votes gives notice to the secretary of the corporation not less than forty-eight hours before the time set for the meeting of his intent to cumulate his votes during the meeting If one shareholder gives his notice all other shareholders in the same voting group participating in the election are entitled to cumulate their votes without giving further notice

Comment The source of this provision is § 7.28 of the Model Act. The language contained in subsections A and B is substantially similar to that found in Virginia Code § 13 1-32 Subsections C and D are new to the Virginia Code

§ 13 1-670 Voting trusts.—A One or more shareholders may create a voting trust, conferring on a trustee or trustees the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust, which may include anything consistent with its purpose, and transferring their shares to the trustee or trustees When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation's principal office

B. A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name A voting trust is valid for not more than ten years after its effective date unless extended under subsection C of this section

C 1 All or some of the parties to a voting trust may extend it for additional terms of not more than ten years each by signing an extension agreement and obtaining the voting trustee's written consent to the extension. An extension is valid for ten years from the date the first shareholder signs the extension agreement

2 The voting trustee shall deliver copies of the extension agreement and list of beneficial owners to the corporation's principal office An extension agreement binds only those parties signing it

Comment This section adopts Model Act § 7.30 with minor language changes. There are several minor differences between the Virginia Draft and Virginia Code § 13.1-34 In addition, subsection C is new to the Virginia Code.

§ 13.1-671 Voting agreements.—A Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this section is not subject to the provisions of § 13.1-670

B A voting agreement created under this section is specifically enforceable

Comment The source of this provision is Model Act § 7.31. Virginia Code § 13.1-34 is substantially similar.

§ 13 1-672 Procedure in derivative proceedings.—A. A person may not commence a proceeding in the right of a domestic or foreign corporation unless he was a shareholder of the corporation when the transaction complained of occurred or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time

B A complaint in a proceeding brought in the right of a corporation shall allege with particularity why demand was excused or that demand was made to obtain action by the board of directors and either that the demand was refused or ignored If the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed

C A proceeding commenced under this section may not be discontinued or settled without the court's approval If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given the shareholders affected

D The court may appoint a committee composed of two or more disinterested directors or other disinterested persons to determine whether it is in the best interests of the corporation to pursue a particular legal right or remedy. The committee shall report its findings to the court After considering the report and any other relevant evidence, the court shall determine whether the proceeding should be continued or not

E For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on his behalf

Comment This section is taken from Model Act § 7.40 A provision in the Model Act authorizing the court to order the plaintiff to pay the expenses of any defendant has not been included Subsection D is new

There is no comparable section in the Virginia Code

Article 9.
Directors and Officers

§ 13 1-673 Requirement for and duties of board of directors—A Each corporation shall have a board of directors

B. All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation

Comment The Virginia Draft adopts Model Act § 8.01 with the elimination of a provision that would allow a corporation with 50 or fewer shareholders to dispense with a board of directors by describing in the articles of incorporation who will perform the board's duties The Virginia Draft is similar to Virginia Code § 13.1-35.

§ 13 1-674 Qualification of directors— The articles of incorporation or bylaws may prescribe qualifications for directors A director need not be a resident of this Commonwealth or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe

Comment The source of this provision is § 8.02 of the Model Act. Virginia Code § 13 1-35 is similar

§ 13 1-675. Number and election of directors—A A board of directors shall consist of one or more individuals, with the number specified in or fixed in accordance with the bylaws, or if not specified in or fixed in accordance with the bylaws, with the number specified in or fixed in accordance with the articles of incorporation The number of directors may be increased or decreased from time to time by amendment to the bylaws, unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment of the articles of incorporation.

B The shareholders may adopt a bylaw fixing the number of directors and may direct that such bylaws not be amended by the board of directors. If a bylaw states a fixed number of directors and the board of directors has the right to amend the bylaw, it may by amendment to the bylaw increase or decrease by thirty percent or less the number of directors last elected by the shareholders, but only the shareholders may increase or decrease the number by more than thirty percent

C The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders or by the board of directors After shares are issued, only the shareholders may change the range for the size of the board of directors or change from a fixed to a variable-range size board or vice versa

D Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under § 13.1-678

E No individual shall be named or elected as a director without his prior consent

Comment This provision follows Model Act § 8.03 with the following changes

1. Subsection A of the Virginia Draft has been taken from Virginia Code § 13 1-36 The Model

Act only states that the board of directors shall consist of the number specified in or fixed in accordance with the articles of incorporation or bylaws.

2 Subsection B has been rewritten to permit the shareholders to adopt a bylaw fixing the number of directors and providing that the bylaw cannot be amended by the board of directors

3. Subsection E is new

Differences between the Virginia Draft and the Virginia Code include the following

1 Virginia Code § 13 1-38 prohibits the board from filling a vacancy resulting from an increase by more than two in the number of directors. The Virginia Draft allows the board of directors to amend the bylaws to alter the number of directors by up to thirty percent so long as the bylaws do not prohibit such an amendment and in § 13 1-682 allows the board to fill a vacancy resulting from an increase in the size of the board unless the articles of incorporation provide otherwise

2 Virginia Code § 13.1-36 requires that the names and addresses of the initial board of directors be stated in the articles of incorporation

3 Subsection E requires notice to an individual before he is named or elected as a director without his prior consent, while Virginia Code § 13 1-36 only requires such notice to the initial board of directors

§ 13.1-676 Election of directors by certain classes of shareholders—If the articles of incorporation authorize dividing the shares into classes, the articles may also authorize the election of all or a specified number of directors by the holders of one or more authorized classes of shares Each class, or classes, of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors

Comment: This section adopts § 8.04 of the Model Act The first sentence is substantially similar to a provision in Virginia Code § 13 1-37 The second sentence is new to the Virginia Code.

§ 13.1-677 Terms of directors generally—A The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected

B The terms of all other directors expire at the next annual shareholders' meeting following their election unless their terms are staggered under § 13 1-678

C A decrease in the number of directors does not shorten an incumbent director's term

D The term of a director elected by the board of directors to fill a vacancy expires at the next shareholders' meeting at which directors are elected

E Despite the expiration of a director's term, he continues to serve until his successor is elected and qualifies or until there is a decrease in the number of directors

Comment The source of this provision is Model Act § 8 05 It is similar to Virginia Code § 13 1-36, but subsection D is new

§ 13.1-678 Staggered terms for directors—A The articles of incorporation may provide for staggering the terms of directors by dividing the total number of directors into two or three groups, with each group containing one-half or one-third of the total, as near as may be In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, and the terms of the third group, if any, expire at the third annual shareholders' meeting after their election At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two years or three years, as the case may be, to succeed those whose terms expire

B If the articles of incorporation permit cumulative voting, any provision establishing staggered terms of directors shall provide that at least three directors shall be elected at each annual shareholders' meeting

Comment: Section 8 06 of the Model Act has been adopted except to delete the requirement that a corporation have at least nine directors in order to have staggered terms In lieu thereof, subsection B of the Virginia Draft states that, if the articles of incorporation permit cumulative voting, any provision establishing staggered terms must require election of at least three directors at each annual meeting This subsection is taken from Va. Code § 13.1-37.

In contrast to the Virginia Draft, Virginia Code § 13.1-37 specifies that no classification of directors is effective before the first annual shareholders' meeting

§ 13 1-679 Resignation of directors—A A director may resign at any time by delivering written notice to the board of directors, its chairman, the president, or the secretary

B A resignation is effective when the notice is delivered unless the notice specifies a later effective date If a resignation is made effective at a later date, the board of directors may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date

Comment This section was taken directly from Model Act § 8.07 There is no comparable provision in the Virginia Code.

§ 13 1-680 Removal of directors by shareholders—A The shareholders may remove one or more directors with or without cause, unless the articles of incorporation provide that directors may be removed only with cause

B If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him

C If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, unless the articles of incorporation require a greater vote, a director may be removed if the number of votes cast to remove him constitutes a majority of the votes entitled to be cast at an election of directors of the voting group or voting groups by which such director was elected.

D A director may be removed by the shareholders only at a meeting called for the purpose of removing him and the meeting notice must state that the purpose, or one of the purposes of the meeting, is removal of the director

Comment Subsection A of the Virginia Draft adopts Model Act § 8.08 (a). The Virginia Code permits removal with or without cause without exception.

Subsections B through D have been taken from Model Act § 8.08 except for the last sentence of subsection C taken from Virginia Code § 13.1-42. In contrast to that provision, the Model Act states that if cumulative voting is not authorized, removal only requires approval of a majority of votes actually cast. These subsections are similar to the Virginia Code

§ 13 1-681 Judicial review of elections.—Any shareholder aggrieved by an election of directors may, after reasonable notice to the corporation and each director whose election is contested, apply for relief to the circuit court in the county or city in which the principal office of the corporation is located, or, if none in this Commonwealth, in the county or city in which its registered office is located The court shall proceed forthwith in a summary way to hear and decide the issues and thereupon to determine the persons elected or order a new election or grant such other relief as may be equitable Pending decision the court may require the production of any information and may by order restrain any person from exercising the powers of a director if such relief is equitable.

Comment This section was taken from the second paragraph of Virginia Code § 13 1-42 with minor changes. There is no similar provision in the Model Act.

Model Act § 8.09, which provides for removal of directors by a circuit court when the director has engaged in fraudulent or deceptive conduct, has not been adopted The shareholders have the right to remove and, in the event that the director in question is able to block the removal, to seek dissolution pursuant to § 13.1-747

§ 13.1-682 Vacancy on board of directors—A Unless the articles of incorporation provide otherwise, if a vacancy occurs on the board of directors, including a vacancy resulting from an increase in the number of directors:

1 The shareholders may fill the vacancy,

2 The board of directors may fill the vacancy, or

3 If the directors remaining in office constitute fewer than a quorum of the board, they

may fill the vacancy by the affirmative vote of a majority of the directors remaining in office

B Unless the articles of incorporation provide otherwise, if the vacant office was held by a director elected by a voting group of shareholders, only the holders of that voting group are entitled to vote to fill the vacancy if it is filled by the shareholders

C A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under subsection B of § 13 1-679 or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs

Comment This provision is taken from Model Act § 8 10 Subsections B and C are new to the Virginia Code

§ 13.1-683 Compensation of directors—Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

Comment This provision was taken from Model Act § 8.11 It is substantially similar to Virginia Code § 13.1-35

§ 13 1-684 Meetings of the board of directors—A. The board of directors may hold regular or special meetings in or out of this Commonwealth

B Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting

Comment The source of this provision is Model Act § 8.20 Virginia Code § 13.1-41 differs from the Virginia Draft in requiring a written record to be made of action taken at a meeting conducted by means of communications equipment. Virginia Code § 13.1-41 also appears to give any director the right to participate in a meeting by conference call or other communications device, rather than leaving such participation to the discretion of the board of directors

§ 13 1-685. Action without meeting of board of directors.—A. Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this Act to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board The action shall be evidenced by one or more written consents stating the action taken, signed by each director either before or after the action taken, and included in the minutes or filed with the corporate records reflecting the action taken

B Action taken under this section is effective when the last director signs the consent unless the consent specifies a different effective date, in which event the action taken is effective as of the date specified therein provided the consent states the date of execution by each director

C A consent signed under this section has the effect of a meeting vote and may be described as such in any document

Comment This provision has been taken from Model Act § 8.21 after modifying subsections A and B to establish a procedure for directors to consent after the fact. This section is similar to Virginia Code § 13.1-41 1 except that subsection B is new

§ 13 1-686 Notice of directors' meetings—A Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting

B Special meetings of the board of directors shall be held upon such notice as is prescribed in the articles of incorporation or bylaws, or when not inconsistent with the articles of incorporation or bylaws, by resolution of the board of directors The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws

Comment Subsection A is taken from Model Act § 8 22 and is similar to Va Code § 13.1-41 Except for the references to the articles of incorporation, subsection B follows Va Code § 13.1-41, rather than the Model Act The Model Act provision is less flexible, requiring at least 2 days' notice of a special meeting unless otherwise provided in the articles of incorporation

or bylaws

§ 13 1-687 Waiver of notice by director—A A director may waive any notice required by this Act, the articles of incorporation, or bylaws before or after the date and time stated in the notice, and such waiver shall be equivalent to the giving of such notice. Except as provided in subsection B of this section, the waiver shall be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records

B A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting or promptly upon his arrival objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting

Comment· The Virginia Draft follows Model Act § 8.23 with minor changes

Subsection B is more precise than Virginia Code § 13.1-27, which provides that attendance at a meeting constitutes a waiver "unless [the director] attends for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened."

§ 13.1-688 Quorum and voting by directors—A Unless the articles of incorporation or bylaws require a greater number for the transaction of all business or any particular business, a quorum of a board of directors consists of·

1 A majority of the fixed number of directors if the corporation has a fixed board size, or

2. A majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable-range size board

B The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or prescribed number of directors determined under subsection A of this section

C If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors

D A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless.

1 He objects at the beginning of the meeting, or promptly upon his arrival, to holding it or transacting specified business at the meeting, or

2 He votes against, or abstains from, the action taken

E Whenever this chapter requires the board of directors to recommend or approve any proposed corporate act, such recommendation or approval shall not be required if the proposed corporate act is adopted by the unanimous consent of shareholders

Comment This section follows Model Act § 8.24 except for changes in subsection A and subsection D and the addition of subsection E, which is new Subsection A has been changed to make clear that the articles of incorporation or bylaws can establish a greater quorum requirement for the transaction of any or all business In subsection D of the Model Act a director who dissents or abstains from the action taken is required to ensure that his dissent is recorded in the minutes or in a written notice to the Secretary While such recordation is the best means of establishing how the director voted, the Virginia Draft does not require such recordation

Although subsections A through C of the Virginia Draft contain language similar to that found at Virginia Code § 13.1-39 the following differences exist

1. Both statutes provide that the articles of incorporation may require a greater number of directors for a quorum than is provided in this section The Virginia Draft adds that the bylaws may require a greater number as well

2 Subsection A 2 is new

3 Subsection C adds that the existence of a quorum is determined at the time the vote is taken, and also provides that a greater voting requirement can be put in the bylaws as well as the articles of incorporation

Subsection D differs from Virginia Code § 13.1-44 in the following ways:

1 The Virginia Code section does not apply to meetings of committees of the board

2 The Virginia Code establishes a presumption that a director has assented to corporate action if present at a meeting of the board of directors unless his dissent is recorded in the manner specified by the Code

Subsection E is new to the Virginia Code

§ 13.1-689 Committees.—A. Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees and appoint members of the board of directors to serve on them. Each committee may have two or more members, who serve at the pleasure of the board of directors.

B. The creation of a committee and appointment of members to it shall be approved by the greater number of (i) a majority of all the directors in office when the action is taken, or (ii) the number of directors required by the articles of incorporation or bylaws to take action under § 13.1-688.

C. Sections 13.1-684 through 13.1-688, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.

D. To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under § 13.1-673, except that a committee may not:

1. Approve or recommend to shareholders action that this Act requires to be approved by shareholders;

2. Fill vacancies on the board or on any of its committees;

3. Amend articles of incorporation pursuant to § 13.1-706;

4. Adopt, amend, or repeal the bylaws;

5. Approve a plan of merger not requiring shareholder approval;

6. Authorize or approve a distribution, except according to a general formula or method prescribed by the board of directors; or

7. Authorize or approve the issuance or sale or contract for sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares, except that the board of directors may authorize a committee, or a senior executive officer of the corporation, to do so within limits specifically prescribed by the board of directors.

E. The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in § 13.1-690.

Comment This section of the Virginia Draft follows § 8.25 of the Model Act except for subsection D 6. That subsection permits a committee to authorize any distribution according to a formula or other method prescribed by the board. The Model Act allows a committee to authorize a reacquisition of shares according to such a formula or method, but does not allow committee authorization of any other distribution.

There are substantial differences between the Virginia Draft and Virginia Code § 13.1-40. These differences include:

1. Under the Virginia Code creation of an executive committee requires the vote of a majority of the number of directors fixed by the bylaws, or if the number of directors is not fixed in the bylaws, a majority of the number stated in the articles of incorporation. Other committees may be authorized by a majority of the directors present at a meeting at which a quorum is present.

2. Subsection C of the Virginia Draft makes the provisions concerning meetings, action without

meetings, notice, waiver of notice, and quorum and voting requirements of the board of directors applicable to committees In the Virginia Code the only one of these provisions that expressly applies to committees is the authorization of action by unanimous written consent (Virginia Code § 13.1-41 1)

3 Both statutes allow the board of directors, the articles of incorporation or the bylaws to delegate the authority of the board of directors to a committee with certain exceptions The exceptions listed in the Virginia Code are covered by subsection D 2 of the Virginia Draft Virginia Draft subsections D 1 and D 3 through 7 are additions to the Virginia Code

4 Subsection E is new

§ 13 1-690 General standards of conduct for director—A A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation

B Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by.

1 One or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented,

2 Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence, or

3 A committee of the board of directors of which he is not a member if the director believes, in good faith, that the committee merits confidence.

C. A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

D A person alleging a violation of this section has the burden of proving the violation.

Comment: While Model Code § 8.30 is the source of this provision, subsection D has been added and significant changes have been made in subsections A and B. In contraxt to the Virginia Deaft, the Model Act § 8.30 (a) requires a director to discharge his duties not only in good faith but also with the care of an ordinarily prudent person acting under similar circumstances and in a manner he reasonably believes to be in the best interests of the corporation. Subsection B permits reliance on others so long as the director does so in good faith and does not have knowledge or information that makes reliance unwarranted, while the Model Act imposes a reasonableness standard

Virginia Code § 13.1-44 contains a paragraph concerning proper reliance upon the corporation's financial statements in connection with distributions, otherwise the Virginia Code has no comparable provision Virginia Code § 13.1-44 also provides immunity for a director who in good faith considered the assets of the corporation to be of a value equal to their cost in determining the amount available for a dividend or distribution. The type of information and the persons upon whom a director may rely have been greatly expanded in the Virginia Draft.

Comment. Section 8 42 of the Model Act establishes a statutory standard of care for officers. That section is not adopted in the Virginia Draft. There is no similar provision in the Virginia Code

§ 13.1-691 Director conflict of interests—A A conflict of interests transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect personal interest A conflict of interests transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true

1 The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction,

2 The material facts of the transaction and the director's interest were disclosed to the shareholders entitled to vote and they authorized, approved, or ratified the transaction, or

3 The transaction was fair to the corporation

B. For the purposes of this section, a director of the corporation has an indirect personal interest in a transaction if

1 Another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction, or

2 Another entity of which he is a director, officer or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation

C. For purposes of paragraph 1 of subsection A of this section, a conflict of interests transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors, or on the committee, who have no direct or indirect personal interest in the transaction. A transaction shall not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect personal interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect personal interest in the transaction does not affect the validity of any action taken under paragraph 1 of subsection A of this section if the transaction is otherwise authorized, approved or ratified as provided in that subsection

D. For purposes of paragraph 2 of subsection A of this section, a conflict of interests transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection Shares owned by or voted under the control of a director who has a direct or indirect personal interest in the transaction, and shares owned by or voted under the control of an entity described in paragraph 1 of subsection B of this section, may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interests transaction under paragraph 2 of subsection A of this section. The vote of those shares, however, shall be counted in determining whether the transaction is approved under other sections of this chapter A majority of the shares, whether or not present, which are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

Comment The Virginia Draft follows Model Act § 8.31

Differences between the Virginia Draft and Virginia Code § 13.1-39.1 include

1 Subsection B of the Virginia Draft adds a definition of indirect personal interest.

2 Subsection C provides for approval by disinterested directors even though less than a majority, while the Virginia Code provides for the requisite vote of the board of directors without counting the votes of interested directors

3. The Virginia Code does not require that shares owned or controlled by an interested director be excluded for purposes of determining whether shareholders approve of the transaction The Virginia Code also provides for approval by a majority of shareholders voting on the matter, while the Virginia Draft requires approval of a majority of votes entitled to be counted

4 In contrast to the Virginia Draft, Virginia Code § 13.1-39 1 places the burden of proving fairness on the party seeking to uphold the transaction unless it was approved by the board or shareholders with disclosure of all material facts

5 Virginia Code § 13.1-39.1 applies to transactions with officers as well as directors while the Virginia Draft and the Model Act only cover transactions with directors

6 A provision in § 13 1-39.1 regarding any director of a public utility who has a relationship with another corporation that furnishes fuel to the public utility has been relocated in Virginia Code § 56-249 7

The Virginia Draft has not adopted Model Act § 8.32, which relates to loans to directors Under the Virginia Draft such a loan would be treated like any other transaction between a director and the corporation.

§ 13 1-692 Liability for unlawful distributions—A Unless he complies with the applicable standards of conduct described in § 13 1-690, a director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation and its creditors for the amount of the distribution that exceeds what could have been distributed without violating this chapter or the articles of incorporation

B A director held liable for an unlawful distribution under subsection A of this section is entitled to contribution.

1 From every other director who voted for or assented to the distribution without complying with the applicable standards of conduct described in § 13.1-690, and

2 From the shareholders who received the unlawful distribution in proportion to the amounts of such unlawful distribution received by them respectively

C No suit shall be brought against any director for any liability imposed by this section except within two years after the right of action shall accrue

Comment Subsections A and B 1 follow Model Act § 8.33, except that subsection A makes the director potentially liable to the corporation's creditors as well as the corporation Subsections B 2 and C were taken from Virginia Code § 13 1-44. Subsection B 2 of the Model Act limits the right of contribution to those shareholders who knew of the unlawful distribution.

Virginia Code § 13 1-44a is similar to subsection A of the Virginia Draft, but the Virginia Code imposes joint and several liability on such directors, and does not condition liability on failure to meet the applicable standards of conduct.

Under subsection B of the Virginia Draft a director is not subject to contribution unless he failed to meet the standards of conduct described in § 13.1-690 Under the Virginia Code any director who voted for or assented to the action upon which the claim is asserted, is subject to contribution.

§ 13.1-693 Required officers—A A corporation shall have a president and a secretary and such other officers as are described in its bylaws or appointed by the board of directors in accordance with the bylaws

B A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors

C. The secretary shall have the responsibility for preparing and maintaining custody of minutes of the directors' and shareholders' meetings and for authenticating records of the corporation.

D. The same individual may simultaneously hold more than one office in a corporation.

Comment This section follows § 8 40 of the Model Act except that the Virginia Draft requires every corporation to have a president and a secretary. The Virginia Draft differs substantively from Virginia Code § 13.1-45 in the following ways

1. The Virginia Code requires that the corporation have a president, a secretary and a treasurer
2. Subsections B and C are new to the Virginia Code.
3. Subsection D allows one individual to hold simultaneously more than one office in a corporation. The Virginia Code specifies that the same person cannot hold simultaneously the offices of president and secretary unless the corporation only has one shareholder.

§ 13.1-694. Duties of officers—Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers

Comment. This section adopts Model Act § 8 41 The Virginia Code contains a similar provision in § 13.1-45

§ 13.1-695. Resignation and removal of officers—A An officer may resign at any time by delivering notice to the corporation A resignation is effective when the notice is delivered unless the notice specifies a later effective date If a resignation is made effective at a later date and the corporation accepts the future effective date, it may fill the pending vacancy before the effective date if the successor does not take office until the effective date

B A board of directors may remove any officer at any time with or without cause and any officer or assistant officer, if appointed by another officer, may likewise be removed by such officer

Comment This section adopts Model Act § 8 43 with minor changes The Virginia Draft adds a

provision in subsection B to allow an officer to remove an officer or assistant officer if appointed by him

There is no section in the Virginia Code comparable to subsection A

Comment. § 8 44 of the Model Act, which addresses contract rights of officers, has not been adopted There is no similar provision in the Virginia Code.

Article 10

Indemnification

§ 13.1-696 Definitions—In this article

"Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction

"Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. "Director " includes, unless the context requires otherwise, the estate or personal representative of a director

"Expenses" includes counsel fees

"Liability" means the obligation to pay a judgment, settlement, penalty, fine, including any excise tax assessed with respect to an employee benefit plan, or reasonable expenses incurred with respect to a proceeding

"Official capacity" means, (i) when used with respect to a director, the office of director in a corporation; or (ii) when used with respect to an individual other than a director, as contemplated in § 13.1-702, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

"Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

"Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative or investigative and whether formal or informal.

Comment. This section has been taken from Model Act § 8 50. In the Model Act "Indemnification" is covered in a subchapter of the chapter on "Directors and officers." The Virginia Draft treats "Indemnification" as a separate article.

The Virginia Code does not have a separate definition section for indemnification. "Corporation" is the only term that is given a special definition in the indemnification section of the Virginia Code.

§ 13.1-697 Authority to indemnify—A. Except as provided in subsection D of this section, a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if

1 He conducted himself in good faith; and

2. He believed·

a. In the case of conduct in his official capacity with the corporation, that his conduct was in its best interests, and

b In all other cases, that his conduct was at least not opposed to its best interests; and

3 In the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful

B A director's conduct with respect to an employee benefit plan for a purpose he believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of paragraph 2b of subsection A of this section

C. The termination of a proceeding by judgment, order, settlement or conviction is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

D A corporation may not indemnify a director under this section:

1 In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

2. In connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him

E Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding

Comment The Virginia Draft adopts § 8 51 of the Model Act with the deletion in subsections A 2 and B of the requirement that the director's belief must be reasonable

Differences between the Virginia Draft and Virginia Code § 13 1-3 1 include

1 The Virginia Draft differentiates between conduct in an official capacity and all other conduct. The Virginia Code applies a uniform standard that any action taken by the person seeking indemnification must be "in or not opposed to the best interests of the corporation."

2 The Virginia Draft permits indemnification for serving an employee benefit plan and establishes a special standard of conduct in subsection B The Virginia Code does not address this situation.

3 Subsection D of the Virginia Draft prohibits indemnification under this section in connection with a proceeding by or in the right of the corporation if the director is adjudged liable to the corporation The Virginia Code prohibits indemnification in such a suit if the director was found liable for "negligence or misconduct in the performance of his duty to the corporation "

4 Subsection D 2 of the Virginia Draft prohibits indemnification under this section whenever the director was adjudged liable on the basis that personal benefit was improperly received by him The Virginia Code does not have a comparable provision

§ 13.1-698. Mandatory indemnification.—Unless limited by its articles of incorporation, a corporation shall indemnify a director who entirely prevails in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding

Comment This section adopts Model Act § 8.52 with minor changes Virginia Code § 13.1-3.1 (c) is similar, except that the Virginia Code does not provide that the articles of incorporation can limit the applicability of this provision

§ 13 1-699 Advance for expenses.—A A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if

1 The director furnishes the corporation a written statement of his good faith belief that he has met the standard of conduct described in § 13 1-697,

2 The director furnishes the corporation a written undertaking, executed personally or on his behalf, to repay the advance if it is ultimately determined that he did not meet the standard of conduct, and

3 A determination is made that the facts then known to those making the determination would not preclude indemnification under this article

B The undertaking required by paragraph 2 of subsection A of this section shall be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment

C Determinations and authorizations of payments under this section shall be made in the manner specified in § 13 1-701

Comment: Model Act § 8.53 is the source of this provision While Virginia Code § 13 1-3.1 (e) is similar, the Virginia Draft makes the following substantive additions

1. The Virginia Draft requires the director to confirm in writing his belief that he has met the required standard of conduct. In addition, there must be a determination that on the basis of the facts then known, indemnification would not be precluded
2 The Virginia Draft limits advances to "reasonable expenses"

§ 13 1-700 Court-ordered indemnification.—Unless limited by a corporation's articles of incorporation, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or seek indemnification in another court of competent jurisdiction The court may order indemnification if it determines·

1 The director is entitled to mandatory indemnification under § 13.1-698, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification, or

2. With respect to a proceeding by or in the right of the corporation, the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances even though he was adjudged liable, but any indemnification shall be limited to reasonable expenses incurred.

Comment. This section of the Virginia Draft was taken from § 8.54 of the Model Act except for elimination of a provision in the Model Act that permits a court to order indemnification even though the director has not met the minimum standard of conduct set forth in § 13.1-697 Virginia Code § 13.1-3.1 (b) authorizes a court to order indemnification for expenses when a director has been adjudged liable in a derivative suit. Otherwise this section is new to the Virginia Code

§ 13 1-701 Determination and authorization of indemnification - A. A corporation may not indemnify a director under § 13 1-697 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because he has met the standard of conduct set forth in § 13.1-697

B. The determination shall be made

1. By the board of directors by a majority vote of a quorum consisting of directors not at the time parties to the proceeding,

2. If a quorum cannot be obtained under paragraph 1 of this subsection, by majority vote of a committee duly designated by the board of directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding;

3. By special legal counsel

a Selected by the board of directors or its committee in the manner prescribed in paragraph 1 or 2 of this subsection, or

b If a quorum of the board of directors cannot be obtained under paragraph 1 of this subsection and a committee cannot be designated under paragraph 2 of this subsection, selected by majority vote of the full board of directors, in which selection directors who are parties may participate, or

4 By the shareholders, but shares owned by or voted under the control of directors who

are at the time parties to the proceeding may not be voted on the determination

C Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under paragraph 3 of subsection B of this section to select counsel.

Comment The Virginia Draft adopts § 8.55 of the Model Act without change Virginia Code § 13.1-3 1 D is similar except that

1 The Virginia Draft allows the determination of indemnification to be made by an independent committee of the board

2 Where the determination is to be made by special legal counsel, the Virginia Draft specifies the manner in which such counsel is selected

3 Subsection B 4 expressly provides that, where the determination is made by shareholders, shares held by directors who are at the time parties to the proceeding may not be voted

4. Subsection C of the Virginia Draft is new

§ 13.1-702 Indemnification of officers, employees and agents—Unless limited by a corporation's articles of incorporation,

1 An officer of the corporation is entitled to mandatory indemnification under § 13 1-698, and is entitled to apply for court-ordered indemnification under § 13 1-700, in each case to the same extent as a director, and

2 The corporation may indemnify and advance expenses under this article to an officer, employee, or agent of the corporation to the same extent as to a director

Comment: While § 8 56 of the Model Act is the source of this provision, the Virginia Draft does not include a Model Act provision that permits additional indemnification by general or specific action of the board or by contract. Like the Virginia Draft, the indemnification provisions of the Virginia Code do not distinguish between directors and officers, employees or agents

§ 13 1-703. Insurance—A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under § 13.1-697 or § 13 1-698

Comment. This section of the Virginia Draft has been taken from § 8.57 of the Model Act without change. It is similar to § 13 1-3.1 (g) of the Virginia Code.

§ 13 1-704. Application of article—A. Unless the articles of incorporation or bylaws provide otherwise, any authorization of indemnification in the articles of incorporation or bylaws shall not be deemed to prevent the corporation from providing the indemnity permitted or mandated by this article.

B Any corporation shall have power to make any further indemnity, including advance of expenses, to any director, officer, employee or agent that may be authorized by the articles of incorporation or any bylaw made by the shareholders or any resolution adopted, before or after the event, by the shareholders, except an indemnity against his gross negligence or willful misconduct. Unless the articles of incorporation, or any such bylaw or resolution provide otherwise, any determination as to any further indemnity shall be made in accordance with subsection B of § 13 1-701 Each such indemnity may continue as to a person who has ceased to have the capacity referred to above and may inure to the benefit of the heirs, executors and administrators of such a person

Comment. Subsection A is new to the Virginia Code and is not found in the Model Act

Subsection B has been taken from Virginia Code § 13.1-3.1 (f) except for the second sentence, which is new Model Act § 8 58 only allows indemnification as authorized by articles of incorporation, bylaws, contracts and action by directors or shareholders to the extent that such provisions are consistent with the Model Act The Model Act also states that any

provision in the articles of incorporation that limits the authority to indemnify shall be deemed controlling

A provision in the Model Act that provides for reimbursing a director for expenses incurred as a witness has not been adopted.

Article 11

Amendment of Articles of Incorporation and Bylaws

§ 13.1-705 Authority to amend articles of incorporation.—A. A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles or to delete a provision not required in the articles. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

B. A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend entitlement, purpose, or duration of the corporation.

Comment. This section adopts Model Act § 10.01. Subsection A is substantively the same as the first paragraph of Virginia Code § 13.1-55. That Code section also contains a non-exclusive list of amendments a corporation may make in its articles of incorporation. This list is not included in the Virginia Draft.

Subsection B is new to the Virginia Code.

§ 13.1-706. Amendment of articles of incorporation by directors.—Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without shareholder action.

1. To delete the names and addresses of the initial directors,

2. To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Commission,

3. To change each issued and unissued authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding,

4. To change the corporate name by substituting the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co." or "ltd.," or a similar word or abbreviation in the name, or by adding, deleting, or changing a geographic attribution for the name, or

5. To make any other change expressly permitted by this chapter to be made without shareholder action.

Comment: The Virginia Draft follows § 10.02 of the Model Act but deletes a provision allowing the board of directors to extend the duration of the corporation if it was incorporated at a time when limited duration was required by law, as Virginia law has not contained such a requirement. There is no comparable provision in the Virginia Code.

§ 13.1-707. Amendment of articles of incorporation by directors and shareholders.—A. A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

B. For the amendment to be adopted:

1. The board of directors shall recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interests or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the amendment, and

2. The shareholders entitled to vote on the amendment shall approve the amendment as

provided in subsection E of this section

C The board of directors may condition its submission of the proposed amendment on any basis

D The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with § 13 1-658 The notice of meeting shall also state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy of the amendment

E Unless this chapter or the board of directors, acting pursuant to subsection C of this section, requires a greater vote, the amendment to be adopted shall be approved by each voting group entitled to vote on the proposed amendment by more than two-thirds of all the votes entitled to be cast by that voting group The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast on the amendment by each voting group entitled to vote on the transaction at a meeting at which a quorum of the voting group exists

F When an exchange, reclassification or change of shares is effected by amendment of the articles of incorporation, and a material difference in right results, or the par value of the shares is changed or the corporate name is changed, the action of the shareholders authorizing the amendment may prescribe a time after which the holders of the old shares shall no longer be entitled to receive dividends or to vote or to exercise any other rights as shareholders until certificates representing the old shares are surrendered in exchange for certificates representing the new shares But upon such surrender all dividends not paid because of this provision shall be paid without interest.

Comment Subsection A-D of this section have been taken from Model Act § 10.03 Subsection D has been modified by deleting a provision allowing the notice to be accompanied by a summary of the amendment. The first sentence of subsection E is from Virginia Code § 13.1-56 C Model Act § 10 03 (e) requires a majority of votes cast to approve an amendment, unless the amendment would create dissenters' rights, in which event approval requires a majority of the votes entitled to be cast on the amendment. The second sentence of subsection E, which would permit a corporation to include a provision in its articles of incorporation to increase or decrease the more than two-thirds vote requirement, is new Subsection F is taken from Virginia Code § 13.1-19.

The Virginia Draft and Virginia Code § 13.1-56 differ in the following ways:

1 The Virginia Draft requires the board of directors to recommend the amendment to the shareholders unless the board determines that, because of special circumstances, no recommendation should be made The Virginia Code requires the board of directors to adopt a resolution finding the amendment in the best interests of the corporation.

2 There is no provision in Virginia Code § 13.1-56 similar to subsection C, which gives the board flexibility to condition its submission of an amendment to shareholders on any basis

3 The Virginia Code does not require notice to shareholders who are not entitled to vote on the proposed amendment.

§ 13 1-708 Voting on amendments by voting groups.—A The outstanding shares of a class are entitled to vote as a separate voting group, if shareholder voting is otherwise required by this chapter, on a proposed amendment of the articles of incorporation if the the amendment would

1 Increase or decrease the aggregate number of authorized shares of the class,

2 Effect an exchange or reclassification of all or part of the shares of the class into shares of another class,

3 Effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class,

4 Change the designation, rights, preferences, or limitations of all or part of the shares of the class, but such class shall not be entitled to vote as a separate voting group on an amendment increasing the number of authorized shares of a subordinate class solely because

both such classes vote on some or all matters as a single voting group,

5 Change the shares of all or part of the class into a different number of shares of the same class,

6 Create a new class of shares, or change a class with subordinate and inferior rights into a class of shares, having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class, or increase the rights, preferences, or number of authorized shares of any class having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class

7 In the case of a class of shares with preferential rights, divide the shares into a series, designate the series, and determine, or, unless authority was conferred at the time the class was created, authorize the board of directors to determine, variations in the rights, preferences and limitations among the shares of the respective series,

8 Limit or deny an existing preemptive right of all or part of the shares of the class, or

9 Cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class

B If a proposed amendment would affect a series of a class of shares in one or more of the ways described in subsection A of this section, the shares of that series are entitled to vote as a separate voting group on the proposed amendment

C If a proposed amendment that entitles two or more series of shares to vote as separate voting groups under this section would affect those two or more series in the same or a substantially similar way, the shares of all the series so affected shall vote together as a single voting group on the proposed amendment.

D. A class or series of shares is entitled to the voting rights granted by this section although the articles of incorporation provide that the shares are nonvoting shares

Comment: The Virginia Draft follows § 10.04 of the Model Act with modifications taken from Virginia Code § 13.1-57 The provision in subsection A 4 is taken from Va. Code § 13.1-57 (f) Subsection A 6 modifies the Model Act to provide that the subsection applies not only to the creation of a new class, but also to a change in any class that had subordinate rights.

The Virginia Draft varies from Virginia Code § 13.1-57 in the following ways

1 Subsection A 4 provides that any change in the rights of a class triggers a class vote, while Virginia Code § 13.1-57 (d) requires that the change be "adverse" Subsection A 4 also expressly covers any change that affects the rights of holders of "all or part of " the shares of any class. Provision for "all or part" of a class also is found in subsections A 5, A 6, A 8 and A 9, but is not found in the comparable provisions of Virginia Code § 13 1-57

2 Subsection C of the Virginia Draft is new.

§ 13.1-709 Amendment before issuance of shares.--If a corporation has not yet issued shares, its board of directors or incorporators, in the event that there is no board of directors, may adopt one or more amendments to the corporation's articles of incorporation

Comment. The Virginia Draft follows § 10 05 of the Model Act with minor changes It is similar to Virginia Code § 13 1-56 (a), but the Virginia Draft allows incorporators to adopt amendments if shares have not been issued and there is no board of directors

§ 13 1-710. Articles of amendment.--A A corporation amending its articles of incorporation shall file with the Commission articles of amendment setting forth

1 The name of the corporation,

2 The text of each amendment adopted,

3. If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself,

4 The date of each amendment's adoption,

5 If an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and that shareholder action was not required,

6 If an amendment was approved by the shareholders, either·

a A statement that the amendment was adopted by unanimous consent of the shareholders, or

b A statement that the amendment was proposed by the board of directors and submitted to the shareholders in accordance with this chapter and a statement of.

(1) The designation, number of outstanding shares, and number of votes entitled to be cast by each voting group entitled to vote separately on the amendment;

(2) Either the total number of votes cast for and against the amendment by each voting group entitled to vote separately on the amendment or the total number of undisputed votes cast for the amendment by each voting group and a statement that the number cast for the amendment by each voting group was sufficient for approval by that voting group.

B If the Commission finds that the articles of amendment comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of amendment

Comment· The source of this provision in the Virginia Draft is Model Act § 10 06 with minor language changes A similar provision is found in Virginia Code § 13 1-58 The Virginia Code differs from the Virginia Draft in the following ways

1 Subsections A 3, A 5 and A 6a are new

2 Subsection A 6 b (1) provides that the articles of amendment may state the number of undisputed votes and that such number is sufficient for approval This concept is new

3 The Virginia Draft does not include the requirement in Virginia Code § 13.1-58 (c) that the articles set forth the date of the meeting of the board of directors at which the amendment was adopted Nor does the Virginia Draft adopt the requirement in Virginia Code § 13.1-58 (c) that the articles of amendment set forth the date when notice was given to shareholders and the fact that it was given in the manner provided for in the Act. But subsection A 6 (b) does require certification that the amendment was submitted to shareholders in accordance with this article.

§ 13.1-711 Restated articles of incorporation.—A A corporation's board of directors may restate its articles of incorporation at any time with or without shareholder action

B The restatement may include one or more amendments to the articles If the restatement includes an amendment requiring shareholder approval, it shall be adopted as provided in § 13 1-707

C If the board of directors submits a restatement for shareholder action, the corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with § 13 1-658 The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the restatement that identifies any amendment it would make in the articles.

D A corporation restating its articles of incorporation shall file with the Commission articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth

1 Whether the restatement contains an amendment to the articles requiring shareholder approval and,· if it does not, that the board of directors adopted the restatement, or

2 If the restatement contains an amendment to the articles requiring shareholder approval, the information required by § 13 1-710

E If the Commission finds that the articles of restatement comply with the requirements of

law and that all required fees have been paid, it shall issue a certificate of restatement When the certificate of restatement is effective the restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

F The Commission may certify restated articles of incorporation as the articles of incorporation currently in effect without including the certificate information required by subsection D of this section

Comment. The Virginia Draft adopts § 10 07 of the Model Act with minor language changes There is no comparable statute in the Virginia Code

§ 13.1-712 Amendment of articles of incorporation pursuant to reorganization—A A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by § 13.1-619

B The individual or individuals designated by the court shall file with the Commission articles of amendment setting forth

1 The name of the corporation,

2 The text of each amendment approved by the court,

3 The date of the court's order or decree approving the articles of amendment,

4 The title of the reorganization proceeding in which the order or decree was entered, and

5 A statement that the court had jurisdiction of the proceeding under federal statute

C. If the Commission finds that the articles of amendment comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of amendment

D. This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan

Comment. This section is taken from Model Act § 10.08 with minor changes and the deletion of a provision relating to dissenters' rights In contrast to the Model Act, the Virginia Draft does not provide for dissenters' rights in connection with amendments of the articles of incorporation. The Virginia Draft and Virginia Code § 13.1-61 are similar in substance but the Virginia Code section is more detailed. Virginia Code § 13.1-61 also provides for organizing a corporation for the purpose of managing properties sold under a deed of trust or pursuant to judicial decree

§ 13.1-713. Effect of amendment of articles of incorporation.—An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

Comment. This provision in the Virginia Draft has been taken from § 10 09 of the Model Act It is substantially the same as Virginia Code § 13 1-60.

§ 13 1-714 Amendment of bylaws by board of directors or shareholders—A A corporation's board of directors may amend or repeal the corporation's bylaws except to the extent that

1 The articles of incorporation or this chapter reserve this power exclusively to the shareholders, or

2 The shareholders in adopting or amending particular bylaws provide expressly that the board of directors may not amend or repeal that bylaw

3 A corporation's shareholders may amend or repeal the corporation's bylaws even though the bylaws also may be amended or repealed by its board of directors

Comment This provision in the Virginia Draft adopts § 10 20 of the Model Act with minor language changes Virginia Code § 13.1-24 is similar

§ 13.1-715 Bylaw provisions increasing quorum or voting requirements for directors—A A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended or repealed

1 If originally adopted by the shareholders, only by the shareholders, or

2 If originally adopted by the directors, either by the shareholders or by the board of directors

B A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors

C Action by the board of directors under paragraph 2 of subsection A of this section to adopt or amend a bylaw that changes the quorum or voting requirement applicable to meetings of the board of directors must meet the quorum requirement and be adopted by the vote required to take action under the quorum and voting requirement then in effect.

Comment This provision follows § 10.22 of the Model Act except for subsection C In the Model Act any proposal relating to a quorum or voting requirement must meet the existing or proposed quorum or voting requirement, whichever is greater This section is new to the Virginia Code

Model Act § 10.21 also provides for adoption of a bylaw that increases the quorum or voting requirement for shareholders That section is not adopted in the Virginia Draft.

Article 12

Merger and Share Exchange

§ 13.1-716 Merger—A One or more corporations may merge into another corporation if the articles of incorporation of each of them could lawfully contain all the corporate powers and purposes of all of them. The board of directors of each corporation shall adopt and its shareholders, if required by § 13 1-718, shall approve a plan of merger

B The plan of merger shall set forth.

1. The name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge,

2. The terms and conditions of the merger, and

3 The manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property in whole or part, and the manner and basis of converting rights to acquire shares of each corporation into rights to acquire shares, obligations, or other securities of the surviving or any other corporation or into cash or other property in whole or part

C The plan of merger may set forth

1. Amendments to, or a restatement of, the articles of incorporation of the surviving corporation, and

2 Other provisions relating to the merger

D Any corporation authorized by its articles of incorporation to engage in a special kind of business enumerated in § 13 1-620 may be merged with another corporation authorized by its articles of incorporation to engage in the same special kind of business, whether or not either or both of such corporations are actually engaged in the transaction of such business, and the

shareholders of the corporations parties to the merger may receive shares of a corporation not authorized by its articles of incorporation to engage in such special kind of business

Comment The Virginia Draft adopts § 11 01 of the Model Act with additions from Virginia Code § 13.1-68 to preserve Virginia law regarding mergers of corporations with limited powers and to provide for inclusion in the plan of merger of the terms of any conversion of rights to acquire shares of one of the merging corporations

§ 13 1-717 Share exchange—A A corporation may acquire all of the outstanding shares of one or more classes or series of another corporation if the board of directors of each corporation adopts and its shareholders, if required by § 13 1-718, approve the exchange

B The plan of share exchange shall set forth

1. The name of the corporation whose shares will be acquired and the name of the acquiring corporation,

2 The terms and conditions of the exchange,

3 The manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring or any other corporation or for cash or other property in whole or part, and the manner and basis of converting rights to acquire shares of the corporation to be acquired into rights to acquire shares, obligations, or other securities of the acquiring or any other corporation or into cash or other property in whole or part

C The plan of share exchange may set forth other provisions relating to the exchange

D This section does not limit the power of a corporation to acquire all or part of the shares of one or more classes or series of another corporation through a voluntary exchange or otherwise.

Comment The Virginia Draft adopts Model Act § 11 02 with an addition from Virginia Code § 13.1-69.1 to provide for inclusion in the plan of exchange of the terms of any conversion of rights to acquire shares of the corporation being acquired. There are minor differences between the Virginia Draft and Virginia Code § 13.1-69 1.

§ 13.1-718 Action on plan by shareholders—A After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation all of whose outstanding shares of any class or series will be acquired in the share exchange, shall submit the plan of merger, except as provided in subsection G of this section, or share exchange for approval by its shareholders

B For a plan of merger or share exchange to be approved·

1 The board of directors shall recommend the plan of merger or share exchange to the shareholders unless the board of directors determines that because of conflict of interests or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the plan, and

2. The shareholders shall approve the plan as provided in subsection E of this section

C The board of directors may condition its submission of the proposed merger or share exchange on any basis

D The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with § 13 1-658 The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy of the plan

E Unless this chapter or the board of directors, acting pursuant to subsection C of this section, requires a greater vote, the plan of merger or share exchange to be authorized shall be approved by each voting group entitled to vote on the plan by more than two-thirds of all the votes entitled to be cast by that voting group The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting

groups so long as the vote provided for is not less than a majority of all the votes cast on the plan by each voting group entitled to vote on the transaction at a meeting at which a quorum of the voting group exists

F Voting by a class or series of shares as a separate voting group is required

1 On a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would entitle the class or series to vote as a separate voting group on the proposed amendment under § 13 1-708

2 On a plan of share exchange if the shares of such class or series are to be converted or exchanged under such plan or if the plan contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle the class or series to vote as a separate voting group on the proposed amendment under § 13 1-708.

G Action by the shareholders of the surviving corporation on a plan of merger is not required if.

1 The articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in § 13 1-706, from its articles before the merger,

2 Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after,

3. The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed by more than twenty percent the total number of voting shares of the surviving corporation outstanding immediately before the merger; and

4. The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed by more than twenty percent the total number of participating shares outstanding immediately before the merger

H As used in subsection G of this section.

1 "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

2. "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors

I Any plan of merger or share exchange may contain a provision that the board of directors of each corporation party to the merger or share exchange may amend the plan at any time prior to issuance of the certificate of merger or share exchange An amendment made subsequent to the submission of the plan to the shareholders of any corporation party to the merger or share exchange shall not

1 Alter or change the amount or kind of shares, securities, cash, property or rights to be received in exchange for or on conversion of all or any of the shares of any class or series of such corporation,

2 Alter or change any of the terms and conditions of the plan if such alteration or change would adversely affect the shares of any class or series of such corporation, or

3 Alter or change any term of the articles of incorporation of any corporation whose shareholders must approve the plan of merger or share exchange

If articles of merger or share exchange already have been filed with the Commission,

amended articles of merger or share exchange shall be filed with the Commission prior to the effective date of the certificate of merger or share exchange

J Unless a plan of merger or share exchange prohibits abandonment of the merger or share exchange without shareholder approval, after the merger or share exchange has been authorized, and at any time prior to issuance of the certificate of merger or share exchange, the merger or share exchange may be abandoned, subject to any contractual rights, without further shareholder action, in accordance with the procedure set forth in the plan or, if none is set forth, in the manner determined by the board of directors of each corporation party to the merger or share exchange Written notice of abandonment must be filed with the Commission prior to the effective date of the certificate of merger or share exchange

Comment This section is taken from Model Act § 11.03 with the following language changes

1 Subsection E has been changed to require approval of more than two-thirds of the shares entitled to vote on any plan of merger or share exchange rather than a majority of the shares entitled to vote as set forth in the Model Act. The second sentence of subsection E, which would permit a corporation to include a provision in its articles of incorporation to avoid the more than two-thirds vote requirement, is new

2 The Virginia Draft requires that a copy of the plan accompany the notice to shareholders, while the Model Act permits the use of a summary of the plan

3 Subsection F 2 has been modified to conform to the Virginia Code.

4 Subsection I is new It has been taken from section 250 of the Delaware corporation law

5. Subsection J has been modified to make it clear that a plan of merger or share exchange can prohibit abandonment without shareholder approval

The Virginia Draft differs from the Virginia Code in the following ways

1 Subsections B 1, C, G, H and I are new

2 Subsection E states that the Act, the articles of incorporation or the board may provide for a greater shareholder voting requirement and the articles of incorporation may provide for a lesser voting requirement. Under Virginia Code § 13 1-33 a greater voting requirement can be provided for in the articles of incorporation

3 The provision in Virginia Code § 13.1-70 reducing the class vote required to approve a plan of merger to a simple majority if the Securities and Exchange Commission exercises jurisdiction over the proxy statement has not been adopted

§ 13 1-719 Merger of subsidiary--A. A domestic or foreign corporation owning at least ninety percent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary

B The board of directors of the parent shall adopt a plan of merger that sets forth·

1 The names of the parent and subsidiary, and

2 The manner and basis of converting the shares of the subsidiary into shares, obligations, or other securities of the parent or any other corporation or into cash or other property in whole or part, and the manner and basis of converting rights to acquire shares, obligations or other securities of the subsidiary into rights to acquire shares, obligations or other securities of the parent or any other corporation or into cash or other property in whole or part

C. The parent shall mail a copy of the plan of merger to each shareholder of the subsidiary who does not waive the mailing requirement in writing

D The articles of incorporation of the parent shall not be altered or amended by a merger pursuant to this section, except for amendments enumerated in § 13 1-706

E Two or more subsidiaries may be merged into the parent pursuant to this section

Comment Subsections A-C of this section have been taken from § 11 04 of the Model Act and subsections D and E have been taken from Virginia Code § 13.1-76 The Virginia Draft modifies the Model Act as follows

1 Subsection B 2 has been changed to include any conversion of rights to acquire shares, obligations or other securities of the subsidiary

2. The provision in subsection C allowing the parent to send a summary instead of a copy of the plan of merger to the shareholders of the subsidiary has been deleted

3. Subsection D of Model Act § 11 04 has been deleted Under that subsection articles of merger

could not be filed with the Commission until 30 days after the copy of the plan had been mailed to the shareholders This provision allowed shareholders to effect dissenters' rights. It is no longer required in view of changes made in Article 14 on dissenters' rights See §§ 13.1-732 B, 13.1-734, 13.1-735 and 13.1-737 and accompanying commentary. Virginia Code § 13 1-76 preserved these rights by allowing a shareholder to demand fair value within 25 days after notice of the merger

The Virginia Draft applies to domestic or foreign parent corporations while Virginia Code § 13 1-76 only applies to domestic parent corporations This change will permit a short form merger of a Virginia subsidiary into a foreign parent if permitted by the laws of the state of incorporation of the parent The Virginia Draft also differs from Virginia Code § 13.1-76 in that it allows shareholders of the subsidiary to waive their right to receive a copy of the plan

§ 13.1-720 Articles of merger or share exchange—A. After a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring corporation shall file with the Commission articles of merger or share exchange setting forth

1 The plan of merger or share exchange,

2 If shareholder approval was not required, a statement to that effect;

3 If approval of the shareholders of one or more corporations party to the merger or share exchange was required, with respect to each such corporation, either

a A statement that the amendment was adopted by the unanimous consent of the shareholders, or

b A statement that the plan was submitted to the shareholders by the board of directors in accordance with this chapter, and a statement of

(1) The designation, number of outstanding shares, and number of votes entitled to be cast by each voting group entitled to vote separately on the plan, and

(2) Either the total number of votes cast for and against the plan by each voting group entitled to vote separately on the plan or the total number of undisputed votes cast for the plan separately by each voting group and a statement that the number cast for the plan by each voting group was sufficient for approval by that voting group

B If the Commission finds that the articles of merger or share exchange comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of merger or share exchange

C In the case of a merger pursuant to § 13.1-719, the certificate of merger shall not be deemed a part of the articles of incorporation

Comment Subsection A is taken from Model Act § 11 05 except that subsection A 3 has been modified to provide for unanimous consent of shareholders and to require certification that the plan was submitted to shareholders in accordance with this Act. Subsections B and C have been taken from § 13 1-72 of the Virginia Code While the requirements for articles of merger and share exchange are similar to the Virginia Code, the disclosure requirements in the Virginia Draft are less detailed

§ 13 1-721 Effect of merger or share exchange—A When a merger takes effect

1 Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases,

2 The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment,

3 The surviving corporation has all liabilities of each corporation party to the merger,

4 A proceeding pending by or against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;

5 The articles of incorporation of the surviving corporation are amended to the extent provided in the plan of merger; and

6. The former holders of the shares of every corporation party to the merger are entitled only to the rights provided in the articles of merger or to their rights under Article 15 (§ 13.1-729 et seq) of this chapter

B When a share exchange takes effect, the shares of each acquired corporation are exchanged as provided in the plan, and the former holders of the shares are entitled only to the exchange rights provided in the articles of share exchange or to their rights under Article 15 (§ 13 1-729 et seq.) of this chapter

C When a conversion, exchange, reclassification or change of shares is effected by merger or share exchange, whether the resulting shares are shares of the same or any other corporation, and a material difference in right results, or the par value of the shares is changed or the corporate name is changed, the action of the shareholders authorizing the merger or share exchange may prescribe a time after which the holders of the old shares shall no longer be entitled to receive dividends or to vote or to exercise any other rights as shareholders until certificates representing the old shares are surrendered in exchange for certificates representing the new shares. But upon such surrender all dividends not paid because of this provision shall be paid without interest

Comment. **The source of this provision is Model Act § 11 06 except for subsection C, which is taken from Virginia Code § 13.1-19 A similar provision is found in Virginia Code § 13.1-74, but the Virginia Draft is less detailed**

§ 13.1-722. Merger or share exchange with foreign corporation.—A One or more foreign corporations may merge or enter into a share exchange with one or more domestic corporations if·

1. In a merger, the merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger,

2. In a share exchange, the corporation whose shares will be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated,

3 The foreign corporation complies with § 13.1-723 if it is the surviving corporation of the merger or acquiring corporation of the share exchange, and

4 Each domestic corporation complies with the applicable provisions of §§ 13.1-716 through 13.1-719 and the surviving corporation of the merger or acquiring corporation of the share exchange complies with § 13 1-720

C. Upon a merger's taking effect, the surviving foreign corporation in the merger, and, upon a share exchange's taking effect in which the plan of share exchange places the responsibility for dissenters' rights on the acquiring corporation, the acquiring foreign corporation in the share exchange, each is deemed

1 To appoint the clerk of the Commission as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of each domestic corporation party to the merger or share exchange, and

2 To agree that it will promptly pay to the dissenting shareholders of each domestic corporation party to the merger or share exchange the amount, if any, to which they are entitled under Article 15 (§ 13.1-729 et seq.) of this chapter

C. This section does not limit the power of a foreign corporation to acquire all or part of

the shares of one or more classes or series of a domestic corporation through a voluntary exchange or otherwise

D No corporation that is required by law to be a domestic corporation, may, by merger, cease to be a domestic corporation, but every such corporation, even though a corporation of some other state, the United States or another country, shall also be a domestic corporation of this Commonwealth

Comment Subsections A-C have been taken from Model Act § 11.07 Subsection A 4 has been changed to require the surviving or acquiring corporation to file articles of merger or share exchange even if it is a foreign corporation Subsection B has been modified to conform to the provisions of Article 15 relating to dissenters' rights in share exchanges Subsection D is taken from Virginia Code § 13.1-71 Differences between the Virginia Code and the Virginia Draft are minor

Note that the Model Act and the Virginia Draft do not recognize the concept of a consolidation Therefore, Virginia Code § 13.1-69 and all other references to consolidation have been eliminated The Model Act and the Virginia Draft do not provide for a merger between a business trust and a corporation See Virginia Code § 13.1-76 1

Article 13

Sale of Assets

§ 13.1-723 Sale of assets in regular course of business and mortgage of assets—A. A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of business, or mortgage, pledge, or dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not in the usual and regular course of business on the terms and conditions and for the consideration determined by the board of directors

B Unless the articles of incorporation require it, approval by the shareholders of a transaction described in subsection A of this section is not required

Comment. This section has been taken from Model Act § 12 01 except for elimination of a provision that would permit the board of directors to authorize a transfer of substantially all of the assets to a wholly owned subsidiary even though the transfer is not in the ordinary course of business

The Virginia Draft permits the board of directors to authorize any mortgage or pledge of all of the corporation's assets even if not in the regular course of business, while Virginia Code § 13.1-77 requires shareholder approval unless the transaction is for the purpose of borrowing money

§ 13.1-724 Sale of assets other than in regular course of business—A A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors adopts and its shareholders approve the proposed transaction

B For a transaction to be authorized

1 The board of directors shall submit the proposed transaction to the shareholders with its recommendation unless the board of directors determines that because of conflict of interests or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the submission of the proposed transaction, and

2 The shareholders entitled to vote shall approve the transaction as provided in subsection E of this section

C The board of directors may condition its submission of the proposed transaction on any basis

D The corporation shall notify each shareholder, whether or not entitled to vote, of the

proposed shareholders' meeting in accordance with § 13 1-658 The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a copy of the agreement pursuant to which the transaction will be effected

E Unless the board of directors, acting pursuant to subsection C of this section, requires a greater vote, the transaction to be authorized shall be approved by the holders of more than two-thirds of all the votes entitled to be cast on the transaction The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast on the transaction by each voting group entitled to vote on the transaction at a meeting at which a quorum of the voting group exists.

F Unless the parties to the transaction have agreed otherwise, after a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further shareholder action in accordance with the procedure set forth in the resolution proposing the transaction or, if none is set forth, in the manner determined by the board of directors

G A transaction that constitutes a distribution is governed by § 13.1-653 and not by this section

H Notwithstanding any other provision of this section, no corporation organized to conduct the business of a railroad or other public service or a banking business, or a savings and loan association, an industrial loan association or a credit union may sell, lease or exchange its properties for the conduct of such business in this Commonwealth except to a corporation of this Commonwealth organized for the same purpose or in the case of a bank to a savings and loan association or a corporation of the United States, and in the case of a savings and loan association to a bank or a corporation of the United States

Comment. This section has been taken from Model Act § 12.02 with the addition of subsection H, which has been taken from Virginia Code § 13.1-77, and with the following changes

1. The phrase "copy of the agreement pursuant to which the transaction will be effected" has been substituted in subsection D for the phrase "description of the transaction."
2. The first sentence of subsection E has been modified to require the approval of more than two-thirds of all the votes entitled to be cast rather than a majority as required by the Model Act. The second sentence of subsection E, which permits a corporation to include in its articles of incorporation a provision to change the more than two-thirds vote requirement, is new
3. Subsection F has been changed to make clear that the parties to a sale or other disposition can contract away the authority to abandon the sale or other disposition without shareholder approval.

This section is similar to Virginia Code § 13.1-77 except that (i) the Virginia Code does not permit a corporation to lower the more than two-thirds vote requirement in its articles of incorporation, and (ii) the authorization for a bank to acquire assets of a savings and loan association and vice versa is new.

Article 14

Affiliated Transactions

§ 13 1-725 Definitions.—For purposes of this article

An "affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the person specified

An "affiliated transaction" means any of the following transactions

1. Any merger of the corporation or any of its subsidiaries with any interested shareholder,

2. Any share exchange pursuant to § 13 1-717 of this Act in which any interested

shareholder acquires one or more classes or series of voting shares of the corporation or any of its subsidiaries;

3 Except for transactions in the ordinary course of business, (i) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions during any twelve-month period) to or with any interested shareholder of any assets of the corporation or of any of its subsidiaries having an aggregate fair market value in excess of five percent of the corporation's consolidated assets as of the date of the most recently available financial statements, or (ii) any guaranty by the corporation or any of its subsidiaries (in one transaction or a series of transactions during any twelve-month period) of indebtedness of any interested shareholder in an amount in excess of five percent of the corporation's consolidated assets as of the date of the most recently available financial statements,

4 The sale or other disposition by the corporation or any of its subsidiaries to an interested shareholder (in one transaction or a series of transactions during any twelve-month period) of any voting shares of the corporation or any of its subsidiaries having an aggregate fair market value in excess of five percent of the aggregate fair market value of all outstanding voting shares of the corporation as of the determination date except pursuant to a share dividend or the exercise of rights or warrants distributed or offered on a basis affording substantially proportionate treatment to all holders of the same class or series of voting shares,

5 The dissolution of the corporation if proposed by or on behalf of an interested shareholder, or

6 Any reclassification of securities, including any reverse stock split, or recapitalization of the corporation, or any merger of the corporation with any of its subsidiaries or any distribution or other transaction, whether or not with or into or otherwise involving an interested shareholder, which has the effect, directly or indirectly (in one transaction or a series of transactions during any twelve-month period), of increasing by more than five percent the percentage of the outstanding voting shares of the corporation or any of its subsidiaries beneficially owned by any interested shareholder who has not been an interested shareholder for at least five years before the date of such transaction.

The "announcement date" means the date of the first general public announcement of the proposed affiliated transaction or of the intention to propose an affiliated transaction or the date on which the proposed affiliated transaction or the intention to propose an affiliated transaction is first communicated generally to shareholders of the corporation, whichever is earlier

An "associate" means as to any specified person:

1 Any entity, other than the corporation and any of its subsidiaries, of which such person is an officer, director, or general partner or is the beneficial owner of ten percent or more of the voting shares,

2. Any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and

3. Any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is an officer or director of the corporation or any of its affiliates

A person is deemed to be a "beneficial owner" of voting shares as to which such person and such person's affiliates and associates, individually or in the aggregate, have or share directly, or indirectly through any contract, arrangement, understanding, relationship, or otherwise

1 Voting power, which includes the power to vote or to direct the voting or the voting shares;

2 Investment power, which includes the power to dispose or to direct the disposition of the voting shares, or

3 The right to acquire voting power or investment power, whether such right is exercisable immediately or only after the passage of time, pursuant to any contract, arrangement, or understanding, upon the exercise of conversion rights, exchange rights, warrants, or options, or otherwise, provided, that in no case shall a director of the corporation be deemed to be the beneficial owner of voting shares beneficially owned by another director of the corporation solely by reason of actions undertaken by such persons in their capacity as directors of the corporation

"Control" means the possession, directly or indirectly, through the ownership of voting securities, by contract, arrangement, understanding, relationship or otherwise, of the power to direct or cause the direction of the management and policies of a person The beneficial ownership of twenty percent or more of a corporation's voting shares shall be deemed to constitute control

The "determination date" means the date on which an interested shareholder became an interested shareholder

Unless otherwise specified in the articles of incorporation initially filed with the Commission, a "disinterested director" means as to any particular interested shareholder (i) any member of the board of directors of the corporation who was a member of the board of directors before the later of January 1, 1985, and the determination date and, (ii) any member of the board of directors of the corporation who was recommended for election by, or was elected to fill a vacancy and received the affirmative vote of, a majority of the disinterested directors then on the board

"Fair market value" means

1 In the case of shares, the highest closing sale price of a share quoted during the thirty-day period immediately preceding the date in question on the composite tape for shares listed on the New York Stock Exchange, or, if such shares are not quoted on the composite tape on the New York Stock Exchange or, if such shares are not listed on such exchange, on the principal United States securities exchange registered under the Securities Exchange Act of 1934 on which such shares are listed, or, if such shares are not listed on any such exchange, the highest closing bid quotation with respect to a share during the thirty-day period preceding the date in question on the National Association of Securities Dealers, Inc automated quotations system or any similar system then in general use, or, if no such quotations are available, the fair market value of a share on the date in question as determined by a majority of the disinterested directors; and

2 In the case of property other than cash or shares, the fair market value of such property on the date in question as determined by a majority of the disinterested directors

An "interested shareholder" means any person that is the beneficial owner of more than ten percent of the outstanding voting shares of the corporation, however, the term "interested shareholder" shall not include the corporation or any of its subsidiaries, any savings, employee stock ownership, or other employee benefit plan of the corporation or any of its subsidiaries, or any fiduciary with respect to any such plan when acting in such capacity. For the purpose of determining whether a person is an interested shareholder, the number of voting shares deemed to be outstanding shall include shares deemed owned by the interested shareholder through application of paragraph 3 under the definition of "beneficial owner" but shall not include any other voting shares that may be issuable pursuant to any contract, arrangement, or understanding, upon the exercise of conversion rights, exchange rights, warrants, or options, or otherwise

As to any corporation, "subsidiary" means any other corporation of which it owns, directly or indirectly, a majority of the voting shares

"Valuation date" means, if the affiliated transaction is voted upon by shareholders, the day before the date of the vote of shareholders or, if the affiliated transaction is not voted upon by shareholders, the date of the consummation of the transaction

"Voting shares" means the outstanding shares of all classes or series of the corporation

entitled to vote generally in the election of directors

Comment This entire article is new to the Virginia Code There is no similar article in the Model Act, but several states have adopted similar provisions to protect minority shareholders in transactions involving the corporation and a potentially dominant shareholder

§ 13 1-726 Voting requirements for affiliated transactions, determinations by disinterested directors—A Except as provided in § 13 1-727 and notwithstanding the provisions of subsection A of § 13 1-638, in addition to any affirmative vote required by any other section of this Act or by the articles of incorporation, an affiliated transaction shall be approved by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by the interested shareholder

B A majority of the disinterested directors shall have the power to determine for the purposes of this article

1 Whether a person is an interested shareholder,

2 The number of voting shares beneficially owned by any person,

3 Whether a person is an affiliate or associate of another,

4 Whether the securities to be issued or transferred by the corporation or any of its subsidiaries to any interested shareholder have an aggregate fair market value equal to or greater than five percent of the aggregate fair market value of all of the outstanding voting shares of the corporation or any of its subsidiaries as of the determination date, and

5 Whether the assets or amount of indebtedness guaranteed that may be the subject of any affiliated transaction constitutes more than five percent of the consolidated assets of the corporation

§ 13 1-727 Exceptions to special voting requirements—The voting requirements set forth in subsection A of § 13 1-726 do not apply to a particular affiliated transaction if all of the conditions specified in any one of the following subsections are met

1 The affiliated transaction has been approved by a majority of the disinterested directors,

2 The corporation has not had more than 300 shareholders of record at any time during the three years preceding the announcement date,

3 The interested shareholder has been the beneficial owner of at least eighty percent of the corporation's outstanding voting shares for at least five years preceding the announcement date,

4 The interested shareholder is the beneficial owner of at least ninety percent of the outstanding voting shares of the corporation, exclusive of shares acquired directly from the corporation in a transaction not approved by a majority of the disinterested directors,

5 The corporation is an investment company registered under the Investment Company Act of 1940, or

6 In the affiliated transaction consideration will be paid to the holders of each class or series of voting shares and all of the following conditions will be met

a The aggregate amount of the cash and the fair market value as of the valuation date of consideration other than cash to be received per share by holders of each class or series of voting shares in such affiliated transaction is at least equal to the highest of the following

(1) If applicable, the highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers' fees paid by the interested shareholder for any shares of such class or series acquired by it (i) within the two-year period immediately preceding the announcement date or (ii) in the transaction in which it became an interested shareholder, whichever is higher,

(2) The fair market value per share of such class or series on the announcement date or on

the determination date, whichever is higher,

(3) If applicable, the price per share equal to the fair market value per share of such class or series determined pursuant to paragraph 6a(2) of this subsection, multiplied by the ratio of (i) the highest per share price including any brokerage commissions, transfer taxes, and soliciting dealers' fees, paid by the interested shareholder for any shares of such class or series acquired by it within the two-year period immediately preceding the announcement date to (ii) the fair market value per share of such class or series on the first day in such two-year period on which the interested shareholder acquired any shares of such class or series, and

(4) If applicable, the highest preferential amount, if any, per share to which the holders of such class or series are entitled in the event of any voluntary or involuntary dissolution of the corporation,

b The consideration to be received by holders of outstanding shares shall be in cash or in the same form as the interested shareholder has previously paid for shares of the same class or series and if the interested shareholder has paid for shares with varying forms of consideration, the form of the consideration will be either cash or the form used to acquire the largest number of shares of such class or series previously acquired by the interested shareholder,

c During such portion of the three-year period preceding the announcement date that such interested shareholder has been an interested shareholder, except as approved by a majority of the disinterested directors

(1) There shall have been no failure to declare and pay at the regular date therefor any full periodic dividends, whether or not cumulative, on any outstanding shares of the corporation,

(2) There shall have been (i) no reduction in the annual rate of dividends paid on any class or series of voting shares, except as necessary to reflect any subdivision of the class or series, and (ii) an increase in such annual rate of dividends as necessary to reflect any reclassification, including any reverse stock split, recapitalization, reorganization, or similar transaction which has the effect of reducing the number of outstanding shares of the class or series, and

(3) Such interested shareholder shall not have become the beneficial owner of any additional voting shares except as part of the transaction which results in such interested shareholder becoming an interested shareholder,

d During such portion of the three-year period preceding the announcement date that such interested shareholder has been an interested shareholder, except as approved by a majority of the disinterested directors, such interested shareholder shall not have received the benefit, directly or indirectly (except proportionately as a shareholder), of any loans, advances, guarantees, pledges, or other financial assistance or any tax credits or other tax advantages provided by the corporation, whether in anticipation of or in connection with such affiliated transaction or otherwise, and

e Except as otherwise approved by a majority of the disinterested directors, a proxy or information statement describing the affiliated transaction and complying with the requirements of the Securities Exchange Act of 1934 and the rules and regulations thereunder (or any subsequent provisions replacing such Act, rules, or regulations) is mailed to holders of voting shares of the corporation at least twenty-five days before the consummation of such affiliated transaction, whether or not such proxy or information statement is required to be mailed pursuant to such Act, rules, regulations, or subsequent provisions.

§ 13.1-728 Application of article—A The provisions of this article shall not apply to any corporation that adopts an amendment of its articles of incorporation stating that this article shall not apply to the corporation In addition to any requirements of this chapter and the articles of incorporation, any such amendment must be approved by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by any interested shareholder.

B Any corporation that has amended its articles of incorporation pursuant to this section may elect to be bound by the provisions of this article by adopting an amendment of its

articles of incorporation that repeals the original amendment In addition to any requirements of this Act and the articles of incorporation, any such amendment shall be approved by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by any interested shareholder

Article 15

Dissenters' Rights

§ 13.1-729 Definitions—In this article

"Corporation" means the issuer of the shares held by a dissenter before the corporate action, except that (i) with respect to a merger, "corporation" means the surviving corporation by merger of that issuer, and (ii) with respect to a share exchange, "corporation" means the acquiring corporation by share exchange, rather than the issuer, if the plan of share exchange places the responsibility for dissenters' rights on the acquiring corporation

"Dissenter" means a shareholder who is entitled to dissent from corporate action under § 13 1-730 and who exercises that right when and in the manner required by §§ 13.1-732 through 13 1-739

"Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

"Interest" means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.

"Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation

"Beneficial shareholder" means the person who is a beneficial owner of shares held by a nominee as the record shareholder

"Shareholder" means the record shareholder or the beneficial shareholder

Comment This section is taken from Model Act § 13.01 with a change in the definition of "corporation" to permit a plan of share exchange to place responsibility for dissenters' rights on the acquiring corporation. The Virginia Code does not contain a separate section for definitions relating to dissenters' rights Virginia Code §§ 13.1-75 (a) (ii) and 13.1-78 (a) do provide that the term " fair value" excludes "any appreciation or depreciation solely in anticipation of the proposed corporate action." Also, Virginia Code §§ 13.1-75 (f) and 13.1-78 (f) give the circuit court jurisdiction to render judgment against a corporation for the "amount of such fair value as of the day prior to the date on which the vote approving [the corporate transaction] was taken"

Virginia Code §§ 13.1-75 (f) and 13 1-78 (f) authorize the inclusion of "an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances from the date on which the vote was taken on the proposed corporate action to the date of payment."

The Virginia Draft defines the term "shareholder" to include a beneficial owner of shares held by a nominee In the Virginia Code dissenters' rights are available only to shareholders of record.

§ 13 1-730 Right to dissent—A A shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions

1 Consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by § 13.1-718 or the articles of incorporation and the

shareholder is entitled to vote on the merger or (ii) if the corporation is a subsidiary that is merged with its parent under § 13.1-719,

2 Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan,

3 Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale,

4 Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares

B A shareholder entitled to dissent and obtain payment for his shares under this article may not challenge the corporate action creating his entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation

C. Notwithstanding any other provision of this article, with respect to a plan of merger or share exchange or a sale or exchange of property there shall be no right of dissent in favor of holders of shares of any class or series which, at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting at which the plan of merger or share exchange or the sale or exchange of property is to be acted on, were (i) listed on a national securities exchange or (ii) held by at least 2,000 record shareholders, unless in either case.

1 The articles of incorporation of the corporation issuing such shares provide otherwise,

2 The holders of the class or series are required under the plan of merger or share exchange or the agreement for the sale or exchange of property to accept for such shares anything except.

a Cash,

b Shares or shares and cash in lieu of fractional shares of the surviving or acquiring corporation or of any other corporation which, at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting at which the plan of merger or share exchange is to be acted on, were either listed subject to notice of issuance on a national securities exchange or held of record by at least 2,000 record shareholders, or

c A combination of cash and shares as set forth in paragraphs 2a and 2b of this subsection, or

3 The transaction to be voted on is an "affiliated transaction" as defined in § 13.1-725

D. The right of a dissenting shareholder to obtain payment of the fair value of his shares shall terminate upon the occurrence of any one of the following events

1 The proposed corporate action is abandoned or rescinded,

2 A court having jurisdiction permanently enjoins or sets aside the corporate action, or

3 His demand for payment is withdrawn with the written consent of the corporation

Comment This section follows Model Act § 13 02 with the deletion of a provision in the Model Act that creates dissenters' rights for any amendment of the articles of incorporation that materially and adversely affects the rights of the dissenter, and with the addition of subsections C and D Subsection C is similar to a provision in Virginia Code §§ 13 1-75 and 13 1-78, but the Virginia Code does not eliminate dissenters' rights for the holders of publicly traded shares if the consideration that the shareholders will receive includes cash (other

than cash in lieu of fractional shares) Subsection C is new Subsection D is similar to Virginia Code §§ 13 1-75(g) and 13 1-78(g)

In addition to the changes in subsection C described in the preceding paragraph, the Virginia Draft differs from Virginia Code §§ 13 1-75 and 13 1-78 as follows:

1 Subsection A3 provides that dissenters' rights apply to a sale in dissolution, but do not apply to a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale Under the Virginia Code shareholders have dissenters' rights in any sale of substantially all of the assets not in the usual and regular course of business, but do not have such rights in a dissolution of the corporation

2 In subsection A4 the Virginia Draft permits expansion of dissenters' rights as expressly provided for in the articles of incorporation, bylaws or by board resolution

3 Subsection B is new. This subsection makes clear that dissenters' rights are in lieu of other rights the shareholder might have except where fraud or illegal conduct is involved

§ 13 1-731 Dissent by nominees and beneficial owners—A. A record shareholder may assert dissenters' rights as to fewer than all the shares registered in his name only if he dissents with respect to all shares beneficially owned by any one person and notifies the corporation in writing of the name and address of each person on whose behalf he asserts dissenters' rights The rights of a partial dissenter under this subsection are determined as if the shares as to which he dissents and his other shares were registered in the names of different shareholders

B A beneficial shareholder may assert dissenters' rights as to shares held on his behalf only if·

1. He submits to the corporation the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights, and

2. He does so with respect to all shares of which he is the beneficial shareholder or over which he has power to direct the vote

Comment· This section was taken from Model Act § 13.03.

The Virginia Code limits dissenters' rights to shareholders of record Virginia Code §§ 13.1-75(c) (i) (B) and 13 1-78(c) (i) (B) provide that a shareholder may exercise his dissenter's rights with respect to less than all shares held by him.

§ 13.1-732. Notice of dissenter's rights.—A If proposed corporate action creating dissenters' rights under § 13.1-730 is submitted to a vote at a shareholders' meeting, the meeting notice shall state that shareholders are or may be entitled to assert dissenters' rights under this article and be accompanied by a copy of this article.

B. If corporate action creating dissenters' rights under § 13.1-730 is taken without a vote of shareholders, the corporation, during the ten-day period after the effectuation of such corporate action, shall notify in writing all record shareholders entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in § 13.1-734

Comment: This section was taken from Model Act § 13.20, with the addition in subsection B of the requirement that the corporation give the requisite notice within 10 days after the effectuation of the corporate action.

While subsection B is new to the Virginia Code, Virginia Code § 13.1-76, which applies to a subsidiary merger where no shareholder vote is required, does provide that a minority shareholder may demand the fair value of his shares within 25 days after the plan of merger is mailed to him.

§ 13.1-733. Notice of intent to demand payment—A If proposed corporate action creating dissenters' rights under § 13.1-730 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights (i) shall deliver to the corporation before the vote is taken written notice of his intent to demand payment for his shares if the proposed action is effectuated and (ii) shall not vote such shares in favor of the proposed action

B A shareholder who does not satisfy the requirements of subsection A of this section is not entitled to payment for his shares under this article

Comment: The source of this provision is Model Act § 13 21

The Virginia Code makes the notice by the shareholder effective only if it is received by the

corporation prior to the shareholder vote or is mailed not less than five days prior to the date on which the vote is taken

§ 13 1-734 Dissenters' notice—A If proposed corporate action creating dissenters' rights under § 13 1-730 is authorized at a shareholders' meeting, the corporation, during the ten-day period after the effectuation of such corporate action, shall deliver a dissenters' notice in writing to all shareholders who satisfied the requirements of § 13 1-733

B The dissenters' notice shall

1 State where the payment demand shall be sent and where and when certificates for certificated shares shall be deposited,

2 Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received,

3 Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not he acquired beneficial ownership of the shares before or after that date,

4 Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty nor more than sixty days after the date of delivery of the dissenters' notice, and

5 Be accompanied by a copy of this article

Comment This section was taken from Model Act § 13.22, with some modification. Model Act § 13.22(a) requires the corporation to notify shareholders following shareholder authorization of the corporate action creating dissenters' rights. In the Virginia Draft the corporation's obligation to provide notice is triggered when the corporate action giving rise to dissenters' rights takes effect. The corporation then has 10 days in which to meet this requirement.

Under the Virginia Code the corporation is required to send a written notice within ten days after the issuance of a certificate of merger or share exchange, or within ten days after the date on which a sale or exchange is effected The notice must state that the shareholder is entitled to receive payment of the fair value of his shares and that he should submit his share certificates for notation The shareholder has fifteen days from the mailing of the notice in which to respond. The corporation then must note on the certificates that demand has been made and return them to the shareholder. The corporation is required to mail to each dissenting shareholder an offer to pay for the shareholder's shares at a specified price within the same time interval required for it to send the above described notice to the shareholder

§ 13.1-735 Duty to demand payment.—A A shareholder sent a dissenters' notice described in § 13 1-734 shall demand payment, certify that he acquired beneficial ownership of the shares before or after the date required to be set forth in the dissenters' notice pursuant to paragraph 3 of subsection B of § 13.1-734, and, in the case of certificated shares, deposit his certificates in accordance with the terms of the notice

B The shareholder who deposits his shares pursuant to subsection A of this section retains all other rights of a shareholder except to the extent that these rights are cancelled or modified by the taking of the proposed corporate action

C A shareholder who does not demand payment and deposit his share certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for his shares under this article

Comment The source of this provision is Model Act § 13.23. Under Virginia Code §§ 13 1-75 and 13 1-78 the shareholder is required to submit his certificates or lose the right to dissent. Subsection (a) contemplates that certificates will be retained by the corporation, while Virginia Code §§ 13 1-75(c) (ii) and 13.1-78(c) (ii) require the corporation to note the demand for payment on the certificates and return them to the shareholder

§ 13.1-736 Share restrictions—A The corporation may restrict the transfer of uncertificated

shares from the date the demand for their payment is received

B The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder except to the extent that these rights are cancelled or modified by the taking of the proposed corporate action

Comment This provision was taken from Model Act § 13 24 with minor changes The Virginia Code is similar except that Virginia Code §§ 13.1-75(c) (iii) and 13 1-78(c) (iii) do not appear to give the corporation the right to restrict the transfer of uncertificated shares

§ 13 1-737 Payment.--A Except as provided in § 13.1-738, within thirty days after receipt of a payment demand made pursuant to § 13.1-735, the corporation shall pay the dissenter the amount the corporation estimates to be the fair value of his shares, plus accrued interest The obligaton of the corporation under this paragraph may be enforced (i) by the circuit court in the city or county where the corporation's principal office is located, or, if none in this Commonwealth, where its registered office is located or (ii) at the election of any dissenter residing or having its principal office in the Commonwealth, by the circuit court in the city or county where the dissenter resides or has its principal office The court shall dispose of the complaint on an expedited basis

B The payment shall be accompanied by

1. The corporation's balance sheet as of the end of a fiscal year ending not more than sixteen months before the effective date of the corporate action creating dissenters' rights, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any,

2 An explanation of how the corporation estimated the fair value of the shares and of how the interest was calculated,

3 A statement of the dissenters' right to demand payment under § 13.1-739, and

4 A copy of this article

Comment Model Act § 13.25 is the source of this provision Subsection A has been modified to make this section consistent with the timing changes made in § 13.1-734 The last two sentences in subsection A are new to the Model Act and have been added to provide shareholders with an enforcement mechanism in the event that a corporation fails to make the required payment

Subsection B1 has been changed to require a balance sheet as of a year ending not more than 16 months prior to the effective date of the corporate action, rather than 16 months before the date of payment.

In view of changes made in this section of the Virginia Draft and in § 13.1-734, Model Act § 13.26 is no longer necessary and has been deleted. Under § 13.26 of the Model Act corporations are allowed a 60-day time period in which to make payment to dissenters According to the comment accompanying § 13.26, this provision was designed to allow for delays in effectuating the corporate action giving rise to dissenters' rights At the end of this time period, if payment has not been made the Model Act requires the corporation to return to the shareholder his deposited certificates

Under Virginia Code §§ 13 1-75(d) and 13.1-78(d) a corporation is required to mail each dissenting shareholder a written offer to pay a price determined by the corporation in good faith to be the fair value of the shareholder's shares The offer must be accompanied by a balance sheet of the corporation as of the latest available date and not more than twelve months prior to the making of such offer, and a profit and loss statement for the twelve-month period ended on the date of the balance sheet.

§ 13 1-738 After-acquired shares.--A A corporation may elect to withhold payment required by § 13 1-737 from a dissenter unless he was the beneficial owner of the shares on the date of the first publication by news media or the first announcement to shareholders generally, whichever is earlier, of the terms of the proposed corporate action, as set forth in the dissenters' notice

B. To the extent the corporation elects to withhold payment under subsection A of this section, after taking the proposed corporate action, it shall estimate the fair value of the shares,

plus accrued interest, and shall offer to pay this amount to each dissenter who agrees to accept it in full satisfaction of his demand. The corporation shall send with its offer an explanation of how it estimated the fair value of the shares and of how the interest was calculated, and a statement of the dissenter's right to demand payment under § 13.1-739

Comment The source of this provision is Model Act § 13.27 There is no comparable provision in the Virginia Code

§ 13.1-739 Procedure if shareholder dissatisfied with payment or offer.—A. A dissenter may notify the corporation in writing of his own estimate of the fair value of his shares and amount of interest due, and demand payment of his estimate (less any payment under § 13 1-737), or reject the corporation's offer under § 13.1-738 and demand payment of the fair value of his shares and interest due, if the dissenter believes that the amount paid under § 13.1-737 or offered under § 13.1-738 is less than the fair value of his shares or that the interest due is incorrectly calculated

B A dissenter waives his right to demand payment under this section unless he notifies the corporation of his demand in writing under subsection A of this section within thirty days after the corporation made or offered payment for his shares.

Comment. This section has been taken from Model Act § 13.28, and is new to the Virginia Code Subsection A2 has been deleted to make this section consistent with the deletion of Model Act § 13.26 and changes made in § 13.1-737.

Under the Virginia Code the shareholder is given the option of accepting or rejecting the offer made by the corporation. If the parties do not agree, the next step under the Virginia Code is for the corporation to file a bill of complaint in the circuit court to have the fair value of the dissenter's shares determined.

§ 13.1-740 Court action.—A If a demand for payment under § 13 1-739 remains unsettled, the corporation shall commence a proceeding within sixty days after receiving the payment demand and petition the circuit court in the city or county described in subsection B of this section to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty-day period, it shall pay each dissenter whose demand remains unsettled the amount demanded

B The corporation shall commence the proceeding in the city or county where its principal office is located, or, if none in this Commonwealth, where its registered office is located. If the corporation is a foreign corporation without a registered office in this Commonwealth, it shall commence the proceeding in the city or county in this Commonwealth where the registerd office of the domestic corporation merged with or whose shares were acquired by the foreign corporation was located.

C The corporation shall make all dissenters, whether or not residents of this Commonwealth, whose demands remain unsettled parties to the proceeding as in an action against their shares and all parties shall be served with a copy of the petition Nonresidents may be served by registered or certified mail or by publication as provided by law

D The corporation may join as a party to the proceeding any shareholder who claims to be a dissenter but who has not, in the opinion of the corporation, complied with the provisions of this article If the court determines that such shareholder has not complied with the provisions of this article, he shall be dismissed as a party.

E The jurisdiction of the court in which the proceeding is commenced under subsection B of this section is plenary and exclusive The court may appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers have the powers described in the order appointing them, or in any amendment to it The dissenters are entitled to the same discovery rights as parties in other civil proceedings

F Each dissenter made a party to the proceeding is entitled to judgment (i) for the amount, if any, by which the court finds the fair value of his shares, plus interest, exceeds the amount paid by the corporation or (ii) for the fair value, plus accrued interest, of his after-acquired shares for which the corporation elected to withhold payment under § 13 1-738

Comment This section has been taken from Model Act § 13.30 with the addition of subsection D taken from the Virginia Code. It differs from Virginia Code §§ 13 1-75(f) and 13.1-78(f) in

the following ways

1 Under the Virginia Code the corporation is given the responsibility to petition the court to determine the fair value of the shares at issue within 60 days of receiving a written demand from a dissenting shareholder. If the corporation fails to institute the court proceeding "any dissenting shareholder may do so in the name of such corporation."

2 Subsection E is new except for the second sentence

§ 13 1-741 Court costs and counsel fees—A. The court in an appraisal proceding commenced under § 13 1-740 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters did not act in good faith in demanding payment under § 13.1-739

B The court may also assess the reasonable fees and expenses of experts, excluding those of counsel, for the respective parties, in amounts the court finds equitable:

1 Against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of §§ 13.1-732 through 13 1 -739, or

2 Against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed did not act in good faith with respect to the rights provided by this article

C If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited

D In a proceeding commenced under subsection A of § 13.1-737 the court shall assess the costs against the corporation, except that the court may assess costs against all or some of the dissenters who are parties to the proceeding, in amounts the court finds equitable, to the extent the court finds that such parties did not act in good faith in instituting the proceeding

Comment. This section has been taken from Model Act § 13.31 with changes to prohibit assessment of counsel fees and with the addition of subsection D.

The Virginia Draft differs from Virginia Code §§ 13.1-75(f) and 13.1-78(f) in the following ways

1. Subsection B1 permits the court to assess fees and expenses against the corporation if the corporation did not substantially comply with the requirements of §§ 13 1-732 through 13.1-739 The Virginia Code permits such an assessment, excluding counsel fees, if the court determines that the fair value of the shares materially exceeds the amount which the corporation offered to pay therefor.
2. Subsections C and D are new to the Virginia Code.

Article 16

Dissolution.

§ 13.1-742. Dissolution by directors and shareholders—A A corporation's board of directors may propose dissolution for submission to the shareholders

B For a proposal to dissolve to be adopted

1 The board of directors shall recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interests or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and

2. The shareholders entitled to vote shall approve the proposal to dissolve as provided in subsection E of this section

C The board of directors may condition its submission of the proposal for dissolution on any basis

D The corporation shall notify each shareholder whether or not entitled to vote, of the proposed shareholders' meeting in accordance with § 13 1-658 The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation

E Unless the board of directors, acting pursuant to subsection C of this section, requires a greater vote, dissolution to be authorized must be approved by the holders of more than two-thirds of all votes entitled to be cast on the proposal to dissolve The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast on the proposed dissolution by each voting group entitled to vote on the transaction at a meeting at which a quorum of the voting group exists

Comment This section follows § 14 02 of the Model Act except for subsection E The Model Act only requires approval by the holders of a majority of the votes entitled to be cast In contrast, Virginia Code § 13.1-81(c) requires an affirmative vote of more than two-thirds of the votes entitled to be cast The second sentence of subsection E, which would permit a corporation to include a provision in its articles of incorporation to change the two-thirds vote requirement, is new.

The Virginia Draft contains the following provisions not found in Virginia Code § 13 1-81

1 The exception in subsection B1 to the requirement that the board recommend dissolution,
2. Subsection C, and
3 The provision in subsection E allowing a corporation to include in its articles of incorporation a change in the voting requirement for dissolution

§ 13.1-743 Articles of dissolution—A At any time after dissolution is authorized, the corporation may dissolve by filing with the Commission articles of dissolution setting forth

1 The name of the corporation,

2 The date dissolution was authorized,

3 Either (i) a statement that dissolution was authorized by unanimous consent of the shareholders, or (ii) a statement that the proposed dissolution was submitted to the shareholders by the board of directors in accordance with this chapter, and a statement of

a The designation, number of outstanding shares, and number of votes entitled to be cast by each voting group entitled to vote separately on dissolution, and

b Either the total number of votes cast for and against dissolution by each voting group entitled to vote separately on dissolution or the total number of undisputed votes cast for dissolution separately by each voting group and a statement that the number cast for dissolution by each voting group was sufficient for approval by that voting group

B If the Commission finds that the articles of dissolution comply with the requirements of law and that the corporation has paid all fees and taxes imposed by laws administered by the Commission, it shall issue a certificate of dissolution

C A corporation is dissolved upon the effective date of the certificate of dissolution

Comment· This section was taken from Model Act § 14 03 except for subsection A3 and subsection B Subsection A3 has been modified to require certification that dissolution was submitted to shareholders in accordance with this Act and to provide for confirmation of the vote by separate voting groups, since the articles of incorporation may condition dissolution on approval of separate voting groups Subsection B follows the Virginia Code

The Virginia Draft and the Virginia Code differ significantly in what they perceive to be the effect of filing articles of dissolution Under the Virginia Draft, articles of dissolution may be filed at any time after dissolution is authorized Distribution of the corporation's assets takes place after the dissolution is effective The corporate existence ceases when all assets have been distributed and the Commission has issued a certificate of termination of corporate existence See Virginia Draft §§ 13 1-745 and 13 1-751 Under the Virginia Code filing of the articles of dissolution is a final step to be taken only after "all assets of the corporation

have been distributed to its creditors and stockholders"

The requirements for the articles of dissolution under the Virginia Draft are similar to the requirements for a "statement of intent to dissolve" under Virginia Code § 13 1-81 Requirements for a statement of intent to dissolve under the Virginia Code that are not in the Virginia Draft include

1 A list of names and addresses of the corporation's officers and directors, and

2 A copy of the shareholder resolution authorizing dissolution.

§ 13 1-744 Revocation of dissolution—A A corporation may revoke its dissolution at any time prior to the effective date of its certificate of termination of corporate existence

B Revocation of dissolution shall be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action by the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder action

C After the revocation of dissolution is authorized, the corporation may revoke the dissolution by filing with the Commission articles of revocation of dissolution that set forth

1 The name of the corporation,

2 The effective date of the dissolution that was revoked,

3 The date that the revocation of dissolution was authorized,

4 If the corporation's board of directors revoked a dissolution authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization, and

5 If shareholder action was required to revoke the dissolution, the information required by paragraph 3 of subsection A of § 13 1-743.

D If the Commission finds that the articles of revocation of dissolution comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of revocation of dissolution

E When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its business as if the dissolution had never occurred

Comment Except for the provision in subsection A that permits revocation of dissolution up to the termination of corporate existence, the Virginia Draft adopts § 14 04 of the Model Act with minor changes Model Act § 14.04(a) only permits revocation of dissolution within 120 days of its effective date

Differences between the Virginia Code and the Virginia Draft include the following

1 Virginia Code § 13 1-86 only allows revocation of voluntary dissolution proceedings "prior to the issuance of a certificate of dissolution by the Commission" Both board of directors and shareholder approval is required

2 The Virginia Draft does not require articles of revocation of dissolution to contain the names and addresses of the corporation's officers and directors, or a copy of the resolution adopted by the shareholders revoking the voluntary dissolution proceedings as is required by Virginia Code § 13.1-86(d) (2-4)

3 The Virginia Draft adds subsections C2-4, and E

§ 13 1-745 Effect of dissolution—A A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including

1 Collecting its assets,

2 Disposing of its properties that will not be distributed in kind to its shareholders,

3 Discharging or making provision for discharging its liabilities,

4 Distributing its remaining property among its shareholders according to their interests, and

5 Doing every other act necessary to wind up and liquidate its business and affairs

B Dissolution of a corporation does not

1 Transfer title to the corporation's property,

2 Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records,

3 Subject its directors to standards of conduct different from those prescribed in Article 9,

4 Change quorum or voting requirements for its board of directors or shareholders, change provisions for selection, resignation, or removal of its directors or officers, or change provisions for amending its bylaws,

5 Prevent commencement of a proceeding by or against the corporation in its corporate name,

6 Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution, or

7 Terminate the authority of the registered agent of the corporation

Comment **This provision was taken from Model Act § 14.05. Subsection A is similar to Virginia Code § 13.1-84(b), which establishes the procedure to be followed after filing a statement of intent to dissolve. Subsection B is new**

§ 13.1-746 Known claims against dissolved corporation.—A. A dissolved corporation may dispose of the known claims against it by following the procedure described in this section

B The dissolved corporation shall deliver to each of its known claimants written notice of the dissolution at any time after its effective date The written notice shall

1 Provide a reasonable description of the claim that the claimant may be entitled to assert,

2 State whether the claim is admitted, or not admitted, and if admitted (i) the amount that is admitted, which may be as of a given date, and (ii) any interest obligation if fixed by an instrument of indebtedness,

3 Provide a mailing address where a claim may be sent,

4 State the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which confirmation of the claim must be delivered to the dissolved corporation, and

5 State that, except to the extent that any claim is admitted, the claim will be barred if written confirmation of the claim is not delivered by the deadline

C A claim against the dissolved corporation is barred to the extent that it is not admitted

1 If the dissolved corporation delivered written notice to the claimant in accordance with subsection B of this section and the claimant does not deliver written confirmation of the claim to the dissolved corporation by the deadline, or

2 If the dissolved corporation delivered written notice to the claimant that his claim is not admitted, in whole or in part, and the claimant does not commence a proceeding to enforce the claim within ninety days from the delivery of written confirmation of the claim to the dissolved corporation

D For purposes of this section, "claim" does not include (i) a contingent liability or a claim

based on an event occurring after the effective date of dissolution or (ii) a liability or claim the ultimate maturity of which is more than sixty days after the delivery of written notice to the claimant pursuant to subsection B or this section

E If a liability exists but the full extent of any damages is or may not be ascertainable, and a proceeding to enforce the claim is commenced pursuant to paragraph 2 of subsection C of this section, the claimant may amend the pleadings after filing to include any damages that occurred or are alleged to have occurred after filing, and the court having jurisdiction of such claim may continue such proceeding during its pendency if it appears that further damages are or may be still occurring

Comment This section adopts Model Act § 14.06 with the addition of subsections B1, B2 and F Other changes have been made to distinguish between claims that are admitted and claims that are not, as well as between mature and unmature claims.

There is no claim resolution mechanism in the Virginia Code, but Virginia Code § 13 1-84(a) does require that known creditors be mailed notice immediately after a corporation has filed a statement of intent to dissolve.

Comment Model Act § 14.07, which provides for disposition of unknown claims by a dissolved corporation, has not been adopted.

§ 13 1-747 Grounds for judicial dissolution—A. The circuit court in any city or county described in subsection C of this section may dissolve a corporation:

1 In a proceeding by a shareholder if it is established that.

a The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; or

b. The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent; or

c. The shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; or

d. The corporate assets are being misapplied or wasted,

2. In a proceeding by a creditor if it is established that:

a. The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied and the corporation is insolvent, or

b The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent,

3 In a proceeding by the corporation to have its voluntary dissolution continued under court supervision,

4 Upon application by the board of directors when it is established that circumstances make it impossible to obtain a representative vote by shareholders on the question of dissolution and that the continuation of the business of the corporation is not in the interest of the shareholders but it is desirable in their interest that the assets and business be liquidated, or

5. When the Commission has instituted a proceeding for the involuntary termination of corporate existence and entered an order finding that the corporate existence of the corporation should be terminated but that liquidation of its business and affairs should precede the entry of an order of termination of corporate existence

B The circuit court in the city or county named in subsection C of this section shall have full power to liquidate the assets and business of the corporation at any time after the

termination of corporate existence pursuant to the provisions of this chapter or any laws of this Commonwealth in effect at any time prior to January 1, 1986, upon the application of any person, for good cause, with regard to any assets or business that may remain The jurisdiction conferred by this clause may also be exercised by any such court in any city or county where any property may be situated whether of a domestic or a foreign corporation that ceased to exist

C. Venue for a proceeding brought under this section lies in the city or county where the corporation's principal office is or was located, or, if none in this Commonwealth, where its registered office is or was last located

D. It is not necessary to make directors or shareholders parties to a proceeding to be brought under this section unless relief is sought against them individually

E A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with such powers and duties as the court may direct, take other action required to preserve the corporate assets whereever located, and carry on the business of the corporation until a full hearing can be held.

Comment **This section of the Virginia Draft adopts Model Act §§ 14.30 and 14.31 with minor changes and with the addition of subsections A4, A5 and B taken from Virginia Code § 13.1-94**

The Virginia Draft differs from Virginia Code § 13 1-94 as follows

1. **The Virginia Draft provides an additional rationale for court-ordered dissolution in the context of deadlocked directors by adding in subsection A1a "or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock"**
2. **Subsection A1c permits a court to order dissolution when shareholders are deadlocked in the election of directors. The Virginia Code requires a finding that "irreparable injury to the corporation is being suffered or is threatened by reason" of a deadlock in voting power of the shareholders**

§ 13.1-748 Receivership or custodianship—A. A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage while the proceeding is pending, the business and affairs of the corporation The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all its property wherever located

B The court may appoint an individual, a domestic corporation, or a foreign corporation authorized to transact business in this Commonwealth, as a receiver or custodian The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs

C The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time Among other powers·

1 The receiver (i) may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court, and (ii) may sue and defend in his own name as receiver of the corporation in all courts of this Commonwealth, and

2 The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interest of its shareholders and creditors

D The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interest of the corporation, its shareholders, and creditors

E The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and his counsel from the assets of the corporation or proceeds from the sale of the

assets

Comment This provision is taken from Model Act § 14 32 with a change in subsection A to make clear that a custodian's authority to manage the corporation is limited to the time period in which the judicial proceeding is pending

The Virginia Code covers the judicial appointment and necessary qualifications of receivers in §§ 13.1-95 and 13 1-96 The appointment of a custodian is provided for in § 13.1-94 and is permitted only if found to be in the best interest of both the creditors and the shareholders

Subsections C2 and D are new

The Virginia Code contains the following provisions which have not been adopted in the Virginia Draft

1 A statement that the receiver has authority to collect all amounts owing to the corporation by subscribers on account of any unpaid portion of the consideration for the issuance of shares.

2. A proviso "that before a receiver shall take any action concerning title to the corporation's real property, a copy of the order whereby he was appointed shall be recorded and indexed in the clerk's office of the circuit court of the city or county wherein the corporation's real property is located in the same manner as a deed"

3 A provision whereby the court may, by order, transfer to the receiver legal title to all or any of the property of the corporation

§ 13.1-749 Decree of dissolution—A. If after a hearing the court determines that one or more grounds for judicial dissolution described in § 13 1-747 exist, it may enter a decree directing that the corporation shall be dissolved The clerk of the court shall deliver a certified copy of the decree to the Commission, which shall enter an order of involuntary dissolution

B After the order of involuntary dissolution has been entered, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with § 13 1-745 and the notification of claimants in accordance with § 13 1-746 When all of the assets of the corporation have been distributed to its creditors and shareholders, the court shall so advise the Commission, which shall enter an order of termination of corporate existence.

Comment This provision has been taken from Model Act § 14.33 except that subsection A adds a requirement for issuance by the Commission of an order of involuntary dissolution and subsection B adds a requirement for issuance by the Commission of an order of termination of corporate existence

The Virginia Draft is similar to Virginia Code § 13.1-99 except that the Code provides for the distribution of all assets prior to the entry of the decree of dissolution.

§ 13 1-750 Articles of termination of corporate existence.—A When a corporation has distributed all of its assets to its creditors and shareholders and voluntary dissolution proceedings have not been revoked, it shall file articles of termination of corporate existence with the Commission The articles shall set forth

1 The name of the corporation,

2. That all the assets of the corporation have been distributed to its creditors and shareholders, and

3 That the dissolution of the corporation has not been revoked

B With the articles of termination of corporate existence, the corporation shall file a certificate signed by the State Tax Commissioner that the corporation has filed a return and has paid all state taxes on account of its income to the time of the certificate On applying for the certificate of the State Tax Commissioner, the corporation may file returns and pay taxes before such returns and taxes would otherwise be due

C If the Commission finds that the articles of termination of corporate existence comply with the requirements of law and that all required fees have been paid, it shall by order issue a certificate of termination of corporate existence Upon the issuance of such certificate the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by shareholders, directors and officers as provided in this chapter

D The statement "that all the assets of the corporation have been distributed to its creditors and shareholders" means that the corporation has divested itself of all its assets by

the payment of claims or liquidating dividends or by assignment to a trustee or trustees for the benefit of claimants or shareholders. If any person described in § 55-210.6 who is entitled to a share in the distribution of the assets cannot be found, the corporation may thereupon, and without awaiting the two years mentioned in § 55-210.7, pay his share to the State Treasurer as abandoned property on complying with all applicable requirements of § 55-210.12 except paragraph (4) of subsection (b) of that section.

Comment This section is taken from Virginia Code § 13 1-89 with modifications to recognize the distinction between dissolution and termination of corporate existence in the Virginia Draft The Model Act does not provide a mechanism for establishing a particular date as the termination of the corporate existence of a corporation

The last sentence of subsection D is similar to Model Act § 14.40, which allows a dissolved corporation to deposit with the State Treasurer assets belonging to claimants who cannot be found.

§ 13.1-751 Termination of corporate existence by incorporators or initial directors.--A majority of the initial directors, or, if initial directors were not named in the articles of incorporation and have not been elected, the incorporators of a corporation that has not issued shares or has not commenced business may dissolve the corporation and terminate its corporate existence by filing with the Commission articles of termination of corporate existence that set forth.

1 The name of the corporation,

2. The date of its incorporation,

3 Either (i) that none of the corporation's shares have been issued or (ii) that the corporation has not commenced business,

4 That no debt of the corporation remains unpaid,

5 That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued, and

6 That a majority of the initial directors authorized the dissolution or that initial directors were not named in the articles of incorporation and have not been elected and a majority of the incorporators authorized the dissolution

Comment: This section follows Model Act § 14 01 with modifications to reflect the distinction between dissolution and termination of corporate existence in the Virginia Draft and with changes to make clear that incorporators can act only if there is no board of directors. Virginia Code § 13.1-79 authorizes dissolution by the incorporators, but only if the corporation has not commenced business and has not issued any shares

§ 13.1-752. Automatic termination of corporate existence.--If any domestic corporation fails on two consecutive annual dates to file the annual report required by this chapter or to pay the annual registration fee or franchise tax required by law, the Commission shall mail notice to it of impending termination of corporate existence Whether or not such notice is mailed, if the corporation fails before June 1 after the second such annual date to file the annual report or to pay the annual registration fees or franchise taxes, together with a penalty of five percent of the registration fees and franchise taxes and interest at an annual rate of six percent on the total amount of any registration fees and franchise taxes assessed, the corporate existence of such corporation shall automatically cease as of June 1 and its properties and affairs shall pass automatically to its directors as trustees in liquidation Thereupon, the trustees shall proceed to collect the assets of the corporation, sell, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations, and do all other acts required to liquidate its business and affairs After paying or adequately providing for the payment of all its obligations, the trustees shall distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interest.

Comment The source of this provision is Virginia Code § 13 1-91, with modifications to recognize the distinction in the Virginia Draft between dissolution and termination of corporate existence There is no comparable statute in the Model Act

§ 13 1-753 Involuntary termination of corporate existence—A. The corporate existence of a corporation may be terminated involuntarily by order of the Commission when it finds that the corporation has continued to exceed or abuse the authority conferred upon it by law, or has failed to maintain a registered office or a registered agent in this Commonwealth as required by law Upon such termination the properties and affairs of the corporation shall pass automatically to its directors as trustees in liquidation Thereupon, the trustees shall proceed to collect the assets of the corporation, sell, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations, and do all other acts required to liquidate its business and affairs After paying or adequately providing for the payment of all its obligations, the trustees shall distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests.

B Before entering any such order the Commission shall issue a rule against the corporation giving it an opportunity to be heard and show cause why such an order should not be entered The Commission may issue the rule on its own motion or on motion of the Attorney General

Comment This section adopts the first two paragraphs of Virginia Code § 13 1-93 with modifications to recognize the distinction in the Virginia Draft between dissolution and termination of corporate existence

Model Act §§ 14 20 through 14.23 cover administrative dissolution in a substantially different manner

§ 13 1-754 Reinstatement of a corporation that has ceased to exist—A corporation that has ceased to exist may apply to the Commission for reinstatement within five years thereafter unless the corporate existence was terminated by order of the Commission upon a finding that the corporation has continued to exceed or abuse the authority conferred upon it by law The Commission shall enter an order reinstating the corporate existence upon receiving an annual report together with payment of a reinstatement fee of $100 plus all registration fees, penalties and franchise taxes that were due before the corporation ceased to exist and that would have become due thereafter if the corporation had not ceased to exist, together with interest to the date of the application The application for reinstatement may be by letter signed by an officer or director of the corporation, or may be by affidavit signed by an agent of any shareholder's interests stating that after diligent search by such agent no officer or director can be found The Commission shall assess the amounts that would have become due together with interest to the date of the application. Upon the entry by the Commission of an order of reinstatement, the corporate existence shall be deemed to have continued from the date of termination of corporate existence except that reinstatement shall have no effect on any question of personal liability of the directors, officers or agents in respect of the period between termination of corporate existence and reinstatement If the name of a corporation that has ceased to exist has been assumed or reserved or registered by any other person, the reinstated corporation shall not engage in business until it has amended its articles of incorporation to change its name

Comment: This section has been taken from Virginia Code § 13.1-92 with changes to recognize the distinction between dissolution and termination of corporate existence that is recognized throughout this article Model Act § 14.22 addresses reinstatement, but is more restrictive and less detailed

§ 13 1-755. Survival of remedy after termination of corporate existence.—The termination of corporate existence shall not take away or impair any remedy available to or against the corporation, its directors, officers or shareholders, for any right or claim existing or any liability incurred, prior to such termination Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim

Comment: This section is taken from Virginia Code § 13 1-101 with modifications to recognize the distinction in the Virginia Draft between dissolution and termination of corporate existence There is no comparable section in the Model Act.

§ 13.1-756 Notification to certain clerks of terminations of corporate existence and reinstatements and records thereof, exceptions—Upon the termination of corporate existence or reinstatement of a corporation under the provisions of §§ 13 1-749, 13.1-752, 13 1-753 or 13 1-754, the Commission shall notify the clerk of the circuit court in the city or county in which the

registered office of the corporation is located, and provide such clerk with the date of the termination of corporate existence or reinstatement, except that no such notice or information shall be required in the City of Richmond or the County of Henrico. The clerk shall note the date of such termination of corporate existence or reinstatement in the charter records of his office For any corporation whose corporate existence has ceased or been reinstated, the Commission shall provide, upon request, to the clerk of the circuit court, the book and page number where the charter of the corporation is recorded.

Comment This provision has been taken from Virginia Code § 13.1-93.1 with modifications to recognize the distinction in the Virginia Draft between dissolution and termination of corporate existence The Model Act contains no comparable provision

Article 17
Foreign Corporations

§ 13.1-757 Authority to transact business required—A. A foreign corporation may not transact business in this Commonwealth until it obtains a certificate of authority from the Commission

B The following activities, among others, do not constitute transacting business within the meaning of subsection A of this section

1 Maintaining, defending, or settling any proceeding,

2. Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs,

3. Maintaining bank accounts,

4 Maintaining offices or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositories with respect to those securities,

5 Selling through independent contractors,

6 Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this Commonwealth before they become contracts,

7 Creating or acquiring indebtedness, deeds of trust, and security interests in real or personal property;

8 Securing or collecting debts or enforcing deeds of trust and security interests in property securing the debts,

9 Owning, without more, real or personal property,

10 Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature, or

11 For a period of less than ninety consecutive days, producing, directing, filming, crewing or acting in motion picture feature films, television series or commercials, or promotional films which are sent outside of the Commonwealth for processing, editing, marketing and distribution The term "transacting business" as used in this subsection shall have no effect on personal jurisdiction under § 8 01-328 1

C The list of activities in subsection B of this section is not exhaustive.

Comment· This section has been taken from Model Act § 15 01 with the addition of subsection B11, which has been taken from Virginia Code § 13 1-102.2. The Virginia Draft eliminates a provision in the Model Act to the effect that transacting business in interstate commerce does not constitute transacting business in the Commonwealth Since such a result clearly is mandated by the U.S Constitution, inclusion of the provision in the Virginia Draft was

deemed unnecessary and potentially confusing

Differences between the Virginia Draft and the Virginia Code include

1 Subsections B1-6 and B9-10 are new

2 Virginia Code § 13 1-102.1 exempts activities described in subsections B7 and B8 It also provides that the employment of attorneys-at-law, surveyors and appraisers in connection with the investment by a foreign corporation in notes, bonds or other instruments secured by deeds of trust on property located in this State does not constitute transacting business in this State But the Virginia Code also contains a proviso that such a foreign corporation cannot "maintain an office or other place of business in this State," nor "advertise for business in this State"

§ 13 1-758 Consequences of transacting business without authority—A. A foreign corporation transacting business in this Commonwealth without a certificate of authority may not maintain a proceeding in any court in this Commonwealth until it obtains a certificate of authority.

B. The successor to a foreign corporation that transacted business in this Commonwealth without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this Commonwealth until the foreign corporation or its successor obtains a certificate of authority

C A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority If it so determines, the court shall further stay the proceeding until the foreign corporation or its successor obtains the certificate

D If a foreign corporation transacts business in this Commonwealth without a certificate of authority, each officer, director and employee who does any of such business in this Commonwealth knowing that a certificate of authority is required shall be liable for a penalty of not less than $100 and not more than $5,000 to be imposed by the Commission, after the corporation and the individual have been given notice and an opportunity to be heard

E. Notwithstanding subsections A and B of this section, the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this Commonwealth

F. Suits, actions and proceedings may be begun against a foreign corporation that transacts business in this Commonwealth without a certificate of authority by serving process on any director, officer or agent of the corporation doing such business, or, if none can be found, on the clerk of the Commission. If any foreign corporation transacts business in this Commonwealth without a certificate of authority, it shall by transacting such business be deemed to have thereby appointed the clerk of the Commission its attorney for service of process Service shall be made by leaving two copies of the process, notice, order or demand, together with the fee required by law, in the office of the clerk of the Commission, together with an affidavit giving the latest known post office address of the defendant Such service shall be sufficient if notice of such service and a copy of the process, notice, order or demand are forthwith sent by registered mail, with return receipt requested, by the clerk of the Commission or one of his staff to the defendant at the specified address An affidavit by the clerk of the Commission showing compliance herewith shall be filed with the papers in the suit, action or proceeding

Comment This section adopts Model Act § 15 02 with minor changes and with the addition of subsection D, which is new and subsection F, which is taken from Virginia Code § 13 1-119

The Virginia Draft has not adopted the concept, found in Virginia Code § 13 1-119, that directors, officers and agents of a foreign corporation transacting business in Virginia without a certificate of authority are jointly and severally liable on contracts made or to be performed in Virginia or torts committed in Virginia Also, subsections B and C are new to the Virginia Code

§ 13 1-759 Application for certificate of authority—A A foreign corporation may apply to the Commission for a certificate of authority to transact business in this Commonwealth The application shall be made on forms prescribed and furnished by the Commission The application shall set forth

1 The name of the corporation,

2 The name of the state or country under whose law it is incorporated,

3. The date of incorporation and period of duration,

4 The street address of the foreign corporation's principal office,

5 The address of the proposed registered office of the foreign corporation in this Commonwealth (including both (i) the post office address with street and number, if any, and (ii) the name of the county or city in which it is located) and the name of its proposed registered agent in this Commonwealth at such address and that the registered agent is (a) a resident of Virginia and an officer or director of the corporation or a member of the Virginia State Bar or (b) a professional corporation registered under the provisions of § 54-42 2, the business office of which is identical with the registered office,

6 The names and usual business addresses of the current directors and officers of the foreign corporation, and

7 The number of shares the corporation is authorized to issue, itemized by classes and series, if any, within a class

B. The foreign corporation shall deliver with the completed application a copy of its articles of incorporation and all amendments thereto duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country under whose law it is incorporated.

C. If the Commission finds that the application complies with the requirements of law and that all required fees have been paid, it shall issue a certificate of authority to transact business in this Commonwealth

Comment. The Virginia Draft follows Model Act § 15 03, with the addition of subsections A5, A7 and B, taken from Virginia Code §§ 13.1-104(a) and 13 1-106

The following provisions in Va. Code § 13.1-106 have not been adopted in the Virginia Draft

1 A provision requiring a statement of the number of issued shares; and

2 A requirement for irrevocable consent that any process, notice, order or demand arising out of or relating to the transaction of business in this State, whether or not the corporation withdraws from this State, may be served on the clerk of the Commission.

§ 13 1-760. Amended certificate of authority—A. A foreign corporation authorized to transact business in this Commonwealth shall obtain an amended certificate of authority from the Commission if it changes·

1 Its corporate name,

2. The period of its duration, or

3 The state or country of its incorporation

B The requirements of § 13.1-759 for obtaining an original certificate of authority apply to obtaining an amended certificate under this section

C Whenever the articles of incorporation of a foreign corporation that is authorized to do business in Virginia are amended, within thirty days after the amendment becomes effective, the foreign corporation shall file with the Commission a copy of such amendment duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country under whose law it is incorporated

Comment This section was taken from Model Act § 15 04 with the addition of subsection C taken from Va Code § 13 1-112 Virginia Code § 13.1-114 requires an amended certificate when the corporate name is changed

§ 13 1-761 Effect of certificate of authority—A A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this Commonwealth subject,

however, to the right of the Commonwealth to revoke the certificate as provided in this Act

B. A foreign corporation holding a valid certificate of authority shall have no greater rights and privileges than a domestic corporation The certificate of authority shall not be deemed to authorize it to exercise any of its corporate powers or purposes that a foreign corporation is forbidden by law to exercise in this Commonwealth

C This chapter does not authorize this Commonwealth to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this Commonwealth
Comment Subsections A is taken from Model Act § 15.05. Virginia Code § 13 1-108 grants the Commonwealth the right to suspend as well as to revoke a certificate of authority Subsection B is taken from Virginia Code § 13.1-103 Subsection C is taken from Model Act § 15.05; it is similar to Virginia Code § 13.1-102

§ 13 1-762 Corporate name of foreign corporation.—A No certificate of authority shall be issued to a foreign corporation unless the corporate name of such corporation.

1. Shall contain the word "corporation," "incorporated," "inc.," "co ," or "ltd ," unless the name of a domestic corporation organized for the same or similar purposes would not be required to contain such a word or abbreviation Such words and their corresponding abbreviations may be used interchangeably for all purposes

2 Shall not contain

a Any language stating or implying that it will transact one of the special kinds of businesses listed in § 13 1-620 unless it purposes in fact to engage in such special kind of business, or

b Any word or phrase that is prohibited by law for such corporation.

3 Except as authorized by subsection C of this section, shall be distinguishable upon the records of the Commission from:

a The corporate name of a domestic corporation or a foreign corporation authorized to transact business in this Commonwealth,

b A corporate name reserved or registered under § 13 1-631, § 13.1-632, § 13.1-830 or § 13.1-831,

c. The designated name adopted by a foreign corporation, whether issuing or not issuing shares, because its real name is unavailable, and

d The corporate name of a nonstock corporation incorporated or authorized to transact business in this Commonwealth

B If the corporate name of a foreign corporation does not satisfy the requirements of subsection A of this section, the foreign corporation to obtain or maintain a certificate of authority to transact business in this Commonwealth:

1 May add the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc ," "co ," or "ltd.," to its corporate name for use in this Commonwealth Such words and their corresponding abbreviations may be used interchangebly for all purposes, or

2 May use a designated name if its real name is unavailable and it delivers to the Commission a copy of the resolution of its board of directors, certified by its secretary, adopting the designated name

C A foreign corporation may apply to the Commission for authorization to use in this Commonwealth the name of another corporation, incorporated or authorized to transact business in this Commonwealth, that is not distinguishable upon its records from the name applied for The Commission shall authorize use of the name applied for if

1 The other entity consents to the use in writing and submits an undertaking in form satisfactory to the Commission to change its name to a name that is distinguishable upon the records of the Commission from the name of the applying corporation, or

2 The applicant delivers to the Commission a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this Commonwealth.

D If a foreign corporation authorized to transact business in this Commonwealth changes its corporate name to one that does not satisfy the requirements of this section, it may not transact business in this Commonwealth under the changed name until it adopts a name satisfying the requirements of this section and obtains an amended certificate of authority under § 13.1-760

Comment This section is taken from Model Act § 15.06 with minor changes and the deletion of § 15.06(d) That subsection allows a foreign corporation to use the name of another domestic or foreign corporation if the proposed user corporation has merged with, been formed by reorganization of, or acquired all or substantially all of the assets of the other corporation

The Virginia Draft and Virginia Code differ in the following ways:

1. The test for availability of a corporate name in subsection B is less restrictive than the requirement in Virginia Code § 13.1-104 that the corporate name must "not be the same as, or confusingly similar to" another corporate name

2. Subsections B2 and C are new

§ 13 1-763. Registered office and registered agent of foreign corporation.—A. Each foreign corporation authorized to transact business in this Commonwealth shall continuously maintain in this Commonwealth

1. A registered office that may be the same as any of its places of business, and

2. A registered agent, which agent shall be

a A resident of Virginia who is an officer or director of the corporation or a member of the Virginia State Bar and whose business address is identical with the registered office, or

b A professional corporation registered under the provisions of § 54-42.2, the business office of which is identical with the registered office

B The sole duty of the registered agent is to forward to the corporation at its last known address any notice that is served on the registered agent

Comment Subsection A is taken from Virginia Code § 13.1-109 with modifications to permit a professional corporation to serve as registered agent. A comparable provision in the Model Act is found at § 15.07 Subsection B is not found in the Model Act or the Virginia Code

§ 13 1-764. Change of registered office or registered agent of a foreign corporation.—A. A foreign corporation authorized to transact business in this Commonwealth may change its registered office or registered agent by filing with the Commission a statement of change that sets forth

1 The name of the foreign corporation,

2 The address of its current registered office,

3 If the current registered office is to be changed, the address of the new registered office, including both (i) the post office address with street and number, if any, and (ii) the name of the county or city in which it is located,

4 The name of its current registered agent,

5 If the current registered agent is to be changed, the name of the new registered agent, and

6. That after the change or changes are made, the corporation will be in compliance with

the requirements of § 13.1-763

B 1 A new statement shall forthwith be filed by the corporation whenever it changes its name or whenever its registered agent dies, resigns or ceases to satisfy the requirements of § 13 1-763

2 If a registered agent changes his business address to another place within this Commonwealth, he shall change the address of the registered office of any corporation of which he is a registered agent by filing a statement as required above except that it need be signed only by the registered agent and must recite that a copy of the statement has been mailed to the corporation

Comment. Subsection A reflects the content of Model Act § 15.08(a), with the addition of language taken from Virginia Code § 13.1-110, and the deletion of the requirement in § 15 02(a)(5) that a statement of change of a registered agent include the new agent's written consent.

Subsection B has been taken from Virginia Code § 13.1-110 except that the corporation only is required to certify compliance with § 13.1-761 rather than repeating each specific requirement of that section A similar provision is found in Model Act § 15 08(b)

The Virginia Draft deletes the requirement in Virginia Code § 13 1-110(g) that the statement of change filed with the Commission show that such change was authorized by resolution duly adopted by the corporation's board of directors

§ 13.1-765 Resignation of registered agent of foreign corporation—A. The registered agent of a foreign corporation may resign his agency appointment by signing and filing with the Commission his statement of resignation accompanied by his certification that he has mailed a copy thereof to the principal office of the corporation by certified mail The statement of resignation may include a statement that the registered office is also discontinued.

B The agency appointment is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed

Comment This provision adopts § 15.09 of the Model Act with the following modifications

1 Language has been inserted in subsection (a) requiring the resigning agent to certify to the Commission that he has mailed a copy of his statement of resignation to the principal office of the corporation by certified mail

2 Subsection (b) of the Model Act has been deleted It required the Commission to mail copies of the statement of resignation to the registered and principal offices of the corporation

There is no similar provision in the Virginia Code

§ 13.1-766 Service of process on foreign corporation—A The registered agent of a foreign corporation authorized to transact business in this Commonwealth shall be an agent of such corporation upon whom any process, notice, order or demand required or permitted by law to be served upon the corporation may be served. The registered agent may by instrument in writing, acknowledged before a notary public, designate a person or persons in the office of the registered agent upon whom any such process, notice or demand may be served

B The clerk of the Commission shall also be an agent of the corporation upon whom may be served any process, notice, order or demand except one issued by the Commission Service may be made on the clerk or any of his staff at his office He shall forthwith cause it to be sent by registered or certified mail addressed to the corporation at its registered office and keep a record thereof Any process, notice, order or demand issued by the Commission shall be served by being mailed by the clerk of the Commission or any of his staff by registered or certified mail addressed to the corporation at its registered office In case of withdrawal from this Commonwealth, the mailing shall be to the address shown in the statement of withdrawal

C Nothing herein contained shall limit or affect the right to serve any process, notice, order or demand, required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law

Comment This section was taken from Virginia Code § 13 1-111 with the addition of the last sentence in subsection A Section 15 10 of the Model Act provides that service may be made by mail addressed to the secretary of the corporation at its principal office The Model Act does not provide for the clerk of the Commission (or any comparable state official) being considered the agent for service

§ 13.1-767 Withdrawal of foreign corporation.—A A foreign corporation authorized to transact business in this Commonwealth may not withdraw from this Commonwealth until it obtains a certificate of withdrawal from the Commission

B A foreign corporation authorized to transact business in this Commonwealth may apply to the Commission for a certificate of withdrawal The application shall be on forms prescribed and furnished by the Commission and shall set forth

1 The name of the foreign corporation and the name of the state or country under whose law it is incorporated,

2 That the foreign corporation is not transacting business in this Commonwealth and that it surrenders its authority to transact business in this Commonwealth,

3 That the foreign corporation revokes the authority of its registered agent to accept service on its behalf and appoints the clerk of the Commission as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this Commonwealth,

4 A mailing address to which the clerk may mail a copy of any process served on him under paragraph 3 of this subsection, and

5 A commitment to notify the clerk of the Commission in the future of any change in the mailing address of the corporation

C. The Commission shall not allow any foreign corporation to withdraw from the Commonwealth unless such corporation shall file with the Commission a certificate of the State Tax Commissioner that it has filed a return and paid or made provision for the payment of all state taxes or other charges on account of its income from sources within this Commonwealth during the part of the taxable year and any previous period when the corporation may have had income from sources within this Commonwealth In such case the corporation may file returns and pay taxes before they would otherwise be due If the Commission finds that the application complies with the requirements of law and that all required fees have been paid, it shall issue a certificate of withdrawal.

D Before any foreign corporation authorized to transact business in this Commonwealth terminates its corporate existence, it shall file with the Commission an application for withdrawal Whether or not such application is filed, the termination of the corporate existence of such foreign corporation shall not take away or impair any remedy available against such corporation for any right or claim existing or any liability incurred prior to such termination Any such action or proceeding against such foreign corporation may be defended by such corporation in its corporate name The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim The right of a foreign corporation that has terminated its corporate existence to institute and maintain in its corporate name actions, suits or proceedings in the courts of this Commonwealth shall be governed by the law of the state of its incorporation

E Service of process on the clerk of the Commission is service of process on a foreign corporation that has withdrawn pursuant to this section. Upon receipt of process, the clerk shall mail, by registered or certified mail, a copy of the process to the foreign corporation at the mailing address set forth in its application for withdrawal

Comment: This section adopts Model Act § 15.20 with minor language changes and with the addition of the first sentence of subsection C taken from Virginia Code § 13 1-116 and subsection D taken from Virginia Code § 13 1-115. Subsection D has been modified to reflect the new concept of dissolution found in the Model Act and the Virginia Draft

§ 13 1-768 Automatic revocation of certificate of authority—If any foreign corporation fails on two successive annual dates to file the annual report required by this chapter or to pay the annual registration fee required by law, the Commission shall mail notice to it of impending revocation of its certificate of authority to do business in this Commonwealth Whether or not such notice is mailed, if the corporation fails before June 1 after the second such annual date to file the annual report or to pay the annual registration fees, together with a penalty of five

percent of the registration fees and interest at an annual rate of six percent on the total amount of any registration fees assessed, such foreign corporation shall thereupon automatically cease to be authorized to do business in this Commonwealth and its certificate of authority shall be automatically revoked as of June 1

Comment This provision was taken from Virginia Code § 13.1-117 There is no comparable provision in the Model Act

§ 13.1-769 Revocation of certificate of authority by Commission—A. The certificate of authority to do business in this Commonwealth of any foreign corporation may be revoked by order of the Commission when it finds that the corporation

1 Has continued to exceed the authority conferred upon it by law,

2 Has failed to maintain a registered office or a registered agent in this Commonwealth as required by law, or

3 Has failed to file any document required by this chapter to be filed with the Commission.

B Before entering any such order the Commission shall issue a rule against the corporation giving it an opportunity to be heard and show cause why such an order should not be entered The Commission may issue the rule on its own motion or on motion of the Attorney General

C The authority of a foreign corporation to transact business in this Commonwealth ceases on the date shown on the certificate revoking its certificate of authority

D The Commission's revocation of a foreign corporation's certificate of authority appoints the clerk of the Commission the foreign corporation's agent for service of process in any proceeding based on a cause of action arising during the time the foreign corporation was authorized to transact business in this Commonwealth Service of process on the clerk of the Commission under this subsection is service on the foreign corporation Upon receipt of process, the clerk of the Commission shall mail a copy of the process to the secretary of the foreign corporation at its principal office shown in its most recent annual report or in any subsequent communication received from the corporation stating the current mailing address of its principal office, or, if none is on file, in its application for a certificate of authority

E Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation

Comment: Subsections A and B follow Virginia Code § 13.1-118 but delete a provision allowing the Commission to revoke a foreign corporation's certificate of authority upon finding that the corporation has failed to comply with any act required by the Commission pursuant to Virginia Code § 13.1-133 (power of the Commission when complaint of unauthorized practice of law is filed) as § 13.1-133 has not been adopted in the Virginia Draft. The Model Act §§ 15.30 through 15.32 contain provisions similar to subsections A and B.

Subsections C-E are taken from Model Act § 15.31 with minor changes

Article 18

Records and Reports

§ 13.1-770 Corporate records—A A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.

B A corporation shall maintain appropriate accounting records

C A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class and series, if any, of shares showing the number and class and series, if any, of

shares held by each

D A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time

E A corporation shall keep a copy of the following records

1 Its articles or restated articles of incorporation and all amendments to them currently in effect,

2 Its bylaws or restated bylaws and all amendments to them currently in effect,

3 Resolutions adopted by its board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding,

4 The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years,

5 All written communications to shareholders generally within the past three years, including the financial statements furnished for the past three years under § 13.1-774,

6 A list of the names and business addresses of its current directors and officers, and

7 Its most recent annual report delivered to the Commission under § 13.1-775

Comment **This section of the Virginia Draft has been taken from Model Act § 16.01 with minor changes**

This provision and Virginia Code § 13 1-47 are similar, but subsection E is new.

§ 13.1-771 Inspection of records by shareholders.—A Subject to subsection C of § 13.1-772, a shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's princial office, any of the records of the corporation described in subsection E of § 13.1-770 if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy

B A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection C of this section and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy

1 Excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under subsection A of § 13 1-771,

2 Accounting records of the corporation, and

3 The record of shareholders

C A shareholder may inspect and copy the records identified in subsection B of this section only if

1 He has been a shareholder of record for at least six months immediately preceding his demand or is the holder of record of at least five percent of all of the outstanding shares,

2 His demand is made in good faith and for a proper purpose,

3 He describes with reasonable particularity his purpose and the records he desires to inspect, and

4 The records are directly connected with his purpose

D The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws

E This section does not affect

1 The right of a shareholder to inspect records under § 13 1-661 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant,

2 The power of a court, independently of this chapter, to compel the production of corporate records for examination.

Comment The source of this provision is Model Act § 16 02 except for subsection C1, which is taken from Virginia Code § 13.1-47

The Virginia Draft differs from Virginia Code § 13.1-47 in the following ways

1 The Virginia Draft allows any shareholder to inspect documents listed in § 13.1-770 E regardless of the shareholder's purpose For other documents, the Virginia Draft follows Virginia Code § 13.1-47 in requiring that the shareholder be a holder of at least five percent of the outstanding shares or a holder for at least six months and that the shareholder's demand be made in good faith and for a proper purpose,

2 The requirement in the Virginia Draft that notice of any demand be given five business days in advance is not found in the Virginia Code,

3 Subsections D and E are new

§ 13 1-772 Scope of inspection right.—A A shareholder's agent or attorney has the same inspection and copying rights as the shareholder he represents

B The right to copy records under § 13.1-771 includes, if reasonable, the right to receive copies made by photographic or other means

C The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the shareholder The charge may not exceed the estimated cost of production or reproduction of the records

D The corporation may comply with a shareholder's demand to inspect the record of shareholders under paragraph 3 of subsection B of § 13 1-771 by providing him with a list of its shareholders that was compiled no earlier than the date of the shareholder's demand

Comment This section has been taken from Model Act § 16.03 Subsections B through D are not found in the Virginia Code

§ 13.1-773. Court-ordered inspection.—A. If a corporation does not allow a shareholder who complies with subsection A of § 13.1-771 to inspect and copy any records required by that subsection to be available for inspection, the circuit court in the city or county where the corporation's principal office is located, or, if none in this Commonwealth, where its registered office is located, may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the shareholder

B If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with subsections B and C of § 13 1-771 may apply to the circuit court in the city or county where the corporation's principal office is located, or, if none in this Commonwealth, where its registered office is located, for an order to permit inspection and copying of the records demanded The court shall dispose of an application under this subsection on an expedited basis

C If the court orders inspection and copying of the records demanded, it may also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order if the shareholder proves that the corporation refused inspection without a reasonable basis for doubt about the right of the shareholder to inspect the records demanded

D If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder

Comment This section has been taken from Model Act § 16 04 with a change in subsection C to

place the burden of proof on the shareholder In the Model Act, the corporation must pay the shareholder's costs unless it can prove that it had a reasonable basis for doubt about the shareholder's right to inspect. There is no comparable provision in the Virginia Code

§ 13.1-774 Financial statements for shareholders—A. If requested in writing by any shareholder, a corporation shall furnish the shareholder with the financial statements for the most recent fiscal year, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries, as appropriate, that include a balance sheet as of the end of the fiscal year, an income statement for that year, and a statement of changes in shareholders' equity for the year unless that information appears elsewhere in the financial statements If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis

B If the annual financial statements are reported upon by a public accountant, his report must accompany them If the annual financial statements are not reported upon by a public accountant, the president or the person responsible for the corporation's accounting records shall provide the shareholder with a statement of the basis of accounting used in preparation of the annual financial statements and a description of any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year

C. If a corporation does not comply with a shareholder's request for financial statements within thirty days of delivery of such request to the corporation, the circuit court in the city or county where the corporation's principal office is located, or, if none in this Commonwealth, where its registered office is located may, upon application of the shareholder, summarily order the corporation to furnish such financial statements.

Comment While the source of this provision is Model Act § 16.20, the section has been revised to provide for distribution of financial statements only if requested by the shareholder. In addition, subsection B has been revised to reduce the disclosure burden for corporations that do not have financial statements reported upon by a public accountant. Subsection C is new

This section of the Virginia Draft is more detailed than Virginia Code § 13.1-47, which provides that upon the written request of any stockholder, the corporation shall mail to such stockholder "its most recent published financial statements showing in reasonable detail its assets and liabilities and the results of its operations"

Comment The Virginia Draft has not adopted Section 16.21(b) of the Model Act, which would require disclosure to shareholders whenever a corporation (i) indemnifies a director or advances expenses in connection with a claim against a director or (ii) issues shares for promissory notes or for promises to render services in the future There is no comparable provision in the Virginia Code

§ 13.1-775. Annual report of domestic and foreign corporations—A. Each domestic corporation, and each foreign corporation authorized to transact business in this Commonwealth, shall file, within the time prescribed by this chapter, and annual report setting forth.

1 The name of the corporation, the address of its principal office and the state or country under the law of which it is incorporated,

2. The address of the registered office of the corporation in this Commonwealth, including both (i) the post office address with street and number, if any, and (ii) the name of the county or city in which it is located, and the name of its registered agent in this Commonwealth at such address

3 The names and post office addresses of the directors and the principal officers of the corporation, and

4 A statement of the aggregate number of shares which the corporation has authority to issue, itemized by class and series

B The report shall be made on forms furnished by the Commission and shall supply the information as of the date of the report

C The annual report of a domestic or foreign corporation shall be filed with the Commission between January 1 and March 1 of each year after the calendar year in which it was incorporated or authorized to transact business in this Commonwealth If the report appears to be incomplete or inaccurate, the Commission shall return it for correction or explanation Otherwise the Commission shall file it in the clerk's office

Comment Subsections A and B have been taken from Virginia Code § 13 1-120 with minor language changes Subsection C has been taken from Virginia Code § 13 1-121 This section of the Virginia Draft is similar to Model Act § 16 22

Article 19

Proceeding for Determination of Shareholders

§ 13 1-776 Definitions—As used in this article, unless the context otherwise requires, the term

"Asserted shareholder" means an entity holding a certificate for one or more shares of stock of a corporation on which it is stated to be the owner thereof but which is not listed as a shareholder on the records of the corporation

"Corporation" shall have the meaning provided in § 13.1-603

"Entity" means one or more persons, partnerships, unincorporated associations, corporations or other organizations entitled to hold property in its own name

"Lost shareholder" means a shareholder shown by the records of a corporation to have been a stockholder for more than seven years but who, throughout that period, neither claimed a dividend or other sum nor corresponded in writing with the corporation or otherwise indicated an interest as evidenced by a memorandum or other record on file with the corporation and the corporation does not know the location of the shareholder at the end of such seven-year period

"Shareholder" means an entity shown by the records of a corporation to be the owner of one or more shares of its outstanding capital stock

§ 13.1-777 Institution of proceeding to determine shareholders—A. Whenever the records of a corporation are such that its board of directors determines that there are entities that appear to be lost shareholders who may or may not be entitled to the shares of stock shown by its records or that there may be asserted shareholders, the board of directors may by a suit in equity brought in the circuit court of the city or county in which its registered office is located, begin a proceeding for a determination of the identity of its proper shareholders.

B Each lost shareholder shall be named a party defendant Asserted shareholders shall be joined as defendants as persons unknown Service shall be effected by order of publication pursuant to § 8 01-316 of the Code of Virginia The Commonwealth shall be named a party defendant and service shall be effected on the Attorney General

C The court shall hear all evidence that shall be available as to the identity of lost shareholders and asserted shareholders and whether or not they are entitled to own shares of stock of the corporation

D The court, on the basis of such evidence, shall determine, to the best of its ability, the identity of the lost shareholders and asserted shareholders of the corporation Such determination shall be final, subject to appeal to the Supreme Court of Virginia

E The court, in its final decree, shall declare that the shares owned by lost shareholders or asserted shareholders and any dividends declared thereon and unpaid shall be the property of the Commonwealth in accordance with § 55-210.6 1 of the Code of Virginia

Article 20

Transition Provisions

§ 13.1-778 Application to existing corporations.—Unless otherwise provided, the provisions of this chapter shall apply to all domestic and foreign corporations existing at the time this chapter takes effect and their shareholders. The charter of every corporation heretofore or hereafter organized in this Commonwealth shall be subject to the provisions of this chapter. In the case of foreign corporations, the certificate of authority to transact business in this Commonwealth issued by the Commission under any prior act of this Commonwealth shall continue in effect subject to the provisions hereof.

Comment. This section is taken from Virginia Code § 13.1-128 with minor language changes. The Model Act §§ 17.01 and 17.02 deal with this subject matter in a similar fashion.

§ 13.1-779 Savings provision.—A. Except as provided in subsection B of this section, the repeal of a statute by this chapter does not affect:

1. The operation of the statute or any action taken under it before its repeal;

2. Any ratification, right, remedy, privilege, obligation or liability acquired, accrued, or incurred under the statute before its repeal;

3. Any violation of the statute, or any penalty, forfeiture or punishment incurred because of the violation, before its repeal; or

4. Any proceeding commenced, or reorganization or dissolution authorized by the board of directors, under the statute before its repeal, and the proceeding, reorganization or dissolution may be completed in accordance with the statute as if it had not been repealed.

B. If a penalty or punishment imposed for violation of a statute repealed by this Act is reduced by this Act, the penalty or punishment if not already imposed shall be imposed in accordance with this chapter.

Comment. This is Model Act § 17.03 with minor changes. The Virginia Code has a less comprehensive provision at § 13.1-130.

§ 13.1-780 Severability.—If any provision of this chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable.

Comment. This section has been taken from Model Act § 17.04. There is no comparable provision in the Virginia Code.

§§ 13.1-781 through 13.1-800 reserved.

CHAPTER 10

VIRGINIA NONSTOCK CORPORATION ACT

Article 1

General Provisions

§ 13.1-801 Short title.—This chapter shall be known as the "Virginia Nonstock Corporation Act."

§ 13.1-802 Reservation of power.—The General Assembly of Virginia shall have power to amend or repeal all or part of this chapter at any time, and all domestic and foreign

corporations subject to this chapter shall be governed by the amendment or repeal

§ 13.1-803 Definitions.—As used in this chapter, unless the context otherwise requires, the term

"Articles of incorporation" means all documents constituting, at any particular time, the charter of a corporation It includes the original charter issued by the General Assembly, a court or the Commission and all amendments including certificates of merger or consolidation When the articles of incorporation have been restated pursuant to any articles of amendment or merger, it includes only the restated articles of incorporation without the accompanying articles of amendment or merger

"Board of directors" means the group of persons vested with the management of the business of the corporation irrespective of the name by which such group is designated, and "director" means a member of the board of directors.

"Certificate," when relating to articles filed with the Commission, means the order of the Commission that makes the articles effective, together with the articles.

"Commission" means the State Corporation Commission of Virginia

"Corporation" or "domestic corporation" means a corporation not issuing shares of stock irrespective of the nature of its business to be transacted, organized under this chapter or existing pursuant to the laws of this Commonwealth on January 1, 1986 , or merged with a corporation of this Commonwealth in such manner as thereby to become a domestic corporation of this Commonwealth, even though also remaining a corporation of another state

"Deliver" includes mail.

"Employee" includes an officer but not a director. A director may accept duties that make him also an employee.

"Entity" includes corporation and foreign corporation, nonstock corporation; profit and not-for-profit unincorporated association; business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest, and state, United States and foreign government

Foreign corporation" means a corporation not issuing shares and organized under laws other than the laws of this Commonwealth

"Individual" includes the estate of an incompetent or deceased individual

"Insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its business

"Member" means one having membership rights in a corporation in accordance with the provisions of its articles of incorporation or bylaws

"Person" includes individual and entity

"Principal office" means the office, in or out of this Commonwealth, where the principal executive offices of a domestic or foreign corporation are located, or, if there are no such offices, the office, in or out of this Commonwealth, so designated by the board of directors The designation of the principal office in the most recent annual report filed pursuant to § 13.1-936 shall be conclusive for purposes of this chapter

"Proceeding" includes civil suit and criminal, administrative and investigatory action conducted by a governmental agency

"Record date" means the date established under Article 7 (§ 13.1-837 et seq.) of this chapter on which a corporation determines the identity of its members for purposes of this chapter

"Transact business" includes the conduct of affairs by any corporation that is not organized for profit

"Voting group" means all members of one or more classes that under the articles of incorporation or this chapter are entitled to vote and be counted together collectively on a matter at a meeting All members entitled by the articles of incorporation or this chapter to vote generally on the matter are for that purpose a single voting group

§ 13 1-804 Filing requirements—A A document shall satisfy the requirements of this section, and of any other section that adds to or varies these requirements, to be entitled to be filed with the Commission

B The document shall be one that this chapter requires or permits to be filed with the Commission

C The document shall contain the information required by this chapter It may contain other information as well

D. The document shall be typewritten or printed The typewritten or printed portion shall be in black Manually signed photocopies, or other reproduced copies, of typewritten or printed documents may be filed

E. The document shall be in the English language A corporate name need not be in English if written in English letters or Arabic or Roman numerals The articles of incorporation, duly authenticated by the official having custody of corporate records in the state or country under whose law the corporation is incorporated, which are required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation

F The document shall be executed in the name of the corporation.

1. By the chairman or any vice chairman of the board of directors, or the president or any vice president,

2. If directors have not been selected or the corporation has not been formed, by an incorporator, or

3. If the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary

G Notwithstanding subsection F of this section, any annual report required to be filed by § 13.1-936 may be executed in the name of the corporation by any officer or director listed in such report

H The person executing the document shall sign it and state beneath or opposite his signature his name and the capacity in which he signs The document may but need not contain.

1 The corporate seal,

2 An attestation by the secretary or an assistant secretary,

3 An acknowledgement, verification, or proof

I If, pursuant to any provision of this chapter, the Commission has prescribed a mandatory form for the document, the document shall be in or on the prescribed form

J The document shall be delivered to the Commission for filing and shall be accompanied by the required filing fee, and any charter or entrance fee or registration fee required by this chapter or by Chapter 28 (§ 58 1-2800 et seq) of Title 58 1

§ 13 1-805 Issuance of certificate by Commission, recordation of documents—A Whenever this chapter conditions the effectiveness of a document upon the issuance of a certificate by the

Commission to evidence the effectiveness of the document, the Commission shall by order issue the certificate if it finds that the document complies with the requirements of law and that all required fees have been paid The Commission shall admit any such certificate to record in its office and shall forward the certificate for recordation in the office for the recording of deeds in the city or county in which is located the registered office of each corporation that is a party to the document, except that no such further recordation shall be required in the City of Richmond or the County of Henrico

B Whenever the Commission is directed to admit any document to record in its office, its shall cause it to be spread upon its record books or to be reproduced in microfilm or in any other manner the Commission may deem suitable The Commission shall reproduce and sell, upon request, an entire roll of microfilm containing public records, documents, instruments and papers, or facsimiles thereof, copies of which could otherwise be obtained from the clerk of the Commission, and shall prescribe, charge and collect a reasonable and uniform fee for each roll, however, such fee shall not exceed the approximate actual cost connected with processing the request and reproducing the roll of microfilm

§ 13 1-806 Effective time and date of document—A A certificate issued by the Commission becomes effective at the time such certificate is issued, unless the certificate relates to articles filed with the Commission and the articles state that the certificate shall become effective at a later time and date specified in the articles In that event the certificate shall become effective at the time and date so specified, so long as the effective date is not more than fifteen days after the date on which the certificate is issued by the Commission Any other document filed with the Commission shall become effective when accepted for filing unless otherwise provided for in this chapter.

B. Notwithstanding the provisions of subsection A of this section, any certificate that has a delayed effective time and date shall not become effective if prior to the effective time and date the parties to the articles to which the certificate relates file a request for cancellation with the Commission and the Commission, by order, cancels the certificate

C Notwithstanding subsection A of this section, for purposes of §§ 13 1-829 and 13 1-924, any certificate that has a delayed effective date shall be deemed to become effective when the certificate is issued.

§ 13.1-807 Correcting filed articles—A The board of directors of a domestic or foreign corporation may authorize correction of any articles filed with the Commission if the articles (i) contain an incorrect statement or (ii) were defectively executed, attested, sealed, verified, or acknowledged.

B Articles are corrected

1 By preparing articles of correction that describe the articles to be corrected, including their effective date, and that correct the incorrect statement or defective execution, and

2 By filing the articles of correction with the Commission

C Upon the issuance of a certificate of correction by the Commission, the articles of correction shall become effective as of the effective date of the articles they correct except as to persons relying on the uncorrected articles and adversely affected by the correction As to those persons, articles of correction are effective upon the issuance of the certificate of correction

D No articles of correction shall be accepted by the Commission when received more than nine days after the effective date of the certificate relating to the articles to be corrected

§ 13.1-808. Evidentiary effect of copy of filed document—A certificate attached to a copy of any document admitted to the records of the Commission, bearing the signature of the clerk or an assistant clerk of the Commission and the seal of the Commission, is conclusive evidence that the document has been admitted to the records of the Commission

§ 13 1-809. Certificate of good standing—A Anyone may apply to the Commission for a

certificate of good standing for a domestic or foreign corporation

B The certificate shall state that the corporation is in good standing in this Commonwealth and shall set forth

1 The domestic corporation's corporate name or the foreign corporation's corporate name used in this Commonwealth,

2 That (i) the domestic corporation is duly incorporated under the laws of this Commonwealth, the date of its incorporation, and the period of its duration if less than perpetual, or (ii) the foreign corporation is authorized to transact business in this Commonwealth, and

3 If requested, a list of all certificates relating to articles filed with the Commission that have been issued by the Commission with respect to such corporation and their respective effective dates

C. A domestic corporation or a foreign corporation authorized to transact business in this Commonwealth shall be deemed to be in good standing if

1. All registration fees owed to this Commonwealth have been paid, if payment is required to be reflected in the records of the Commission,

2 An annual report required by § 13 1-936 has been delivered to and accepted by the Commission within the preceding fourteen months, and

3 No certificate of dissolution or certificate of withdrawal has been issued or such certificate no longer is in effect

D The certificate may state any other facts of record in the office of the clerk of the Commission that may be requested by the applicant

E. Subject to any qualification stated in the certificate, a certificate of good standing issued by the Commission may be relied upon as conclusive evidence that the domestic or foreign corporation is in good standing in this Commonwealth.

§ 13 1-810 Notice.--For purposes of this chapter

A. Notice shall be in writing except that oral notice of any meeting of the board of directors may be given if expressly authorized by the articles of incorporation or bylaws

B Notice may be communicated in person, by telephone, telegraph, teletype, or other form of wire or wireless communication, or by mail or private carrier If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where the notice is intended to be given, or by radio, television or other form of public broadcast communication

C Written notice by a domestic or foreign corporation to its member, if in a comprehensible form, is effective when mailed, if mailed postpaid and correctly addressed to the member's address shown in the corporation's current record of members

D Written notice to a domestic corporation or a foreign corporation authorized to transact business in this Commonwealth, may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report or, in the case of a foreign corporation that has not yet filed an annual report, in its application for a certificate of authority

E Except as provided in subsections B and C of this section, written notice, if in a comprehensible form, becomes effective at the earliest of the following

1 When received,

2 Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed, or

3 On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested and the receipt is signed by or on behalf of the addressee

F Oral notice becomes effective when communicated if communicated in a comprehensible manner

G If this chapter prescribes notice requirements for particular circumstances, those requirements govern If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this chapter, those requirements govern

§ 13 1-811 Penalty for signing false documents—A It shall be unlawful for any person to sign a document which he knows is false in any material respect with intent that the document be delivered to the Commission for filing Any person who violates the provisions of this section shall be guilty of a Class 1 misdemeanor

§ 13 1-812 Unlawful to transact or offer to transact business as a corporation unless authorized—It shall be unlawful for any person, firm or association to transact business in this Commonwealth as a corporation or to offer or advertise to transact business in this Commonwealth as a corporation unless the alleged corporation is either a Virginia corporation or a foreign corporation authorized to transact business in Virginia Any person who, individually or as a member of a firm or association, violates this section shall be guilty of a Class 1 misdemeanor

§ 13.1-813 Rehearing and finality of Commission action, injunctions—The Commission shall have no power to grant a rehearing with respect to any certificate issued by the Commission with respect to any articles filed with the Commission except on a petition by a member or director, filed with the Commission and the corporation within ten days after the effective date of the certificate, in which the member or director asserts that the certification of corporate action contained in the articles contains a misstatement of a material fact as to compliance with statutory requirements, specifying the particulars thereof. After hearing, on notice in writing to the corporation and the member or director, the Commission shall determine the issues and revoke or refuse to revoke its order accordingly

No court within or without Virginia shall have jurisdiction to enjoin or delay the holding of any meeting of directors or members for the purpose of authorizing or consummating any amendment merger or dissolution, or the execution or filing with the Commission of any articles or other documents for such purpose, except for fraud. No court within or without Virginia, except the Supreme Court by way of appeal as authorized by law, shall have jurisdiction to review, reverse, correct or annul any action of the Commission, within the scope of its authority, with regard to any articles, certificate, order, objection or petition, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties

§ 13 1-814 Shares of stock and dividends prohibited—A corporation shall not issue shares of stock No dividend shall be paid and no part of the income of a corporation shall be distributed to its members, directors or officers A corporation may pay compensation in a reasonable amount to its members, directors or officers for services rendered, including pensions, may confer benefits upon its members in conformity with its purposes, and may make distributions to its members or others as permitted by this Act upon dissolution or final liquidation and no such payment, benefit or distribution shall be deemed to be a dividend or a distribution of income

Article 2

Fees

§ 13 1-815 Fees, taxes and charges to be collected by Commission—The Commission shall

assess the registration fees and shall charge and collect the charter fees and entrance fees imposed by law

§ 13 1-816 Fees for filing documents or issuing certificates –The Commission shall charge and collect the following fees:

A For filing any one of the following the fee shall be ten dollars

1 Articles of incorporation

2 Articles of amendment or restatement

3. Articles of merger

4 Articles of correction

5 Articles of dissolution

6 Articles of revocation of dissolution

7. An application to reserve a corporate name

8 A notice of transfer of a reserved corporate name.

9. Articles of termination of corporate existence

10. An application of a foreign corporation for a certificate of authority to transact business in this Commonwealth

11 An application of a foreign corporation for an amended certificate of authority to transact business in this Commonwealth

12 A copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to transact business in this Commonwealth

13 A copy of articles of merger or consolidation of a foreign corporation holding a certificate of authority to transact business in this Commonwealth

14 A statement of withdrawal of a foreign corporation

15. An application for use of an indistinguishable name

B For issuing a certificate of change of name the fee shall be five dollars

C For filing a statement of change of address of registered office or change of registered agent or both the fee shall be five dollars. Except in the case of the City of Richmond or Henrico County, the Commission, in respect of domestic corporations, shall collect and remit to the clerk of the court for the recording of deeds in the city or county in which the registered office is located an additional fee of five dollars. If the location of the registered office is changed from one city or county to another the Commission shall collect and remit fees of five dollars for each of the clerks to which it is required to give notice

D A domestic or a foreign corporation that (i) has failed to comply with § 13 1-833 or § 13.1-925, and (ii) has been sent a written notice by the Commission to file the statement required by § 13.1-834 or § 13.1-921, and (iii) delivers such statement to the Commission for filing more than thirty days after the notice was sent, but prior to the date of the Commission order of dissolution or of revocation of authority to transact business in this Commonwealth, shall pay a filing fee of ten dollars instead of the filing fee prescribed by the first sentence of subsection C of § 13 1-816.

E Whenever the Commission is required to admit any document to record in its office, it shall collect a fee of two dollars a page plus two dollars for the order of the Commission, or a

fee of ten dollars, whichever is greater Whenever any such document shall also be recorded in the office of any clerk, the Commission shall collect and transmit to such clerk a fee in the same amount plus two dollars for the certification fee.

§ 13 1-817 Miscellaneous charges –The Commission shall charge and collect for furnishing a certified copy of any document, instrument or paper one dollar per page and three dollars for the certificate and affixing the seal thereto

The clerk of the Commission shall charge and collect at the time of any service of process on him with respect to any domestic or foreign corporation thirty dollars, which amount may be recovered as taxable costs by the party to the suit or action causing such service to be made if such party prevails in the suit or action

For making up, certifying and transmitting a record on appeal the clerk shall charge and collect fifty dollars

Article 3

Formation of Corporations

§ 13.1-818 Incorporators.–One or more persons may act as incorporators of a corporation by signing and filing articles of incorporation with the Commission

§ 13.1-819 Articles of incorporation –A The articles of incorporation shall set forth.

1 A corporate name for the corporation that meets the requirements of § 13.1-829

2 If the corporation is to have no members, a statement to that effect

3 If the corporation is to have one or more classes of members, any provision which the incorporators elect to set forth in the articles of incorporation or, if the articles of incorporation so provide, in the bylaws designating the class or classes of members, stating the qualifications and rights of the members of each class and conferring, limiting or denying the right to vote

4. If the directors or any of them are not to be elected or appointed by one or more classes of members, a statement of the manner in which such directors shall be elected or appointed, and a designation of ex officio directors, if any.

5 The address of its initial registered office (including both (i) the post office address with street and number, if any, and (ii) the name of the city or county in which it is located), and the name of its initial registered agent at that office, and that the registered agent meets the requirements of § 13 1-833

B The articles of incorporation may set forth.

1 The names and addresses of the persons who are to serve as the initial directors

2 Any provisions not inconsistent with law·

a Stating the purpose or purposes for which the corporation is organized

b Regarding the management or regulation of the business of the corporation

c Defining, limiting and regulating the powers of the corporation, its directors and its members

d Any provision that under this chapter is required or permitted to be set forth in the bylaws.

C It shall not be necessary to set forth in the articles of incorporation any of the corporate

powers enumerated in this chapter

D Except as provided in subsection A of § 13.1-855, whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation shall be controlling

§ 13.1-820 Issuance of certificate of incorporation.— If the Commission finds that the articles comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of incorporation

When the certificate of incorporation becomes effective, the corporate existence shall begin Upon becoming effective, the certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter

§ 13 1-821 Liability for preincorporation transactions —All persons purporting to act as or on behalf of a corporation, but knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting except for any liability to any person who also knew that there was no incorporation

§ 13 1-822 Organization of corporation —A After incorporation·

1 If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors , to complete the organization of the corporation by adopting bylaws, appointing officers and carrying on any other business brought before the meeting

2 If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators.

a To elect a board of directors and complete the organization of the corporation, or

b To elect directors who shall complete the organization of the corporation

B Action required or permitted by this chapter to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator

C. An organizational meeting may be held in or out of this Commonwealth

§ 13 1-823 Bylaws —A The initial bylaws of the corporation shall be adopted by its incorporators or board of directors

B The bylaws of a corporation may contain any provision for the regulation or management of the business of the corporation that is not inconsistent with law or the articles of incorporation

§ 13 1-824 Emergency bylaws —A Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in subsection D of this section The emergency bylaws, which are subject to amendment or repeal by the members, may make all provisions necessary for managing the corporation during the emergency, including

1 Procedures for calling a meeting of the board of directors ,

2 Quorum requirements for the meeting, and

3 Designation of additional or substitute directors

B All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency The emergency bylaws are not effective after the emergency ends

C Corporate action taken in good faith in accordance with the emergency bylaws·

1 Binds the corporation, and

2 May not be used to impose liability on a corporate director, officer, employee or agent

D An emergency exists for purposes of this section if a quorum of the corporation's board of directors cannot readily be assembled because of some catastrophic event

Article 4
Purposes and Powers

§ 13 1-825 Purposes.– Every corporation incorporated under this chapter has the purpose of engaging in any lawful purpose or purposes, unless

1 A statute requires the corporation to issue shares or one of the purposes of the corporation is to conduct the business of a public service company other than a sewer company, or

2 A more limited purpose is (i) set forth in the articles of incorporation or (ii) required to be set forth in the articles of incorporation by any other laws of this Commonwealth

§ 13 1-826 General powers.–A. Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business, including, without limitation, power to

1 Sue and be sued, complain and defend, in its corporate name

2. Have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it

3 Purchase, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located

4 Sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property

5 Purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and with, shares or other interests in, or obligations of, any other domestic or foreign corporations organized for any purpose, associations, partnerships or individuals, or direct or indirect obligations of the United States, or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof, and to guarantee the payment of any bonds or other obligations of any association, partnership, or individual or any other domestic or foreign corporation organized for any purpose.

6 Make contracts and guarantees, incur liabilities, borrow money , issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income

7 Lend money, invest and reinvest its funds, and hold real and personal property as security for repayment

8 Transact its business, locate offices and exercise the powers granted by this chapter within or without this Commonwealth

9 Elect directors and appoint officers, employees and agents of the corporation, define their duties, fix their compensation and lend them money and credit

10 Make and amend bylaws, not inconsistent with its articles of incorporation or with the

laws of this Commonwealth, for managing or regulating the business of the corporation

11 Make donations for the public welfare or for religious, charitable, scientific, literary or educational purposes.

12 Pay pensions and establish pension plans, pension trusts, profit-sharing plans, and other incentive and compensation plans for any or all of the current or former directors, officers, employees and agents of the corporation or any of its subsidiaries

13 Insure for its benefit the life of any director, officer or employee of the corporation and continue such insurance after the relationship terminates

14 Cease its corporate activities and surrender its corporate franchise

15 Have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

B Each corporation other than a banking corporation, an insurance corporation, a savings and loan association or a credit union shall have power to enter into partnership agreements, joint ventures, or other association of any kind with other corporations, whether organized under the laws of this Commonwealth or otherwise, or with any individual or individuals.

C Privileges and powers conferred and restrictions and requirements imposed by other titles of the Code on railroads or other public service companies, banking corporations, insurance corporations, savings and loan associations, credit unions, industrial loan associations or other special types of corporations shall not be deemed repealed or amended by any provision of this chapter except where specifically so provided.

D Each corporation which is deemed a private foundation (as defined in § 509 of the Internal Revenue Code), unless its articles of incorporation expressly provide otherwise, shall distribute its income and, if necessary, principal, for each taxable year at such time and in such manner as not to subject such corporation to tax under § 4942 of the Internal Revenue Code Such corporation shall not engage in any act of self-dealing (as defined in § 4941 (d) of the Internal Revenue Code), retain any excess business holdings (as defined in § 4943 (c) of the Internal Revenue Code), make any investments in such manner as to give rise to liability for the tax imposed by § 4944 of the Internal Revenue Code, or make any taxable expenditures (as defined in § 4945 (d) of the Internal Revenue Code) This subsection shall apply to any corporation organized under this chapter after December 31, 1969, and to any corporation organized before January 1, 1970, only for its taxable years beginning on and after January 1, 1972, unless the exceptions provided in § 508 (e) (2) (B) or (C) of the Internal Revenue Code shall apply, or unless the board of directors of such corporation shall elect that such restrictions as are contained in this subsection shall not apply by filing written notice of such election with the Attorney General and the clerk of the Commission on or before December 31, 1971. Each reference to a section of the Internal Revenue Code made in this subsection shall include future amendments to such Code sections and corresponding provisions of future internal revenue laws.

§ 13 1-827. Emergency powers—A In anticipation of or during any emergency defined in subsection D of this section, the board of directors of a corporation may

1 Modify lines of succession to accommodate the incapacity of any director, officer, employee or agent

2 Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so

B During an emergency defined in subsection D of this section, unless emergency bylaws provide otherwise

1 Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio

2 One or more officers of the corporation present at a meeting of the board of directors may be deemed by a majority of the directors present at the meeting to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum

C Corporate action taken in good faith during an emergency under this section to further the ordinary business of the corporation

1 Binds the corporation, and

2 May not be used to impose liability on a corporate director, officer, employee or agent

D An emergency exists for purposes of this section if a quorum of the corporation's board of directors cannot readily be assembled because of some catastrophic event

§ 13 1-828 Ultra vires.– A Except as provided in subsection B of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act

B A corporation's power to act may be challenged.

1 In a proceeding by a member or a director against the corporation to enjoin the act, or

2 In a proceeding by the corporation, directly, derivatively or through a receiver, trustee, or other legal representative, against incumbent or former officers, directors, employees or agents of the corporation, or

3 In a proceeding against a corporation before the Commission

C In a proceeding by a member or a director under paragraph 1 of subsection B of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act.

Article 5

Name.

§ 13.1-829 Corporate name.–A. The corporate name shall not contain any word or phrase which indicates or implies that it is organized for the purpose of conducting any business other than a business which it is authorized to conduct.

B Except as authorized by subsection C of this section, a corporate name shall be distinguishable upon the records of the Commission from.

1. The name of any corporation, whether issuing shares or not issuing shares, existing under the laws of this Commonwealth or authorized to transact business in this Commonwealth;

2 A name, the exclusive right to which is, at the time, reserved or registered in the manner provided in §§ 13 1-631, 13 1-632, 13 1-830 or 13 1-831,

3 The designated name adopted by a foreign corporation, whether issuing or not issuing shares, because its real name is unavailable

C A domestic corporation may apply to the Commission for authorization to use a name that is not distinguishable upon its records from one or more of the names described in subsection B of this section The Commission shall authorize use of the name applied for if

1 The other entity consents to the use in writing and submits an undertaking in form

satisfactory to the Commission to change its name to a name that is distinguishable upon the records of the Commission from the name of the applying corporation, or

2 The applicant delivers to the Commission a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this Commonwealth

D The use of assumed names or fictitious names, as provided in Chapter 5 (§ 59 1-69 et seq) of Title 59 1, is not affected by this chapter

§ 13.1-830 Reserved name—A Any person or foreign or domestic corporation may apply to the Commission to reserve the exclusive use of a corporate name, including a designated name for a foreign corporation whose corporate name is not available If the Commission finds that the name applied for is available, it shall reserve the name for the applicant's exclusive use for a 120-day period

B The owner of a reserved corporate name may renew the reservation for successive periods of 120 days each

C The owner of a reserved corporate name may transfer the reservation to another person or corporation by delivering to the Commission a notice of the transfer, executed by the applicant for whom the name was reserved, and specifying the name and address of the transferee

§ 13 1-831 Registered name—A A foreign corporation may register its corporate name, or its corporate name with any addition required by § 13.1-919 , if the name is distinguishable upon the records of the Commission from the corporate names that are not available under subsection B of § 13.1-829

B. A foreign corporation registers its corporate name, or its corporate name with any additions required by § 13 1-919, by

1 Filing with the Commission (i) an application setting forth the name of the corporation, or its corporate name with any addition required by § 13.1-919, the state or country and date of its incorporation, and a brief description of the nature of the business in which it is engaged, and (ii) a certificate setting forth that such corporation is in good standing (or a document of similar import) from the state or country of incorporation, executed by the official who has custody of the records pertaining to corporations, and

2 Paying to the Commission a registration fee of one dollar for each month, or fraction thereof, between the date of filing such application and December 31 of the calendar year in which such application is filed

C. If the Commission finds that the corporate name applied for is available, it shall register the name for the applicant's exclusive use The registration shall expire at the end of the calendar year in which it became effective

D A foreign corporation whose registration is effective may renew it for the succeeding year by filing with the Commission between October 1 and December 31 a renewal application which complies with subsection B of this section, and by paying a renewal fee of twenty dollars The renewal application becomes effective when filed in accordance with this section and renews the registration for the following calendar year

E. A foreign corporation whose registration is effective may thereafter obtain a certificate of authority to transact business in this Commonwealth under that name or consent in writing to the use of that name by a corporation thereafter incorporated under this chapter or by another foreign corporation thereafter authorized to transact business in this Commonwealth The registration terminates when the domestic corporation is incorporated or the foreign corporation obtains a certificate of authority to transact business in this Commonwealth or consents to the authorization of another foreign corporation to transact business in this Commonwealth under the registered name

F A foreign corporation which has in effect a registration of its corporate name may release such name by filing a notice of release of a registered name with the Commission and by paying a fee of five dollars.

§ 13 1-832 Property title records.—Whenever by merger or amendment to the articles of incorporation the name of any domestic or foreign corporation is changed or another domestic or foreign corporation succeeds to the ownership of its property, a certificate reciting such change or succession shall be issued by the clerk of the Commission upon request and such certificate, or if such corporation is not a domestic corporation or a foreign corporation authorized to transact business in this Commonwealth, a similar certificate by any competent authority of the state of incorporation, may be admitted to record in any recording office within the jurisdiction of which any property of the corporation is located in order to maintain the continuity of title records upon paying the fee of the clerk of the court, but no tax shall be due thereon

Article 6

Office and Agent

§ 13.1-833 Registered office and registered agent.—A Each corporation shall continuously maintain in this Commonwealth·

1 A registered office which may be the same as any of its places of business,

2 A registered agent, who shall be

a An individual who resides in this Commonwealth, whose business office is identical with such registered office and who is an officer or director of the corporation or a member of the Virginia State Bar, or

b A professional corporation registered under the provisions of § 54-42.2, the business office of which is identical with the registered office.

B. The sole duty of the registered agent is to forward to the corporation at its last known address any notice that is served on the registered agent

§ 13.1-834. Change of registered office or registered agent.—A. A corporation may change its registered office or registered agent, or both, upon filing in the office of the Commission a statement on a form supplied by the Commission that sets forth.

1 The name of the corporation,

2 The address of its current registered office,

3 If the current registered office is to be changed, the post office address (including the street and number, if any) of the new registered office and the name of the county or city in which it is to be located,

4 The name of its current registered agent,

5 If the current registered agent is to be changed, the name of the new registered agent, and

6. That after the change or changes are made, the corporation shall be in compliance with the requirements of § 13 1-833

B. The Commission shall mail to the clerk in whose office deeds are recorded in the city or county in which the current registered office is located a notice giving the name of the corporation, the address of the registered office and the name and address of the registered agent If the location of the registered office is changed to a different city or county, the

Commission shall mail a similar notice to the proper clerk of that city or county. But no such notice shall be sent to the clerk of any court in the City of Richmond or the County of Henrico The clerk, on receiving the notice, shall record it in a book for the recordation of charters Every statement shall be accompanied by the fees prescribed by law

C A new statement shall forthwith be executed by the corporation whenever it changes its name or whenever its registered agent dies, resigns or ceases to satisfy the requirements of § 13.1-833

D If a registered agent changes his business address to another place within this Commonwealth, he shall change the address of the registered office of any corporation of which he is a registered agent by filing a statement as required above except that it need be signed, either manually or in facsimile, only by the registered agent and shall recite that a copy of the statement has been mailed to the corporation.

§ 13.1-835. Resignation of registered agent.—A. A registered agent may resign his agency appointment by signing and filing with the Commission his statement of resignation accompanied by his certification that he has mailed a copy thereof to the principal office of the corporation by certified mail The statement may include a statement that the registered office is also discontinued

B. The agency appointment is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed.

§ 13.1-836. Service on corporation.—A The registered agent of a corporation is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation The registered agent may by instrument in writing, acknowledged before a notary public, designate a person or persons in the office of the registered agent upon whom any such process, notice or demand may be served Whenever any such person accepts service of process, a photographic copy of such instrument shall be attached to the return

B. Whenever a corporation shall fail to appoint or maintain a registered agent in this Commonwealth, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the clerk of the Commission shall be an agent of the corporation upon whom may be served any process, notice, order or demand except one issued by the Commission Service may be made on the clerk or any of his staff at his office. He shall keep a record of any process, notice, order or demand so served and shall forthwith cause it to be sent by registered or certified mail addressed to the corporation at its principal office unless the Commission does not have a record of its principal office, in which event it shall be addressed to the corporation at its registered office

C. This section does not prescribe the only means, or necessarily the required means, of serving a corporation

D. The name of the registered agent, the address of the registered office and the principal office, the names and addresses of the officers and directors of the corporation as last filed with the Commission pursuant to the provisions of this title shall be conclusive for the purpose of service of process

Article 7

Members and Meetings

§ 13.1-837 Members.—A corporation may have one or more classes of members or may have no members If the corporation has one or more classes of members, the designation of such class or classes and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation or, if the articles of incorporation so provide, in the bylaws A corporation may issue certificates evidencing membership therein Memberships shall not be transferable Members shall not have voting or other rights except as provided in the articles of incorporation or if the articles of incorporation so provide, in the bylaws Members of any

corporation existing on January 1, 1957, shall continue to have the same voting and other rights as before January 1, 1957, until changed by amendment of the articles of incorporation

§ 13 1-838 Annual meeting –A A corporation shall hold annually at a time stated in or fixed in accordance with the bylaws a meeting of the members

B Annual meetings of members may be held at such place, either in or out of this Commonwealth, as may be provided in the bylaws or, where not inconsistent with the bylaws, in the notice of the meeting

C The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action

§ 13.1-839 Special meeting –A. A corporation shall hold a special meeting of members on call of the chairman of the board of directors, the president, the board of directors, or the person or persons authorized to do so by the articles of incorporation or bylaws In the absence of a provision in the articles of incorporation or bylaws stating who may call a special meeting of members, a special meeting of members may be called by members having one-twentieth of the votes entitled to be cast at such meeting

B If not otherwise fixed under § 13.1-840 or § 13 1-844, the record date for determining members entitled to demand a special meeting is the date the first member signs the demand

C Special members' meetings may be held at such place in or out of this Commonwealth as may be provided in the bylaws or, where not inconsistent with the bylaws, in the notice of the meeting

D. Only business within the purpose or purposes described in the meeting notice required by subsection C of § 13.1-842 may be conducted at a special members' meeting

§ 13.1-840. Court-ordered meeting –A. The circuit court of the city or county where a corporation's principal office is located, or, if none in this Commonwealth, where its registered office is located, may, after notice to the corporation, summarily order a meeting to be held·

1 On petition of any member of the corporation entitled to participate in an annual meeting if an annual meeting was not held within fifteen months after its last annual meeting or, if there has been no annual meeting, the date of its incorporation , or

2. On petition of a member who signed a demand for a special meeting that satisfies the requirements of § 13.1-839 if.

a Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary, or

b The special meeting was not held in accordance with the notice

B The court may fix the time and place of the meeting, determine the members entitled to participate in the meeting, specify a record date for determining members entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, and enter other orders necessary to accomplish the purpose or purposes of the meeting

§ 13 1-841 Action without a meeting –A Action required or permitted by this chapter to be taken at a meeting of the members may be taken without a meeting and without action by the board of directors if the action is taken by all of the members entitled to vote on the action The action shall be evidenced by one or more written consents describing the action taken, signed by all of the members entitled to vote on the action, and delivered to the secretary of the corporation for inclusion in the minutes or filing with the corporate records Any action taken by unanimous written consent shall be effective according to its terms when all consents are in possession of the corporation A member may withdraw consent only by delivering a written notice of withdrawal to the corporation prior to the time that all consents are in the possession of the corporation Action taken under this section is effective as of the date specified therein, provided that the consent states the date of execution by each member

B If not otherwise determined under § 13.1-844, the record date for determining members entitled to take action without a meeting is the date the first member signs the consent under subsection A of this section

C A consent signed under this section has the effect of a unanimous vote of voting members, and may be described as such in any articles or document filed with the Commission under this chapter

D If this chapter requires that notice of proposed action be given to nonvoting members and the action is to be taken by unanimous consent of the voting members, the corporation shall give its nonvoting members written notice of the proposed action at least ten days before the action is taken. The notice shall contain or be accompanied by the same material that under this chapter would have been required to be sent to nonvoting members in a notice of meeting at which the proposed action would have been submitted to the members for action

§ 13 1-842 Notice of meetings—A A corporation shall notify members of the date, time and place of each annual and special members' meeting. Such notice shall be given no less than ten nor more than sixty days before the date of the meeting except that notice of a members' meeting to act on an amendment of the articles of incorporation, a plan of merger, a proposed sale of assets pursuant to § 13 1-900 or the dissolution of the corporation shall be given not less than twenty-five nor more than sixty days before the meeting Unless this chapter or the articles of incorporation require otherwise, the corporation is required to give notice only to each member entitled to vote at such meeting

B Unless this chapter or the articles of incorporation require otherwise, notice of an annual meeting need not state the purpose or purposes for which the meeting is called

C. Notice of a special meeting shall state the purpose or purposes for which the meeting is called

D If not otherwise fixed under § 13 1-840 or § 13.1-844, the record date for determining members entitled to notice of and to vote at an annual or special meeting is the close of business on the day before the effective date of the notice to the members.

E. Unless the bylaws require otherwise, if an annual or special meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or shall be fixed by the bylaws, however, the notice of the adjourned meeting shall be given under this section to persons who are members as of the new record date

§ 13 1-843. Waiver of notice of meetings— A. A member may waive any notice required by this chapter, the articles of incorporation or bylaws before or after the date and time of the meeting that is the subject of such notice The waiver shall be in writing, be signed by the member entitled to such notice, and be delivered to the secretary of the corporation for inclusion in the minutes or filing with the corporate records

B A member who attends a meeting

1 Waives objection to lack of notice or defective notice of the meeting, unless the member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting, and

2 Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the member objects to considering the matter when it is presented

§ 13 1-844 Record date — A. The bylaws may fix or provide the manner of fixing in advance the record date for one or more voting groups in order to make a determination of members for any purpose. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date

B A record date fixed under this section may not be more than seventy days before the meeting or action requiring a determination of members

C A determination of members entitled to notice of or to vote at a members' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it shall do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting

D If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date

§ 13 1-845 Members' list for meeting --A The officer or agent having charge of the record of members of a corporation shall make, at least ten days before each meeting, a complete list of the members, with the address of each Where members are entitled to vote the list shall be arranged by voting group and within each voting group by class

B For a period of ten days prior to the meeting, the list of members shall be subject to inspection by any member at any time during usual business hours Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any member during the whole time of the meeting for the purposes thereof The original record of members shall be prima facie evidence as to who are the members entitled to examine such list or records or to vote at any meeting of members The right of the member of a corporation to inspect such list prior to a meeting shall be subject to the limitations set forth in subsection C of § 13.1-933.

C If the requirements of this section have not been substantially complied with, the meeting shall, on the demand of any member in person or by proxy, be adjourned until the requirements are complied with Refusal or failure to prepare or make available the members' list does not affect the validity of action taken at the meeting prior to the making of any such demand, but any action taken by the members after the making of any such demand shall be invalid and of no effect

§ 13 1-846 Voting entitlement of members --A Members shall not be entitled to vote except as the right to vote shall be conferred by the articles of incorporation or if the articles of incorporation so provide, in the bylaws

When directors or officers are to be elected by members, the bylaws may provide that such elections may be conducted by mail

B Unless the articles of incorporation provide otherwise, in the election of directors every member, regardless of class, is entitled to one vote for as many persons as there are directors to be elected at that time and for whose election the member has a right to vote

C If a corporation has no members or its members have no right to vote, the directors shall have the sole voting power

§ 13 1-847 Proxies --A. A member entitled to vote may vote in person or, unless the articles of incorporation or bylaws otherwise provide, by proxy

B A member may appoint a proxy to vote or otherwise act for him by signing an appointment form, either personally or by his attorney-in-fact.

C An appointment of a proxy becomes effective when received by the secretary or other officer or agent authorized to tabulate votes An appointment is valid for eleven months unless a longer period is expressly provided in the appointment form

D An appointment of a proxy is revocable by the member unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest Appointments coupled with an interest include the appointment of

1. A creditor of the corporation who extended it credit under terms requiring the

appointment, or

2 An employee of the corporation whose employment contract requires the appointment

E The death or incapacity of the member appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises his authority under the appointment.

F An appointment made irrevocable under subsection D of this section is revoked when the interest with which it is coupled is extinguished

G Subject to § 13 1-848 and to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment

§ 13 1-848 Corporation's acceptance of votes—A If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a member, the corporation if acting in good faith is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the member

B If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the name of a member, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the member if:

1 The member is a domestic or foreign corporation, association, estate, trust or partnership and the name signed purports to be that of an officer, partner or agent of the entity,

2 The name signed purports to be that of an administrator, executor, guardian, or conservator representing the member and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment, or

3 The name signed purports to be that of an attorney-in-fact of the member and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the member has been presented with respect to the vote, consent, waiver, or proxy appointment

C Notwithstanding the provisions of paragraph 2 of subsection B, in any case in which the will, trust agreement, or other instrument under which a fiduciary purports to act contains directions for voting, or for the execution and delivery of proxies for voting, such directions shall be binding upon the fiduciary and upon the corporation if a copy thereof has been furnished the corporation.

D The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member

E The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the member for the consequences of the acceptance or rejection

F Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise

§ 13 1-849 Quorum and voting requirements for voting groups of members—A The bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy, or the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members In the absence of any such provision, members

holding one tenth of the votes entitled to be cast represented in person or by proxy shall constitute a quorum The vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption of any matter voted upon by the members, unless a greater proportion is required by this chapter or the articles of incorporation Members entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those members exists with respect to that matter

B Once a member is present at a meeting it is deemed present for quorum purposes for the remainder of the meeting and for adjournment of that meeting unless a new record date is or shall be set for that adjourned meeting.

C Less than a quorum may adjourn a meeting

D The election of directors is governed by § 13.1-852

§ 13.1-850 Action by single and multiple voting groups—A. If the articles of incorporation or this chapter provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in § 13 1-849

B If the articles of incorporation or this chapter provides for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in § 13.1-849 Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter

§ 13.1-851 Greater quorum or voting requirements—A. The articles of incorporation may provide for a greater quorum or voting requirement for members or voting groups of members than required by this chapter

B An amendment to the articles of incorporation that adds, changes, or deletes a greater quorum or voting requirement shall meet the quorum requirement and be adopted by the vote and voting groups required to take action under the quorum and voting requirements then in effect

§ 13.1-852 Voting for directors, cumulative voting—A Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the members entitled to vote in the election at a meeting at which a quorum is present

B Members do not have a right to cumulate their votes for directors unless the articles of incorporation so provide

C A statement included in the articles of incorporation that "all of a designated voting group of members are entitled to cumulate their votes for directors" (or words of similar import) means that the members designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates

D Members otherwise entitled to vote cumulatively may not vote cumulatively at a particular meeting unless

1 The meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized, or

2 A member who has the right to cumulate his votes gives notice to the secretary of the corporation not less than forty-eight hours before the time set for the meeting of his intent to cumulate his votes during the meeting If one member gives this notice, all other members in the same voting group participating in the election are entitled to cumulate their votes without giving further notice

Article 8

§ 13.1-853 Requirement for and duties of board of directors.— A. Each corporation shall have a board of directors.

B. All corporate powers shall be exercised by or under the authority of, and the business of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.

§ 13.1-854 Qualification of directors.—The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this Commonwealth or a member of the corporation unless the articles of incorporation or bylaws so prescribe.

§ 13.1-855 Number and election of directors.—A. A board of directors shall consist of one or more individuals, with the number specified in or fixed in accordance with the bylaws, or if not specified in or fixed in accordance with the bylaws, with the number specified in or fixed in accordance with the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to the bylaws, unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment of the articles of incorporation.

B. The members may adopt a bylaw fixing the number of directors and may direct that such bylaw not be amended by the board of directors. If a bylaw states a fixed number of directors and the board of directors has the right to amend the bylaw, it may by amendment to the bylaw increase or decrease the number of directors, but to the extent that the corporation has members with voting privileges only the members may increase or decrease by more than thirty percent the number of directors last elected by the members.

C. The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the members or the board of directors. However, to the extent that the corporation has members with voting privileges, only the members may change the range for the size of the board of directors or change from a fixed to a variable-range size board or vice versa.

D. Directors shall be elected or appointed in the manner provided in the articles of incorporation. If the corporation has members with voting privileges, directors shall be elected at the first annual members' meeting and at each annual meeting thereafter unless their terms are staggered under § 13.1-858.

E. No individual shall be named or elected as a director without his prior consent.

§ 13.1-856 Election of directors by certain classes of members.—If the articles of incorporation authorize dividing the members into classes, the articles may also authorize the election of all or a specified number of directors by the members of one or more authorized classes. Each class entitled to elect one or more directors is a separate voting group for purposes of the election of directors.

§ 13.1-857 Terms of directors generally.—A. In the absence of a provision in the articles of incorporation fixing a term of office, the term of office for a director shall be one year.

B. The terms of the initial directors of a corporation which has voting members expire at the first members' meeting at which directors are elected. The terms of all other directors expire at the next annual meeting following their election unless their terms are staggered under § 13.1-858.

C. A decrease in the number of directors does not shorten an incumbent director's term.

D. The term of a director elected by the board of directors to fill a vacancy expires at the next members' meeting at which directors are elected.

E Except in the case of ex-officio directors, despite the expiration of a director's term, he continues to serve until his successor is elected and qualifies or until there is a decrease in the number of directors.

§ 13 1-858 Staggered terms of directors—A The articles of incorporation may provide for staggering the terms of directors by dividing the total number of directors into two or three groups, with each group containing one-half or one-third of the total, as near as may be In that event, the terms of directors in the first group expire at the first annual meeting after their election, the terms of the second group expire at the second annual meeting after their election, and the terms of the third group, if any, expire at the third annual meeting after their election. At each ar[illegible] meeting held thereafter, directors shall be chosen for a term of two years or three years, as the case may be, to succeed those whose terms expire

B If the articles of incorporation permit cumulative voting, any provision establishing staggered terms of directors shall provide that at least three directors shall be elected at each annual members' meeting

§ 13 1-859 Resignation of directors—A A director may resign at any time by delivering written notice to the board of directors, its chairman, the president, or the secretary

B A resignation is effective when the notice is delivered unless the notice specifies a later effective date If a resignation is made effective at the later date, the board of directors may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date

§ 13.1-860 Removal of directors by members.—A The members may remove one or more directors with or without cause, unless the articles of incorporation provide that directors may be removed only with cause

B If a director is elected by a voting group of members, only the members of that voting group may participate in the vote to remove him

C If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him constitutes a majority of the votes entitled to be cast at an election of directors of the voting group or voting groups by which such director was elected

D A director may be removed only at a meeting called for the purpose of removing him and the meeting notice shall state that the purpose, or one of the purposes, of the meeting is removal of the director

§ 13 1-861 Judicial review of elections—

Any member or director aggrieved by an election of directors may, after reasonable notice to the corporation and each director whose election is contested, apply for relief to the circuit court in the county or city in which the principal office of the corporation is located, or if none in this Commonwealth, where its registered office is located The court shall proceed forthwith in a summary way to hear and decide the issues and thereupon to determine the persons elected or order a new election or grant such other relief as may be equitable Pending decision the court may require the production of any information and may by order restrain any person from exercising the powers of a director if such relief is equitable

§ 13.1-862 Vacancy on board of directors—A Unless the articles of incorporation provide otherwise, if a vacancy occurs on the board of directors, including a vacancy resulting from an increase

1 The members may fill the vacancy,

2 The board of directors may fill the vacancy, or

3 If the directors remaining in office constitute fewer than a quorum of the board, they

may fill the vacancy by the affirmative vote of a majority of the directors remaining in office

B Unless the articles of incorporation provide otherwise, if the vacant office was held by a director elected by a voting group of members, only the members of that voting group are entitled to vote to fill the vacancy if it is filled by the members

C A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under subsection B of § 13 1-859 or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

§ 13 1-863 Compensation of directors –Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors

§ 13 1-864 Meetings of the board of directors –A. The board of directors may hold regular or special meetings in or out of this Commonwealth

B Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting

§ 13 1-865 Action without meeting of board of directors –A. Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this Act to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board The action shall be evidenced by one or more written consents stating the action taken, signed by each director either before or after the action taken, and included in the minutes or filed with the corporate records reflecting the action taken.

B Action taken under this section becomes effective when the last director signs the consent, unless the consent specifies a different effective date, in which event the action taken is effective as of the date specified therein provided the consent states the date of execution by each director

C A consent signed under this section has the effect of a meeting vote and may be described as such in any document

§ 13.1-866 Notice of directors' meetings –A Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting

B Special meetings of the board of directors shall be held upon such notice as is prescribed in the articles of incorporation or bylaws, or when not inconsistent with the articles of incorporation or bylaws, by resolution of the board of directors. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws

§ 13 1-867 Waiver of notice by director –A A director may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice, and such waiver shall be equivalent to the giving of such notice. Except as provided in subsection B of this section, the waiver shall be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records

B. A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting, or promptly upon his arrival, objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting

§ 13 1-868 Quorum and voting by directors – A Unless the articles of incorporation or bylaws require a greater or lesser number for the transaction of all business or any particular business, a quorum of a board of directors consists of

1 A majority of the fixed number of directors if the corporation has a fixed board size, or

2 A majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable-range size board

B The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or prescribed number of directors determined by subsection A of this section

C If a quorum is present when a vote is taken, the affirmative vote of a majority of the directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors

D. A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless (i) he objects at the beginning of the meeting, or promptly upon his arrival, to holding it or transacting specified business at the meeting or (ii) he votes against, or abstains from, the action taken

E. Whenever this chapter requires the board of directors to recommend or approve any proposed corporate act, such recommendation or approval shall not be required if the proposed corporate act is adopted by the unanimous consent of members

§ 13.1-869 Committees.—A Unless the articles of incorporation or the bylaws provide otherwise, a board of directors may create one or more committees and appoint members of the board of directors to serve on them Each committee may have two or more members who serve at the pleasure of the board of directors

B The creation of a committee and appointment of directors to it shall be approved by the greater of (i) a majority of all the directors in office when the action is taken, or (ii) the number of directors required by the articles of incorporation or bylaws to take action under § 13.1-868.

C. Sections 13.1-864 through 13.1-868, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well

D To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under § 13 1-853, except that a committee may not.

1. Approve or recommend to members action that this Act requires to be approved by members, provided that the executive committee of the board of directors may exercise the authority of the board of directors to approve any amendment of the articles of incorporation if so authorized by the articles of incorporation,

2 Fill vacancies on the board or on any of its committees,

3 Amend articles of incorporation pursuant to § 13 1-885,

4 Adopt. amend, or repeal the bylaws,

5 Approve a plan of merger not requiring member approval

E The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in § 13 1-870

§ 13.1-870 General standards of conduct for directors.—A A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith judgment of the best interests of the corporation

B Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by

1 One or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented,

2 Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence, or

3 A committee of the board of directors of which he is not a member if the director believes, in good faith, that the committee merits confidence.

C A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section

D A person alleging a violation of this section has the burden of proving the violation

§ 13.1-871 Director conflicts of interests—A A conflict of interests transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect personal interest A conflict of interests transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true

1 The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved or ratified the transaction, or

2. The material facts of the transaction and the director's interest were disclosed to the members entitled to vote and they authorized, approved or ratified the transaction, or

3. The transaction was fair to the corporation

B For purposes of this section, a director of the corporation has an indirect personal interest in a transaction if (i) another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction or (ii) another entity of which he is a director, officer or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation A vote or consent of an entity in which the director has an interest described in the preceding sentence is deemed to be a vote or consent of the director for purposes of this section

C For purposes of paragraph 1 of subsection A of this section, a conflict of interests transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors, or on the committee, who have no direct or indirect personal interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director If a majority of the directors who have no direct or indirect personal interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect personal interest in the transaction does not affect the validity of any action taken under paragraph 1 of subsection A of this section if the transaction is otherwise authorized, approved or ratified as provided in that subsection

D For purposes of paragraph 2 of subsection A of this section, a conflict of interests transaction is authorized, approved, or ratified if it receives the vote of a majority of the votes entitled to be cast by members whether or not present, that may be counted under this subsection A director who has a direct or indirect personal interest in the transaction may not vote to determine whether to authorize, approve, or ratify a conflict of interests transaction under paragraph 2 of subsection A of this section His vote, however, may be counted in determining whether the transaction is approved under other sections of this Act A majority of the members, whether or not present, who are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section

§ 13.1-872. Required officers—A A corporation shall have a president and a secretary and such other officers as are described in its bylaws or appointed by the board of directors in accordance with the bylaws

B A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors

C The secretary shall have responsibility for preparing and maintaining custody of minutes of the directors' and members' meetings and for authenticating records of the corporation

D The same individual may simultaneously hold more than one office in the corporation

§ 13 1-873 Duties of officers—Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers

§ 13.1-874 Resignation and removal of officers.—A. An officer may resign at any time by delivering notice to the corporation A resignation is effective when the notice is delivered unless the notice specifies a later effective date If a resignation is made effective at a later date and the corporation accepts the future effective date, it may fill the pending vacancy before the effective date if the successor does not take office until the effective date

B A board of directors may remove any officer at any time with or without cause and any officer or assistant officer, if appointed by another officer, may likewise be removed by such officer.

Article 9
Indemnification

§ 13 1-875 Definitions—In this article·

"Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction

"Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan "Director" includes, unless the context requires otherwise, the estate or personal representatives of a director

"Expenses" includes counsel fees.

"Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding

"Official capacity" means (i) when used with respect to a director, the office of director in a corporation; or (ii) when used with respect to an individual other than a director, as contemplated in § 13.1-881, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise

"Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding

"Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal

§ 13 1-876 Authority to idemnify –A. Except as provided in subsection D of this section, a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if

1 He conducted himself in good faith,

2 He believed

a In the case of conduct in his official capacity with the corporation, that his conduct was in the best interests of the corporation, and

b In all other cases, that his conduct was at least not opposed to the best interests of the corporation, and

3 In the case of any criminal proceeding, he had no reasonable cause to believe that his conduct was unlawful.

B A director's conduct with respect to an employee benefit plan for a purpose he believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of item b of paragraph 2 of subsection A of this section

C The termination of a proceeding by judgment, order, settlement or conviction is not of itself determinative that the director did not meet the standard of conduct described in this section

D A corporation may not indemnify a director under this section

1 In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation, or

2 In connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him

E. Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

§ 13.1-877 Mandatory indemnification – Unless limited by its articles of incorporation, a corporation shall indemnify a director who entirely prevails in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding

§ 13 1-878. Advance for expenses – A A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if.

1 The director furnishes the corporation a written statement of his good faith belief that he has met the standard of conduct described in § 13 1-876,

2 The director furnishes the corporation a written undertaking, executed personally or on his behalf, to repay the advance if it is ultimately determined that he did not meet the standard of conduct, and

3 A determination is made that the facts then known to those making the determination would not preclude indemnification under this article

B The undertaking required by paragraph 2 of subsection A of this section shall be an unlimited general obligation of the director but need not be secured and may be accepted

without reference to financial ability to make repayment.

C Determinations and authorizations of payments under this section shall be made in the manner specified in § 13 1-880.

§ 13 1-879 Court-ordered indemnification—Unless limited by a corporation's articles of incorporation, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or seek indemnification in another court of competent jurisdiction The court may order indemnification if it determines that

1 The director is entitled to mandatory indemnification under § 13.1-877, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification, or

2 With respect to a proceeding by or in the right of the corporation, the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, even though he was adjudged liable, but any indemnification shall be limited to reasonable expenses incurred

§ 13.1-880 Determination and authorization of indemnification.—A. A corporation may not indemnify a director under § 13.1-876 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because he has met the standard of conduct set forth in § 13.1-876

B. The determination shall be made·

1. By the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding,

2 If a quorum cannot be obtained under paragraph 1 of this subsection, by majority vote of a committee duly designated by the board of directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding ,

3. By special legal counsel

a. Selected by the board of directors or its committee in the manner prescribed in paragraph 1 or 2 of this subsection, or

b If a quorum of the board of directors cannot be obtained under paragraph 1 of this subsection and a committee cannot be designated under paragraph 2 of this subsection, selected by majority vote of the full board of directors, in which selection directors who are parties may participate, or

4. By the members, but directors who are at the time parties to the proceeding may not vote on the determination

C. Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under paragraph 3 of subsection B of this section to select counsel

§ 13.1-881 Indemnification of officers, employees and agents—Unless limited by a corporation's articles of incorporation.

1 An officer of the corporation who is not a director is entitled to mandatory indemnification under § 13 1-877, and is entitled to apply for court-ordered indemnification under § 13.1-879, in each case to the same extent as a director, and

2 The corporation may indemnify and advance expenses under this article to an officer, employee, or agent of the corporation who is not a director to the same extent as to a

director

§ 13 1-882 Insurance —A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of another foreign or domestic corporation, partnership joint venture, trust, employee benefit plan or other enterprise, against liability asserted against or incurred by him in that capacity or arising out of his status as a director, officer, employee or agent, whether or not the corporation would have power to indemnify him against the same liability under § 13.1-876 or § 13 1-877

§ 13.1-883 Application of article.—A Unless the articles of incorporation or bylaws provide otherwise, any authorization of indemnification in the articles of incorporation or bylaws shall not be deemed to prevent the corporation from providing the indemnity permitted or mandated by this article

B Any corporation shall have power to make any further indemnity, including advance of expenses, to any director, officer, employer or agent that may be authorized by the articles of incorporation or any bylaw made by the members or any resolutio adopted, before or after the event, by the members, except an indemnity against his gross negligence or willful misconduct Unless the articles of incorporation, or any such bylaw or resolution provides otherwise, any determination as to any further indemnity shall be made in accordance with subsection B of § 13.1-880. Each such indemnity may continue as to a person who has ceased to have the capacity referred to above and may inure to the benefit o, the heirs, executors and administrators of such a person

Article 10

Amendment of Articles of Incorporation and Bylaws

§ 13 1-884. Authority to amend articles of incorporation —A A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles or to delete a provision not required in the articles. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

B A member of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, purpose, or duration of the corporation

§ 13.1-885 Amendment of articles of incorporation by directors —Where there are no members, or no members having voting rights, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of at least two-thirds of the directors in office The board may adopt one or more amendments at any one meeting

§ 13.1-886 Amendment of articles of incorporation by directors and members —A Where there are members having voting rights, a corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the members

B For the amendment to be adopted

1 The board of directors shall recommend the amendment to the members unless the board of directors determines that because of conflict of interests or other special circumstances it should make no recommendation and communicates the basis for its determination to the members with the amendment, and

2 The members entitled to vote on the amendment shall approve the amendment as provided in subsection E of this section

C The board of directors may condition its submission of the proposed amendment on any

basis

D The corporation shall notify each member entitled to vote of the proposed members' meeting in accordance with § 13.1-842 The notice of meeting shall also state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy of the amendment

E Unless this chapter or the board of directors, acting pursuant to subsection C of this section, requires a greater vote, the amendment to be adopted shall be approved by each voting group entitled to vote on the proposed amendment by more than two-thirds of all the votes cast on the amendment by that voting group at a meeting at which a quorum of the voting group exists The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast on the amendment by each voting group entitled to vote on the amendment at a meeting at which a quorum of the voting group exists

§ 13.1-887 Voting on amendments by voting groups.--The articles of incorporation may provide that members of a class are entitled to vote as a separate voting group on specified amendments of the articles of incorporation

§ 13.1-888 Articles of amendment.--A A corporation amending its articles of incorporation shall file with the Commission articles of amendment setting forth.

1. The name of the corporation,

2. The text of each amendment adopted;

3. The date of each amendment's adoption,

4. If an amendment was adopted by the incorporators or board of directors without member action, a statement to that effect and that member action was not required,

5 If an amendment was approved by the members, either

a. A statement that the amendment was adopted by unanimous consent of the members, or

b. A statement that the amendment was proposed by the board of directors and submitted to the members in accordance with this Act and a statement of

(1) The existence of a quorum of each voting group entitled to vote separately on the amendment; and

(2) Either the total number of votes cast for and against the amendment by each voting group entitled to vote separately on the amendment or the total number of undisputed votes cast for the amendment by each voting group and a statement that the number cast for the amendment by each voting group was sufficient for approval by that voting group

B. If the Commission finds that the articles of amendment comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of amendment

§ 13 1-889 Restated articles of incorporation.--A A corporation's board of directors may restate its articles of incorporation at any time with or without member action

B The restatement may include one or more amendments to the articles If the restatement includes an amendment requiring member approval, it shall be adopted as provided in § 13 1-886

C If the board of directors submits a restatement for member action, the corporation shall notify each member entitled to vote of the proposed members' meeting in accordance with § 13.1-842 The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the

restatement that identifies any amendment it would make in the articles

D. A corporation restating its articles of incorporation shall file with the Commission articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth.

1 Whether the restatement contains an amendment to the articles requiring member approval and, if it does not, that the board of directors adopted the restatement, or

2 If the restatement contains an amendment to the articles requiring member approval, the information required by § 13 1-888.

E. If the Commission finds that the articles of restatement comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of restatement. When the certificate of restatement is effective the restated articles of incorporation supersede the original articles of incorporation and all amendments to them

F The Commission may certify restated articles of incorporation as the articles of incorporation currently in effect without including the certificate information required by subsection D of this section

§ 13 1-890 Amendment of articles of incorporation pursuant to reorganization.—A A corporation's articles of incorporation may be amended without action by the board of directors or members to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by § 13.1.819

B The individual or individuals designated by the court shall file with the Commission articles of amendment setting forth.

1 The name of the corporation,

2 The text of each amendment approved by the court,

3 The date of the court's order or decree approving the articles of amendment,

4 The title of the reorganization proceeding in which the order of decree was entered, and

5 A statement that the court had jurisdiction of the proceeding under federal statute

C If the Commission finds that the articles of amendment comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of amendment

D This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan

§ 13.1-891 Effect of amendment of articles of incorporation —An amendment of the articles of incorporation does not affect a cause of action existing in favor of or against the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than members of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name

§ 13.1-892 Amendment of bylaws by board of directors or members— A corporation's board of directors may amend or repeal the corporation's bylaws except to the extent that.

1 The articles of incorporation or this chapter reserves this power exlusively to the members, or

2 The members in adopting or amending particular bylaws provide expressly that the board of directors may not amend or repeal that bylaw

§ 13 1-893 Bylaw provisions increasing quorum or voting requirements for directors—A A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended or repealed

1 If originally adopted by the members, only by the members,

2 If originally adopted by the board of directors, either by the members or by the board of directors

B A bylaw adopted or amended by the members that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the members or the board of directors

C Action by the board of directors under paragraph 2 of subsection A of this section to adopt or amend a bylaw that changes the quorum or voting requirement applicable to meetings of the board of directors shall meet the quorum requirement and be adopted by the vote required to take action under the quorum and voting requirement then in effect

Article 11.

Merger

§ 13.1-894 Merger—A One or more corporations may merge into another corporation if the articles of incorporation of each of them could lawfully contain all the corporate powers and purposes of all of them The board of directors of each corporation shall adopt and its members, if required by § 13 1-896, shall approve a plan of merger

B The plan of merger shall set forth

1 The name of each corporation planning to merge, and the name of the surviving corporation into which each other corporation plans to merge, and

2. The terms and conditions of the merger

C The plan of merger may set forth:

1. Amendments to, or a restatement of, the articles of incorporation of the surviving corporation, and

2. Other provisions relating to the merger

§ 13.1-895 Action on plan by directors or members—A Where the members of any merging corporation have voting rights, a plan of merger shall be adopted in the following manner

1. The board of directors of such corporation party to the merger, after adopting a plan of merger, shall submit the plan of merger, except as provided in paragraph 7 of this subsection, for approval by its members

2. For a plan of merger to be approved

a. The board of directors shall recommend the plan of merger to the members unless the board of directors determines that because of conflict of interests or other special circumstances it should make no recommendation and communicates the basis for its determination to the members with the plan, and

b. The members shall approve the plan as provided in paragraph 5 of this subsection

3. The board of directors may condition its submission of the proposed merger on any basis

4. The corporation shall notify each member entitled to vote of the proposed members'

meeting in accordance with § 13.1-842 The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger and contain or be accompanied by a copy of the plan

5 Unless this chapter or the board of directors, acting pursuant to paragraph 3 of this subsection, requires a greater vote, the plan of merger to be authorized shall be approved by each voting group entitled to vote on the plan by more than two-thirds of all the votes cast on the plan by that voting group at a meeting at which a quorum of the voting group exists The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast on the plan by each voting group entitled to vote on the plan at a meeting at which a quorum of the voting group exists

6. Voting by a class of members as a separate voting group is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would entitle the class to vote as a separate voting group on the proposed amendment under § 13 1-887

7. Action by the members of the surviving corporation on a plan of merger is not required if

a. The articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in § 13.1-885, from its articles before the merger, and

b. Each member of the surviving corporation will retain the identical designation, preferences, limitations, and relative rights, immediately after the effective date of the merger as held before.

B Where any merging corporation has no members, or no members having voting rights, a plan of merger shall be adopted at a meeting of the board of directors of such corporation upon receiving the vote of a majority of the directors in office

C. Any plan of merger may contain a provision that the board of directors of each corporation party to the merger may amend the plan at any time prior to issuance of the certificate of merger. Where a plan of merger is required to be submitted to the members for their approval an amendment made subsequent to the submission of the plan to the members of any corporation party to the merger shall not (i) alter or change any of the terms and conditions of the plan if such alteration or change would adversely affect the members of any class of such corporation, or (ii) alter or change any term of the articles of incorporation of any corporation whose members shall approve the plan of merger If articles of merger already have been filed with the Commission, amended articles of merger shall be filed with the Commission prior to the issuance of the certificate of merger

D. Unless a plan of merger prohibits abandonment of the merger without member approval, after the merger has been authorized, and at any time prior to issuance of the certificate of merger, the merger may be abandoned, subject to any contractual rights, without further member action, in accordance with the procedure set forth in the plan or, if none is set forth, in the manner determined by the board of directors of each corporation party to the merger Written notice of abandonment shall be filed with the Commission prior to the issuance of the certificate of merger

§ 13 1-896. Articles of merger —A After a plan of merger is approved by the members, or adopted by the board of directors if member approval is not required, the surviving corporation shall file with the Commission articles of merger setting forth

1 The plan of merger

2 Where the members of any merging corporation have voting rights, then as to each such corporation, either

a A statement that the amendment was adopted by the unanimous consent of the members, or

b A statement that the plan was submitted to the members by the board of directors in accordance with this Act, and a statement of

(1) The existence of a quorum of each voting group entitled to vote separately on the plan, and

(2) Either the total number of votes cast for and against the plan by each voting group entitled to vote separately on the plan or the total number of undisputed votes cast for the plan separately by each voting group and a statement that the number cast for the plan by each voting group was sufficient for approval by that voting group

3 Where any merging corporation has no members, or no members having voting rights, then a statement of that fact, the date of the meeting of the board of directors at which the plan was adopted and a statement of the fact that such plan received the vote of a majority of the directors in office

B If the Commission finds that the articles of merger comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of merger

§ 13.1-897 Effect of merger.--A. When a merger takes effect

1 Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases,

2 The title to all real estate and other property owned by each corporation party to the merger shall be taken and deemed to be transferred to and vested in the surviving corporation without reversion or impairment,

3. The surviving corporation has all liabilities of each corporation party to the merger,

4. A proceeding pending by or against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased,

5 The articles of incorporation of the surviving corporation are amended to the extent provided in the plan of merger, and

6 The former members of every corporation party to the merger are entitled only to the rights provided in the articles of merger.

§ 13 1-898. Merger with foreign corporation.--A. One or more foreign corporations may merge with one or more domestic corporations if:

1. The merger is permitted by the laws of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger,

2 The foreign corporation complies with § 13 1-899 if it is the surviving corporation of the merger, and

3 Each domestic corporation complies with the applicable provisions of §§ 13.1-894 and 13 1-895 and the surviving corporation of the merger complies with § 13.1-896

B Upon a merger's taking effect, the surviving foreign corporation in the merger is deemed to appoint the clerk of the Commission as its agent for service of process in a proceeding to enforce any obligation of each domestic corporation party to the merger.

C No corporation that is required by law to be a domestic corporation may, by merger, cease to be a domestic corporation, but every such corporation, even though a corporation of such other state, the United States or another country, shall also be a domestic corporation of this Commonwealth

Article 12

Sale of Assets

§ 13 1-899 Sale of assets in regular course of business and mortgage of assets—A A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of business, or mortgage, pledge, or dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not in the usual and regular course of business, on the terms and conditions and for the consideration determined by the board of directors

B. Unless the articles of incorporation require it, approval by the members of a transaction described in subsection A of this section is not required

§ 13 1-900 Sale of assets other than in regular course of business.—A A corporation may sell, lease, exchange, mortgage, or otherwise dispose of all, or substantially all, of its property, with or without the good will, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors adopts and its members approve the proposed transaction

B For a transaction to be authorized where there are members having voting rights

1 The board of directors shall submit the proposed transaction to the members with its recommendation unless the board of directors determines that because of conflict of interests or other special circumstances it should make no recommendation and communicates the basis for its determination to the members with the submission of the proposed transaction

2 The members entitled to vote shall approve the transaction as provided in paragraph 5 of this subsection

3 The board of directors may condition its submission of the proposed transaction on any basis

4 The corporation shall notify each member, whether or not entitled to vote, of the proposed members' meeting in accordance with § 13 1-842 The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a copy of the agreement pursuant to which the transaction will be effected.

5 Unless the board of directors, acting pursuant to paragraph 3 of this subsection, requires a greater vote, the transaction to be authorized shall be approved by more than two-thirds of all the votes cast on the transaction at a meeting at which a quorum exists The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast on the transaction by each voting group entitled to vote on the transaction at a meeting at which a quorum of the voting group exists

6 Unless the parties to the transaction have agreed otherwise, after a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further member action in accordance with the procedure set forth in the resolution proposing the transaction or, if none is set forth, in the manner determined by the board of directors

C. For a transaction to be authorized where there are no members, or no members having voting rights, the proposed transaction shall be authorized upon receiving the vote of a majority of the directors in office

§ 13 1-901. Sale of certain real property by incorporated educational institutions—In all cases where an incorporated educational institution, or its board of directors, or trustees, for its benefit, owns or holds more than 1,000 acres of land in one or more tracts outside of a city or incorporated town, such board of trustees or directors may, notwithstanding any provision in its

charter, or in the deed, will or muniment of title under which such real estate is held, by a majority vote of all of the members of such board, sell and convey all of such real estate in excess of 1,000 acres, the portion to be sold to embrace both land and buildings as may be determined by the board

Article 13

Dissolution

§ 13.1-902 Dissolution by directors and members –

A Where there are members having voting rights, a corporation's board of directors may propose dissolution for submission to the members.

B For a proposal to dissolve to be adopted

1 The board of directors shall recommend dissolution to the members unless the board of directors determines that because of conflict of interests or other special circumstances it should make no recommendation and communicates the basis for its determination to the members, and

2 The members entitled to vote shall approve the proposal to dissolve as provided in subsection E of this section.

C The board of directors may condition its submission of the proposal for dissolution on any basis.

D. The corporation shall notify each member entitled to vote of the proposed members' meeting in accordance with § 13.1-842 The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

E Unless the board of directors, acting pursuant to subsection C of this section, requires a greater vote, dissolution to be authorized shall be approved by more than two-thirds of all the votes cast on the proposal to dissolve The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast by each voting group entitled to vote on the proposed dissolution at a meeting at which a quorum of the voting group exists

§ 13.1-903 Dissolution by directors –Where there are no members, or no members having voting rights, the dissolution of the corporation shall be authorized at a meeting of the board of directors upon the adoption of a resolution to dissolve by the vote of a majority of the directors in office.

§ 13.1-904 Articles of dissolution –A At any time after dissolution is authorized, the corporation may dissolve by filing with the Commission articles of dissolution setting forth

1. The name of the corporation

2 The date dissolution was authorized

3 Where there are members having voting rights,

a Either (i) a statement that dissolution was authorized by unanimous consent of the members, or (ii) a statement that the proposed dissolution was submitted to the members by the board of directors in accordance with this chapter, and

b A statement of

(1) The existence of a quorum of each voting group entitled to vote separately on

dissolution, and

(2) Either the total number of votes cast for and against dissolution by each voting group entitled to vote separately on dissolution or the total number of undisputed votes cast for dissolution separately by each voting group and a statement that the number cast for dissolution by each voting group was sufficient for approval by that voting group

4 Where there are no members, or no members having voting rights, a statement of that fact

B If the Commission finds that the articles of dissolution comply with the requirements of law and that the corporation has paid all required fees and taxes imposed by laws administered by the Commission, it shall issue a certificate of dissolution

A corporation is dissolved upon the effective date of the certificate of dissolution

§ 13.1-905 Revocation of dissolution.—A A corporation may revoke its dissolution at any time prior to the effective date of its certificate of termination of corporate existence

B Revocation of dissolution shall be authorized in the same manner as the dissolution was authorized unless, where members have votes, that authorization permitted revocation by action by the board of directors alone, in which event the board of directors may revoke the dissolution without member action

C After the revocation of dissolution is authorized, the corporation may revoke the dissolution by filing with the Commission articles of revocation of dissolution that set forth.

1 The name of the corporation,

2 The effective date of the dissolution that was revoked,

3 The date that the revocation of dissolution was authorized,

4 If the corporation's board of directors revoked a dissolution authorized by the members, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization, and

5 If member action was required to revoke the dissolution, the information required by paragraph 3 of subsection A of § 13 1-904

D If the Commission finds that the articles of revocation of dissolution comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of revocation of dissolution

E When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its business as if dissolution had never occurred.

§ 13.1-906 Effect of dissolution.—A A dissolved corporation continues its corporate existence but may not transact any business except that appropriate to wind up and liquidate its business, including

1 Collecting its assets,

2 Disposing of its properties,

3 Discharging or making provision for discharging its liabilities,

4 Distributing its remaining property, and

5 Doing every other act necessary to wind up and liquidate its business

B Dissolution of a corporation does not.

1 Transfer title to the corporation's property,

2 Subject its directors to standards of conduct different from those prescribed in § 13 1-870

3 Change quorum or voting requirements for its board of directors or members, change provisions for selection, resignation, or removal of its directors or officers, or change provisions for amending its bylaws,

4 Prevent commencement of a proceeding by or against the corporation in its corporate name,

5 Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution, or

6 Terminate the authority of the registered agent of the corporation

§ 13.1-907 Distribution and plan of distribution of assets.—A The assets of a corporation in the process of dissolution shall be applied and distributed as follows

1 All liabilities and obligations of the corporation shall be paid, satisfied and discharged, or adequate provision shall be made therefor,

2 Assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred or conveyed in accordance with such requirements,

3 Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution adopted as provided in this chapter or as a court may direct,

4 Other assets, if any, shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws to the extent that the articles of incorporation or bylaws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others,

5 Any remaining assets may be distributed to such persons, societies, organizations or domestic or foreign corporations, whether issuing shares or not, as may be specified in a plan of distribution adopted as provided in this chapter or as a court may direct

B A plan providing for the distribution of assets, not inconsistent with the provisions of this chapter, may be adopted by a corporation in the process of dissolution and shall be adopted by a corporation for the purpose of authorizing any transfer or conveyance of assets for which this chapter requires a plan of distribution A plan shall be adopted in accordance with the procedures established in § 13 1-902 or § 13 1-903, as the case may be

§ 13 1-908 Known claims against dissolved corporation—A A dissolved corporation may dispose of the known claims against it by following the procedure described in this section

B The dissolved corporation shall deliver to each of its known claimants written notice of the dissolution at any time after its effective date The written notice shall

1 Provide a reasonable description of the claim that the claimant may be entitled to assert,

2. State whether the claim is admitted, or not admitted, and if admitted (i) the amount that is admitted, which may be as of a given date, and (ii) any interest obligation if fixed by an instrument of indebtedness,

3 Provide a mailing address where a claim may be sent,

4 State the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which confirmation of the claim shall be delivered to the dissolved corporation, and

5 State that, except to the extent that any claim is admitted, the claim will be barred if written confirmation of the claim is not delivered by the deadline

C A claim against the dissolved corporation is barred to the extent that it is not admitted

1 If the dissolved corporation delivered written notice to the claimant in accordance with subsection B of this section and the claimant does not deliver written confirmation of the claim to the dissolved corporation by the deadline, or

2 If the dissolved corporation delivered written notice to the claimant that his claim is not admitted, in whole or in part, and the claimant does not commence a proceeding to enforce the claim within ninety days from the delivery of written confirmation of the claim to the dissolved corporation.

D For purposes of this section, "claim" does not include (i) a contingent liability or a claim based on an event occurring after the effective date of dissolution or (ii) a liability or claim the ultimate maturity of which is more than sixty days after the delivery of written notice to the claimant pursuant to subsection B of this section

E. If a liability exists but the full extent of any damages is or may not be ascertainable, and a proceeding to enforce the claim is commenced pursuant to paragraph 2 of subsection C of this section, the claimant may amend the pleadings after filing to include any damages that occurred or are alleged to have occurred after filing The court having jurisdiction of such claim may continue such proceeding during its pendency if it appears that further damages are or may be still occurring

§ 13 1-909 Grounds for judicial dissolution—A The circuit court in the city or county described in subsection C of this section may dissolve a corporation

1 In a proceeding by a member or director if it is established that.

a The directors are deadlocked in the management of the corporate affairs and irreparable injury to the corporation is threatened or being suffered, or the business of the corporation can no longer be conducted to the advantage of the members generally, because of the deadlock, and either that the members are unable to break the deadlock or there are no members having voting rights, or

b The directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent, or

c The members are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired, or

d The corporate assets are being misapplied or wasted, or

e The corporation is unable to carry out its purposes

2 In a proceeding by a creditor if it is established that

a The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied and the corporation is insolvent, or

b The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent

3 In a proceeding by the corporation to have its voluntary dissolution continued under court supervision

4 Upon application by the board of directors when it is established that circumstances make it impossible to obtain a representative vote by members on the question of dissolution and that the continuation of the business of the corporation is not in the interest of the members but it is desirable in their interest that the assets and business be liquidated

5 When the Commission has instituted a proceeding for the involuntary termination of a corporate existence and entered an order finding that the corporate existence of the corporation should be terminated but that liquidation of its assets and business should precede the entry of an order of termination of corporate existence

B The circuit court in the city or county named in subsection C of this section shall have full power to liquidate the assets and business of the corporation at any time after the termination of corporate existence, pursuant to the provisions of this chapter or any laws of this Commonwealth in effect at any time prior to January 1, 1986, upon the application of any person, for good cause, with regard to any assets or business that may remain The jurisdiction conferred by this clause may also be exercised by any such court in any city or county where any property may be situated whether of a domestic or of a foreign corporation that has ceased to exist

C Venue for a proceeding brought under this section lies in the city or county where the corporation's principal office is or was last located, or, if none in this Commonwealth, where its registered office is or was last located

D It is not necessary to make directors or members parties to a proceeding brought under this section unless relief is sought against them individually

E A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with such powers and duties as the court may direct, take other action required to preserve the corporate assets where located, and carry on the business of the corporation until a full hearing can be held.

§ 13.1-910 Receivership or custodianship—A. A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage while the proceeding is pending, the business of the corporation The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all its property wherever located

B The court may appoint an individual, a domestic corporation or foreign corporation, authorized to transact business in this Commonwealth, as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

C The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time Among other powers·

1 The receiver (i) may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court, and (ii) may sue and defend in his own name as receiver of the corporation in all courts of this Commonwealth,

2 The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the business of the corporation in the best interests of its members and creditors

D The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its members, and creditors

E The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and his counsel from the assets of the corporation or proceeds from the sale of the assets.

§ 13 1-911 Decree for dissolution.– A If after a hearing the court determines that one or more grounds for judicial dissolution described in § 13 1-909 exists, it may enter a decree directing that the corporation shall be dissolved, and the clerk of the court shall deliver a certified copy of the decree to the Commission, which shall enter an order of involuntary dissolution

B After the order of involuntary dissolution has been entered, the court shall direct the winding up and liquidation of the corporation's business in accordance with §§ 13.1-906 and 13.1-907 and the notification of claimants in accordance with § 13 1-908 When all of the assets of the corporation have been distributed, the court shall so advise the Commission, which shall enter an order of termination of corporate existence

§ 13 1-912 Articles of termination of corporate existence –A When a corporation has distributed all of its assets and voluntary dissolution proceedings have not been revoked, it shall file articles of termination of corporate existence with the Commission The articles shall set forth

1 The name of the corporation,

2 That all the assets of the corporation have been distributed, and

3 That the dissolution of the corporation has not been revoked

B. With the articles of termination of corporate existence the corporation shall file a certificate signed by the State Tax Commissioner that the corporation has filed a return and has paid all state taxes on account of its income to the time of the certificate On applying for the certificate of the State Tax Commissioner, the corporation may file returns and pay taxes before such returns and taxes would otherwise be due. Where the corporation has a tax exempt status it shall file proof of its current exemption

C. If the Commission finds that the articles of termination of corporate existence comply with the requirements of law and that all required fees have been paid, it shall by order issue a certificate of termination of corporate existence. Upon the issuance of such certificate the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by members, directors and officers as provided in this chapter

D The statement "that all the assets of the corporation have been distributed" means that the corporation has divested itself of all its assets by the payment of claims or by assignment to a trustee or trustees as directed by § 13 1-907 If any person described in § 55-210.6 who is entitled to a share in the distribution of the assets cannot be found, the corporation may thereupon, and without awaiting the two years mentioned in § 55-210.7, pay his share to the State Treasurer as abandoned property on complying with all applicable requirements of § 55-210 12 except paragraph 4 of subsection (b) of that section

§ 13 1-913 Termination of corporate existence by incorporators or initial directors –A majority of the initial directors or, if initial directors were not named in the articles of incorporation and have not been elected, the incorporators of a corporation that has not commenced to transact business may dissolve the corporation and terminate its corporate existence by filing with the Commission articles of termination of corporate existence that set forth.

1. The name of the corporation,

2 The date of its incorporation,

3 That the corporation has not commenced to transact business,

4 That no debt of the corporation remains unpaid,

5 That the net assets of the corporation remaining after winding up have been distributed, and

6 That a majority of the initial directors authorized the dissolution or that initial directors were not named in the articles of incorporation and have not been elected and a majority of the incorporators authorized the dissolution

§ 13 1-914 Automatic termination of corporate existence –If any domestic corporation fails on two successive annual dates to file the annual report required by this chapter or to pay the annual registration fee required by law, the Commission shall mail notice to it of impending termination of corporate existence Whether or not such notice is mailed, if the corporation fails before June 1 after the second such annual date to file the annual report or to pay the annual registration fees, together with a penalty of five percent of the registration fees and annual interest at the rate of six percent on the total amount of any registration fees assessed, the corporate existence of such corporation shall automatically cease June 1 and its properties and affairs shall pass automatically to its directors as trustees in liquidation Thereupon, the trustees shall proceed to collect the assets of the corporation, and pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business After paying or adequately providing for the payment of all its obligations, the trustees shall distribute the remainder of its assets in accordance with § 13 1-907.

§ 13 1-915 Involuntary termination of corporate existence –The corporate existence of a corporation may be terminated involuntarily by order of the Commission when it finds that the corporation has continued to exceed or abuse the authority conferred upon it by law or has failed to maintain a registered office or a registered agent in this Commonwealth as required by law

Upon such termination the properties and business of the corporation shall pass automatically to its directors as trustees in liquidation Thereupon, the trustees shall proceed to collect the assets of the corporation, and pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business After paying or adequately providing for the payment of all its obligations, the trustees shall distribute the remainder of its assets in accordance with § 13 1-907

Before entering any such order the Commission shall issue a rule against the corporation giving it an opportunity to be heard and show cause why such an order should not be entered The Commission may issue the rule on its own motion or on motion of the Attorney General

§ 13 1-916. Reinstatement of a corporation that has ceased to exist –A corporation that has ceased to exist may apply to the Commission for reinstatement within five years thereafter unless the corporate existence was terminated by order of the Commission upon a finding that the corporation has continued to exceed or abuse the authority conferred upon it by law The Commission shall enter an order reinstating the corporate existence upon receiving an annual report together with payment of a reinstatement fee of ten dollars plus all registration fees and penalties that were due before the corporation ceased to exist and that would have become due thereafter if the corporation had not ceased to exist, together with interest to the date of the application The application for reinstatement may be by letter signed by an officer or director of the corporation The Commission shall assess the amounts that would have become due together with interest to the date of the application Upon the entry by the Commission of an order of reinstatement, the corporate existence shall be deemed to have continued from the date of the termination of corporate existence except that reinstatement shall have no effect on any question of personal liability of the directors, officers or agents in respect of the period between termination of corporate existence and reinstatement If the name of a corporation that has ceased to exist has been assumed or reserved or registered by any other person or corporation, the reinstated corporation shall not transact business until it has amended its articles of incorporation to change its name

§ 13 1-917 Survival of remedy after termination of corporate existence –The termination of corporate existence shall not take away or impair any remedy available to or against such corporation, its directors, officers or members, for any right or claim existing, or any liability

incurred, prior to such termination Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name The members, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim

§ 13 1-918 Notification to certain clerks of terminations of corporate existence and reinstatements and records thereof, exceptions—Upon the termination of corporate existence or reinstatement of corporations under the provisions of §§ 13 1-911, 13 1-914, 13.1-915 or 13 1-920, the Commission shall notify the clerk of the circuit court in the city or county in which the registered office of the corporation is located, and shall provide such clerk with the date of the termination of corporate existence or reinstatement, except that no such notice or information shall be required in the City of Richmond or the County of Henrico The clerk shall note the date of such termination of corporate existence or reinstatement in the charter records of his office

For any corporation whose corporate existence has ceased or been reinstated, the Commission shall provide, upon request, to the clerk of the circuit court, the book and page number where the charter of the corporation is recorded

Article 14

Foreign Corporations

§ 13 1-919 Authority to transact business—A A foreign corporation may not transact business in this Commonwealth until it obtains a certificate of authority from the Commission.

B The following activities, among others, do not constitute transacting business within the meaning of subsection A of this section.

1. Maintaining, defending, or settling any proceeding,

2. Holding meetings of the board of directors or members or carrying on other activities concerning internal corporate affairs,

3 Maintaining bank accounts,

4. Selling through independent contractors,

5 Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this Commonwealth before they become contracts,

6 Creating or acquiring indebtedness, deeds of trust, and security interests in real or personal property,

7 Securing or collecting debts or enforcing deeds of trust and security interests in property securing the debts,

8 Owning, without more, real or personal property,

9 Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature, or

10. For a period of less than ninety consecutive days, producing, directing, filming, crewing or acting in motion picture feature films, television series or commercials, or promotional films which are sent outside of the Commonwealth for processing, editing, marketing and distribution

C The list of activities in subsection B of this section is not exhaustive

§ 13 1-920 Consequences of transacting business without authority.—A A foreign corporation transacting business in this Commonwealth without a certificate of authority may not maintain a proceeding in any court of this Commonwealth until it obtains a certificate of authority

B Notwithstanding subsections A and C of this section, the failure of a foreign corporation to obtain a certificate of authority shall not impair the validity of its corporate acts or prevent it from defending any proceeding in this Commonwealth

C The successor to a foreign corporation that transacted business in this Commonwealth without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this Commonwealth until the foreign corporation or its successor obtains a certificate of authority

D A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority If it so determines, the court shall further stay the proceeding until the foreign corporation or its successor obtains the certificate

E If a foreign corporation transacts business in this Commonwealth without a certificate of authority, each officer, director or employee who transacts any of such business in this Commonwealth knowing that a certificate of authority is required shall be liable for a penalty of not less than $100 and not more than $5,000 to be imposed by the Commission after notice and opportunity to be heard both to the corporation and to the individual

F. Suits, actions and proceedings may be begun against a foreign corporation that transacts business in this Commonwealth without a certificate of authority by serving process on any director, officer or agent of the corporation, or, if none can be found, on the clerk of the Commission If any foreign corporation transacts business in this Commonwealth without a certificate of authority, it shall by transacting such business be deemed to have thereby appointed the clerk of the Commission its attorney for service of process. Service shall be made by leaving two copies of the process, notice, order or demand, together with the fee required by law, in the office of the clerk of the Commission, together with an affidavit giving the latest known post office address of the defendant Such service shall be sufficient if notice of such service and copy of the process, notice, order or demand are forthwith sent by registered mail, with return receipt requested, by the clerk of the Commission or one of his staff to the defendant at the specified address An affidavit by the clerk of the Commission showing compliance herewith shall be filed with the papers in the suit, action or proceeding

§ 13 1-921 Application for certificate of authority.—A A foreign corporation may apply to the Commission for a certificate of authority to transact business in this Commonwealth The application shall be made on forms prescribed and furnished by the Commission The application shall set forth

1 The name of the corporation, or if the corporation is prevented by § 13 1-829 from using its own name in this Commonwealth, a designated name that satisfies the requirements of subsection B of § 13 1-924

2 The name of the state or country under whose laws it is incorporated

3 The date of incorporation and the period of duration of the corporation

4 The street address of the foreign corporation's principal office

5 The address of the proposed registered office of the foreign corporation in this Commonwealth (including both (i) the post office address with street and number, if any, and (ii) the name of the county or city in which it is located), and the name of its proposed registered agent in this Commonwealth at such address and that the registered agent is (a) a resident of Virginia and an officer or director of the corporation or a member of the Virginia State Bar or (b) a professional corporation registered pursuant to § 54-42.2, the business office of which is identical with the registered office

6 The names and usual business addresses of the current directors and officers of the foreign corporation

B The foreign corporation shall deliver to the Commission with the completed application a copy of its articles of incorporation and all amendments thereto, duly authenticated by the proper official having custody of corporate records in the state or country under whose laws it is incorporated

C If the Commission finds that such application complies with the requirements of law, and that all required fees have been paid, it shall issue a certificate of authority to transact business in this Commonwealth

§ 13 1-922 Amended certificate of authority – A. A foreign corporation authorized to transact business in this Commonwealth shall obtain an amended certificate of authority from the Commission if it changes.

1 Its corporate name,

2 The period of its duration, or

3 The state or country of its incorporation

B The requirements of § 13 1-921 for obtaining an original certificate of authority apply to obtaining an amended certificate under this section

C Whenever the articles of incorporation of a foreign corporation authorized to transact business in this Commonwealth are amended, within thirty days after the amendment becomes effective, the foreign corporation shall file with the Commission a copy of such amendment duly authenticated by the proper official having custody of corporate records in the state or country under whose laws it is incorporated

§ 13 1-923. Effect of certificate of authority –A A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this Commonwealth, subject, however, to the right of this Commonwealth to revoke the certificate as provided in this chapter

B A foreign corporation holding a valid certificate of authority shall have no greater rights and privileges than a domestic corporation. The certificate of authority shall not be deemed to authorize it to exercise any of its corporate powers or purposes that a foreign corporation is forbidden by law to exercise in this Commonwealth

C This act does not authorize this Commonwealth to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this Commonwealth.

§ 13 1-924 Corporate name of foreign corporation –A. No certificate of authority shall be issued to a foreign corporation unless the corporate name of such corporation

1 Shall not contain any word or phrase which indicates or implies that it is organized for the purpose of conducting any business other than a business which it is authorized to conduct

2 Except as authorized by subsection B of this section, the name shall be distinguishable upon the records of the Commission from

a The name of any corporation, whether issuing shares or not issuing shares, existing under the laws of this Commonwealth or authorized to transact business in this Commonwealth,

b A name, the exclusive right to which is, at the time, reserved or registered in the manner provided in §§ 13.1-631, 13 1-632, 13 1-830 or 13.1-831,

c The designated name adopted by a foreign corporation, whether issuing or not issuing shares, because its real name is unavailable

B. If the corporate name of a foreign corporation does not satisfy the requirements of subsection A of this section, the foreign corporation to obtain or maintain a certificate of authority to transact business in this Commonwealth may use a designated name if its real name is unavailable and it delivers to the Commission a copy of the resolution of its board of directors, certified by its secretary, adopting the designated name

C A foreign corporation may apply to the Commission for authorization to use in this Commonwealth the name of another corporation, incorporated or authorized to transact business in this Commonwealth, that is not distinguishable upon its records from the name applied for The Commission shall authorize use of the name applied for if:

1 The other entity consents to the use in writing and submits an undertaking in form satisfactory to the Commission to change its name to a name that is distinguishable upon the records of the Commission from the name of the applying corporation, or

2 The applicant delivers to the Commission a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this Commonwealth

D If a foreign corporation authorized to transact business in this Commonwealth changes its name to one that does not satisfy the requirements of this section, it shall not transact business or affairs in this Commonwealth under the changed name until it adopts a name satisfying the requirements of this section and obtains an amended certificate of authority under § 13.1-922

§ 13.1-925 Registered office and registered agent of foreign corporation.--A Each foreign corporation authorized to transact business in this Commonwealth shall continuously maintain in this Commonwealth:

1 A registered office which may be the same as any of its places of business

2 A registered agent which shall be:

a A resident of this Commonwealth whose business address is identical with the registered office, and who is an officer or director of the corporation or a member of the Virginia State Bar, or

b A professional corporation registered under § 54-42.2, the business office of which is identical with the registered office

B The sole duty of the registered agent is to forward to the corporation at its last known address any notice served on the registered agent

§ 13 1-926. Change of registered office or registered agent of foreign corporation --A. A foreign corporation authorized to transact business in this Commonwealth may change its registered office or registered agent by filing with the Commission a statement of change that sets forth

1 The name of the foreign corporation

2 The address of its current registered office

3. If the current registered office is to be changed, the address of the new registered office (including both (i) the post office address with street and number, if any, and (ii) the name of the city or county in which it is to be located)

4. The name of its current registered agent

5 If its current registered agent is to be changed, the name of the new registered agent

6 That after the change or changes are made, the corporation shall be in compliance with the requirements of § 13 1-925

B A new statement shall forthwith be filed by the corporation whenever it changes its name or whenever its registered agent dies, resigns or ceases to satisfy the requirements of § 13 1-925

C If a registered agent changes his business address to another place within this Commonwealth, he shall change the address of the registered office of any corporation of which he is registered agent by filing a statement as required above except that it need be signed only by the registered agent and shall recite that a copy of the statement has been mailed to the corporation

§ 13 1-927 Resignation of registered agent of foreign corporation—A. The registered agent of a foreign corporation may resign his agency appointment by signing and filing with the Commission his statement of resignation accompanied by his certification that he has mailed a copy thereof to the principal office of the corporation by certified mail The statement of resignation may include a statement that the registered office is also discontinued

B The agency appointment is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed.

§ 13 1-928. Service of process on foreign corporation—A The registered agent of a foreign corporation authorized to transact business in this Commonwealth shall be an agent of such corporation upon whom any process, notice, order or demand required or permitted by law to be served upon the corporation may be served The registered agent may, by a written instrument acknowledged before a notary public, designate a person or persons in the registered agent's office upon whom any such process, notice or demand may be served

B The clerk of the Commission shall also be an agent of the corporation upon whom may be served any process, notice, order or demand except one issued by the Commission Service may be made on the clerk or any of his staff at his office He shall forthwith cause it to be sent by registered or certified mail addressed to the corporation at its registered office and keep a record thereof. Any process, notice, order or demand issued by the Commission shall be served by being mailed by the clerk of the Commission or any of his staff by registered or certified mail addressed to the corporation at its registered office. In case of withdrawal from this Commonwealth, the mailing shall be to the address shown in the statement of withdrawal

C Nothing herein contained shall limit or affect the right to serve any process, notice, order or demand, required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law

§ 13.1-929 Withdrawal of foreign corporation— A A foreign corporation authorized to transact business in this Commonwealth may not withdraw from this Commonwealth until it obtains a certificate of withdrawal from the Commission.

B A foreign corporation authorized to transact business in this Commonwealth may apply to the Commission for a certificate of withdrawal The application shall be on forms prescribed and furnished by the Commission and shall set forth

1 The name of the foreign corporation and the name of the state or country under whose laws it is incorporated

2 That the foreign corporation is not transacting business in this Commonwealth and that it

surrenders its authority to transact business in this Commonwealth

3 That the foreign corporation revokes the authority of its registered agent to accept service on its behalf and appoints the clerk of the Commission as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this Commonwealth

4 A mailing address to which the clerk may mail a copy of any process served on him under paragraph 3 of this subsection

5 A commitment to notify in the future the clerk of the Commission of any change in the address of the corporation

C The Commission shall not allow any foreign corporation to withdraw from the Commonwealth unless such corporation files with the Commission a certificate of the State Tax Commissioner that it has filed a return and paid or made provision for the payment of all state taxes or other charges on account of its income from sources within this Commonwealth during the part of the taxable year and any previous period when the corporation may have had income from sources within this Commonwealth In such case the corporation may file returns and pay taxes before they would otherwise be due

D If the Commission finds that the application complies with the requirements of law and that all required fees have been paid, it shall issue a certificate of withdrawal

E Before any foreign corporation authorized to transact business in this Commonwealth terminates its corporate existence, it shall file with the Commission an application for withdrawal Whether or not such application is filed, the termination of corporate existence of such foreign corporation shall not take away or impair any remedy available against such corporation for any right or claim existing or any liability incurred prior to such termination. Any such action or proceeding against such foreign corporation may be defended by such corporation in its corporate name The members, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. The right of a foreign corporation that has terminated its corporate existence to institute and maintain in its corporate name actions, suits or proceedings in the courts of this Commonwealth shall be governed by the law of the state of its incorporation

F Service of process on the clerk of the Commission is service of process on a foreign corporation that has withdrawn pursuant to this section Upon receipt of process, the clerk shall mail, by registered or certified mail, a copy of the process to the foreign corporation at the mailing address set forth in its application for withdrawal

§ 13 1-930 Automatic revocation of certificate of authority—If any foreign corporation fails on two successive annual dates to file the annual report required by this chapter or to pay the annual registration fee required by law, the Commission shall mail notice to it of impending revocation of its certificate of authority to transact business in this Commonwealth Whether or not such notice is mailed, if the corporation fails before June 1 after the second such annual date to file the annual report or to pay the annual registration fees, together with a penalty of five percent of the registration fees and interest at the annual rate of six percent on the total amount of any registration fees assessed, such foreign corporation shall thereupon automatically cease to be authorized to transact business in this Commonwealth and its certificate of authority shall be automatically revoked as of June 1

§ 13 1-931 Revocation of certificate of authority by Commission—A The certificate of authority to transact business in this Commonwealth of any foreign corporation may be revoked by order of the Commission when it finds that the corporation:

1 Has continued to exceed the authority conferred upon it by law,

2 Has failed to maintain a registered office or a registered agent in this Commonwealth as required by law, or

3 Has failed to file any document required by this Act to be filed with the Commission

B Before entering any such order the Commission shall issue a rule against the corporation giving it an opportunity to be heard and show cause why such an order should not be entered The Commission may issue the rule on its own motion or on motion of the Attorney General

C The authority of a foreign corporation to transact business in this Commonwealth ceases on the date shown on the certificate revoking its certificate of authority

D The Commission's revocation of a foreign corporation's certificate of authority appoints the clerk of the Commission the foreign corporation's agent for service of process in any

proceeding based on a cause of action arising during the time the foreign corporation was authorized to transact business in this Commonwealth Service of process on the clerk of the Commission under this subsection is service on the foreign corporation Upon receipt of process, the clerk of the Commission shall mail a copy of the process to the secretary of the foreign corporation at its principal office shown in its most recent annual report or in any subsequent communication received from the corporation stating the current mailing address of its principal office, or, if none is on file, in its application for a certificate of authority

E Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation

Article 15

Records and Reports

§ 13 1-932 Corporate records—A A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation

B A corporation shall maintain appropriate accounting records

C. A corporation or its agent shall maintain a record of its members, in a form that permits preparation of a list of the names and addresses of all members, in alphabetical order by class, if any

D A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

E. A corporation shall keep a copy of the following records

1 Its articles or restated articles of incorporation and all amendments to them currently in effect,

2 Its bylaws or restated bylaws and all amendments to them currently in effect,

3 Resolutions adopted by its board of directors creating one or more classes of members, and fixing their relative rights, preferences, and limitations,

4 The minutes of all members' meetings, and records of all action taken by members without a meeting, for the past three years,

5 All written communications to members generally within the past three years,

6 A list of the names and business addresses of its current directors and officers, and

7 Its most recent annual report delivered to the Commission under § 13 1-936

§ 13 1-933 Inspection of records by members—A Subject to subsection C of § 13.1-934, a member of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in subsection E of § 13 1-932 if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy

B A member of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection C of this section and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy

1 Excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the members, and records of action taken by the members or board of directors without a meeting, to the extent not subject to inspection under subsection A of this section,

2 Accounting records of the corporation, and

3 The record of members

C A member may inspect and copy the records identified in subsection B of this section only if

1 He has been a member for at least six months immediately preceding his demand,

2 His demand is made in good faith and for a proper purpose,

3 He describes with reasonable particularity his purpose and the records he desires to inspect, and

4 The records are directly connected with his purpose

D The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws

E This section does not affect

1 The right of a member to inspect records if the member is in litigation with the corporation, to the same extent as any other litigant, or

2 The power of a court, independently of this Act, to compel the production of corporate records for examination

§ 13.1-934 Scope of inspection right—A A member's agent or attorney has the same inspection and copying rights as the member he represents

B The right to copy records under § 13 1-933 includes, if reasonable, the right to receive copies made by photographic or other means

C. The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member The charge may not exceed the estimated cost of production or reproduction of the records

D. The corporation may comply with a member's demand to inspect the record of members under paragraph 3 of subsection B of § 13 1-933 by providing him with a list of its members that was compiled no earlier than the date of the member's demand

§ 13.1-935 Court-ordered inspection—A If a corporation does not allow a member who complies with subsection A of § 13 1-933 to inspect and copy any records required by that subsection to be available for inspection, the circuit court in the city or county where the corporation's principal office is located, or, if none in this Commonwealth, where its registered office is located, may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the member

B. If a corporation does not within a reasonable time allow a member to inspect and copy any other record, the member who complies with subsections B and C of § 13 1-933 may apply to the circuit court in the city or county where the corporation's principal office is located, or, if none in this Commonwealth, where its registered office is located, for an order to permit inspection and copying of the records demanded The court shall dispose of an application under this subsection on an expedited basis

C. If the court orders inspection and copying of the records demanded, it may also order

the corporation to pay the member's costs, including reasonable counsel fees, incurred to obtain the order if the member proves that the corporation refused inspection without a reasonable basis for doubt about the right of the member to inspect the records demanded

D. If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding member

§ 13.1-936 Annual report of domestic and foreign corporations.—A Each domestic corporation, and each foreign corporation authorized to transact business in this Commonwealth, shall file, within the time prescribed by this chapter, an annual report setting forth

1 The name of the corporation, the address of its principal office and the state or country under whose laws it is incorporated

2 The address of the registered office of the corporation in this Commonwealth (including both (i) the post office address with street and number, if any, and (ii) the name of the county or city in which it is located), and the name of its registered agent in this Commonwealth at such address

3 The names and post office addresses of the directors and the principal officers of the corporation

B The report shall be made on forms furnished by the Commission, and shall supply the information as of the date of the report

C The annual report of a domestic or foreign corporation shall be filed with the Commission between January 1 and March 1 of each year after the calendar year in which it was incorporated or authorized to transact business in this Commonwealth If the report appears to be incomplete or inaccurate, the Commission shall return it for correction or explanation Otherwise the Commission shall file it in the clerk's office

Article 16

Transition Provisions

§ 13.1-937 Application to existing corporations.—Unless otherwise provided, the provisions of this chapter shall apply to all domestic and foreign corporations existing at the time this chapter takes effect and their members The charter of every corporation heretofore or hereafter organized in this Commonwealth shall be subject to the provisions of this chapter In the case of foreign corporations, the certificate of authority to transact business in this Commonwealth issued by the Commission under any prior act of this Commonwealth shall continue in effect subject to the provisions hereof.

§ 13.1-938. Application to certain social, patriotic and benevolent societies incorporated before year 1900, reports by such societies.—The charter of every social, patriotic and benevolent society incorporated by an act of the General Assembly of Virginia prior to the year 1900 for the purpose of perpetuating the memory of men in the military, naval and civil service of the Colonies and of the Continental Congress shall be deemed to have remained, and to be, in full force and effect notwithstanding the provisions of § 13.1-937 or any other statute enacted after January 1, 1950, or regulation pursuant thereto requiring the filing of any report or reports with the Commission All such reports which under such statutes should have been so filed shall be filed with the Commission on or before August 1, 1986 Such corporation hereafter shall be deemed to hold its charter subject to the provisions of the Constitution of Virginia now in effect, and the laws passed in pursuance thereof

§ 13.1-939 Saving provision.—A Except as provided in subsection B of this section, the repeal of a statute by this Act does not affect

1 The operation of the statute or any action taken under it before its repeal,

2 Any ratification, right, remedy, privilege, obligation or liability acquired, accrued, or incurred under the statute before its repeal,

3 Any violation of the statute, or any penalty, forfeiture or punishment incurred because of the violation, before its repeal,

4 Any proceeding commenced, or reorganization or dissolution authorized by the board of directors, under the statute before its repeal, and the proceeding, reorganization or dissolution may be completed in accordance with the statute as if it had not been repealed

B If a penalty or punishment imposed for violation of a statute repealed by this Act is reduced by this Act, the penalty or punishment if not already imposed shall be imposed in accordance with this Act

§ 13 1-940 Severability.—If any provision of this Chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable

§§ 13.1-941 through 13 1-980 reserved.

CHAPTER 11

INDUSTRIAL DEVELOPMENT CORPORATIONS

§ 13 1-981 How chapter cited.—This chapter shall be known and may be cited as the "Virginia Industrial Development Corporation Act."

§ 13.1-982 Definitions.—As used in this chapter, unless a different meaning is required by the context, the following words and phrases shall have the following meanings.

"Board of directors" The board of directors of a corporation created under this chapter

"Commission": The State Corporation Commission of Virginia.

(a) "Corporation" A Virginia industrial development corporation created under the provisions of this chapter

(b) "Financial institution" Any bank, trust company, savings and loan association, industrial loan association or insurance company

"Loan limit" For any member, the maximum amount permitted to be outstanding at one time on loans made by such member to a corporation as determined under the provisions of this chapter

(c) "Member" Any financial institution which shall undertake to lend money to a corporation created under this chapter, upon its call and in accordance with the provisions of this chapter

§ 13 1-983 Incorporation.—An industrial development corporation may be incorporated in this Commonwealth pursuant to the provisions of Article 3 (§ 13.1-618 et seq.) of Chapter 9 of this title, and all the provisions of Chapter 9 (§ 13.1-601 et seq.) of this title not in conflict with or inconsistent with the provisions of this article shall apply to such corporation except as hereinafter otherwise provided The purpose clause of the articles of incorporation shall recite that the purposes for which the corporation is formed are to stimulate and promote the business prosperity and economic welfare of this Commonwealth and its citizens, to encourage and assist through financial aid, advice, technical assistance and other appropriate means the location of new businesses and industries and the rehabilitation, improvement and expansion of existing businesses and industries throughout the Commonwealth, and in furtherance of such purposes, to cooperate with the Virginia Department of Economic Development and with other

organizations, public and private

§ 13 1-984 Corporate name –Every corporation created under this chapter shall have as part of its corporate name or title the words "Industrial Development"

§ 13 1-985 Governor to approve articles of incorporation –The articles of incorporation shall not be issued by the Commission unless approved by the Governor in writing Such approval shall not be given by the Governor until he first shall have sought the advice of the Director of the Department of Economic Development

§ 13.1-986 How funds may be derived –A corporation created under this chapter may derive funds from the sale of its shares and debentures, from loans from its members on the terms and conditions set forth in this chapter, from any other financial institution or person and from any agency established by the federal government or the Commonwealth of Virginia

§ 13.1-987 Restrictions on powers of corporation –The powers of a corporation shall be subject to the following restrictions

1 It shall not approve any application for a loan until the applicant shall have shown that he has applied to a financial institution that could lawfully lend the amount of money sought and that the financial institution has refused in writing to make the requested loan

2 It shall not incur any secondary liability for the debts of others, but may assume primary liability therefor

3 It shall not give security for any loan made to it unless all loans to it are secured ratably in proportion to unpaid balances due, except that it may give security or priority on loans made to it by any federal agency or instrumentality or by any agency or instrumentality of the Commonwealth of Virginia without securing all loans made to it.

§ 13.1-988. Acquisition, transfer, etc, of securities and shares of corporation – Notwithstanding any other provision of law, any person, corporation, including a public service corporation, financial institution or railroad may acquire, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds, notes, debentures, securities or other evidences of indebtedness, or the shares of capital stock of a corporation created hereunder, provided that the amount of capital stock which may be acquired by any member of such corporation shall not exceed ten percent of the loan limit of such member

§ 13.1-989 Membership in corporation, loans from members –A Any financial institution is authorized to become a member of a corporation by making application to the board of directors on such form and in such manner as the board of directors may require and membership shall become effective upon acceptance of such application by the board. Membership shall be for the duration of the corporation, provided, however, that upon written notice given to the corporation two years in advance, a member may withdraw from membership at the expiration date of such notice and shall not thereafter be obligated to make any loans to the corporation

B Each member shall make loans to the corporation as and when called upon by it to do so Such loans shall be made upon terms and conditions as shall be approved from time to time by the board of directors, subject to the following conditions

1 All loans shall be evidenced by transferable instruments of the corporation and shall bear interest at a rate of not less than one half of one percent in excess of the rate of interest determined by the board of directors to be prevalent commercial banking prime or base rate on unsecured commercial loans as of the date of the loan

2 If expressly provided in such call, the loan may provide for a rate of interest which fluctuates with the prime or base rate from time to time and which would be subject during the life of the loan to adjustment as of each interest period commencing after the next interest payment date

3 All loan limits shall be established at the $1000 amount nearest to the amount computed

in accordance with the provisions of this section

4 No loan pursuant to call under this section to a development corporation shall be made if immediately thereafter the total amount of the obligations of the corporation would exceed ten times the amount of its outstanding and unimpaired capital stock, its earned and unimpaired surplus established pursuant to § 13.1-994 and any indebtedness expressly subordinated to loans made pursuant to call under this section

5 The total amount outstanding at any one time on loans to a development corporation made by any member shall not exceed the following limit, to be determined as of the time such member becomes a member, on the basis of figures contained in the most recent year-end statement furnished by such member to state or federal supervisory authorities, as the case may be two percent of the capital and permanent surplus of banks and trust companies, one-half of one percent of the total outstanding loans made by a savings and loan association, or $250,000, whichever is less, one percent of the total outstanding loans made by an industrial loan company, one percent of the capital and unassigned surplus of stock insurance companies, except fire insurance companies, one percent of the unassigned surplus of mutual insurance companies, except fire insurance companies, one-tenth of one percent of the assets of fire insurance companies

6 All loan limits shall be recomputed as of the January 1 of each even-numbered year, but no member's loan limit shall be increased as the result of such recomputation without the consent of such member

7 Each call for loans made by the corporation shall be prorated among the members of the corporation in substantially the same proportion that the adjusted loan limit of each member bears to the aggregate of the adjusted loan limits of all members The "adjusted loan limit" of a member shall be the amount of such member's loan limit, reduced by the balance of outstanding loans made by such member to the corporation and the investment of such member in capital stock of the corporation at the time of such call

8 A member of a corporation created under this chapter shall not be a member of more than one such corporation

§ 13 1-990 Shares and shareholders—Each share of common stock of a corporation shall have a par value of $100, and shall be issued for cash.

Each shareholder shall be entitled to one vote, in person or by proxy, for each share of capital stock held, and each member shall be entitled to one vote, in person or by proxy, for each $1000 of the authorized loan limit of such member as determined under § 13 1-989

The rights given by Chapter 9 (§ 13.1-601 et seq.) of this title to shareholders to attend meetings and to receive notice thereof and to exercise voting rights shall apply to members as well as to shareholders of a corporation created hereunder The voting rights of the members shall be the same as if they were a separate class of shareholders and shareholders and members shall in all cases vote separately by classes A quorum at a meeting shall require the presence in person or by proxy of a majority of the holders of the voting rights of each class

§ 13 1-991 Directors—The business and affairs of a corporation shall be conducted by a board of directors The number of directors shall be a multiple of three Two-thirds of the directors shall be elected by the members and one-third shall be elected by the shareholders Any vacancy in the office of a director elected by the members may be filled by the directors elected by the members and any vacancy in the office of director elected by the shareholders may be filled by the directors elected by the shareholders The shareholders and members or the directors may by bylaw provide that a quorum of the board of directors for the purpose of transaction of business shall consist of a stated number or percentage of the directors less than a majority of the number of directors fixed by the bylaws, but in no event shall a quorum consist of less than one-third of the number of directors so fixed

§ 13 1-992 Executive committee—The board of directors, by a resolution adopted by a majority of the directors present and constituting a quorum at any meeting, may designate five or more directors to constitute an executive committee which, to the extent provided in such

resolution or the bylaws of the corporation, shall have and may exercise all the authority of the board of directors except the authority to approve an amendment to the articles of incorporation or a plan of merger The executive committee specifically shall have the right to make calls upon the membership under § 13 1-989, unless expressly provided to the contrary by such resolution or bylaw Such committee shall have the power to fill any vacancy occurring in the board of directors or in the executive committee Such vacancy shall be filled by the affirmative vote of a majority of the remaining members of the executive committee, though less than a quorum of the committee, unless expressly provided to the contrary by such resolution or bylaw

§ 13.1-993 Restrictions on amendments to articles of incorporation No amendment to the articles of incorporation shall be made which increases the obligation of a member to make loans to the corporation or which makes any change in the principal amount, interest rate, maturity date, or in the security or credit position of any outstanding loan made by a member to the corporation or which affects the right of a member to withdraw from membership or the voting rights of such member, without the consent of each member who would be affected by such amendment

§ 13 1-994 Earned surplus.—Each year the corporation shall set apart as earned surplus not less than ten percent of its net earnings for the preceding fiscal year until such surplus shall be equal in value to one-half of the amount paid in on the capital stock then outstanding Whenever the amount of surplus so established shall become impaired, it shall be built up again to the required amount in the manner provided for its original accumulation

§ 13.1-995 Members to have rights of shareholders.—The rights given to shareholders under the provisions of §§ 13.1-614, 13.1-624, 13.1-629, 13.1-742 and 13 1-744 shall apply to members as well as to shareholders of a corporation created hereunder

§ 13.1-996 Corporation not authorized to receive money on deposit, deposit of funds of corporation.—No corporation organized under the provisions of this chapter shall at any time be authorized to receive money on deposit. The corporation shall not deposit any of its funds in any banking institution unless such institution has been designated as a depository by appropriate vote of the board of directors or executive committee

§ 13.1-997 Books and records.—A corporation shall keep, in addition to the books and records required by § 13.1-770, a record showing the names and addresses of all members of the corporation and the current status of loans made by each to the corporation Members shall have the same rights with respect to such books and records as are given to shareholders by § 13 1-770

§ 13.1-998. Credit of Commonwealth not pledged.—Under no circumstances is the credit of the Commonwealth pledged herein.

§ 56-249 7 Certain directors and officers of utility to file shareholder information - The directors and officers of any public utility as defined in § 56-232 shall file with the Commission a record of all officers and directorships and all sources of income in excess of $25,000 per year arising from voting securities in all other corporations which to the knowledge of the director or officer furnishes fuel with a value in excess of $50,000 per year to the public utility Such records for the past year shall be filed or made current on or before September 1 of each year

2. That Chapter 1 of Title of 13 1 of the Code of Virginia, consisting of articles numbered 1 through 14, containing sections numbered 13 1-1 through 13.1-200, and Chapter 2 of Title 13 1 of the Code of Virginia, consisting of articles numbered 1 through 11, containing sections numbered 13 1-201 through 13.1-300, are repealed

3 That this act shall become effective January 1, 1986

APPENDIX 2

Comparative Tables

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13.1-862	13 1-222
13 1-863	New
13 1-864	13.1-225
13.1-865	New
13 1-866	New
13 1-867	New
13 1-868	13 1-223
13.1-869	13 1-224
13 1-870	New

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13 1-871	13.1-223
13 1-872	13 1-226
13 1-873	New
13 1-874	13.1-1-227
13 1-875	New
13 1-876	13.1-205 1
13 1-877	13.1-205 1
13 1-878	13.1-205.1
13 1-879	13.1-205.1
13.1-880	13.1-205.1
13.1-881	13.1-205.1
13.1-882	13.1-205.1
13.1-883	13 1-205.1
13 1-884	13.1-235
13.1-885	13 1-236
13.1-886	13.1-236
13.1-887	New
13.1-888	13.1-237
	13.1-238
13.1-889	New
13 1-890	New
13 1-891	13.1-239
13.1-892	New
13.1-893	New

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13.1-894	13.1-240
13.1-895	13 1-242
13 1-896	13 1-243
	13 1-244
13 1-897	13.1-245
13 1-898	13.1-242.1
13 1-899	13.1-246
13 1-900	13.1-246
13 1-901	13.1-246.1
13.1-902	13.1-248
13.1-903	13.1-248
13 1-904	13.1-252
	13.1-253
13 1-905	13 1-251
13 1-906	New
13 1-907	13.1-249
	13.1-250
13 1-908	New
13 1-909	13 1-257
	13.1-260
	13.1-261
13 1-910	13.1-258
	13.1-259
13 1-911	13.1-262
	13 1-263

Chapter 10	*Chapter 2*
13 1-912	New
13 1-913	New
13 1-914	13.1-254
13 1-915	13 1-256
13 1-916	13.1-255
13 1-917	13 1-264
13 1-918	13 1-256 1
13 1-919	13 1-265
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	13 1-265 2
13 1-920	13 1-281
13 1-921	13.1-269
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13 1-922	13.1-275
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	13.1-271
13.1-924	13 1-267
	13 1-268
	13.1-277
13 1-925	13 1-272
13 1-926	13 1-273
13 1-927	New
13 1-928	13 1-274
13 1-929	13 1-278

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	13 1-278.1
13 1-930	13.1-279
13 1-931	13.1-280
13 1-932	13 1-228
13 1-933	New
13 1-934	New
13 1-935	New
13 1-936	13.1-282
	13.1-283
13.1-937	13.1-290
13 1-938	13.1-290 1
13 1-939	New
	13.1-292
13 1-940	New

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13 1-201

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13 1-205 1

13.1-206

13 1-207

13 1-207 1

13 1-207 2

13 1-208

13 1-209

13 1-210

13 1-211

13 1-212

13 1-212 1

13 1-213

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13 1-220

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13 1-803

13 1-937

13 1-825

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13 1-876 through 13.1-883

13 1-828

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13.1-838

13.1-839

13 1-842

13.1-843

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13 1-221

13 1-222

13 1-223

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13 1-226

13 1-227

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13 1-854

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13.1-868

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13 1-932

13 1-814

13.1-818

13 1-819

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13 1-240	13.1-894
13 1-241	Repealed
13 1-242	13.1-895
13 1-242 1	13 1-898
13 1-243	13 1-896
13 1-244	13 1-896
13 1-245	13.1-897
13 1-246	13 1-899
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13 1-246 1	13 1-901
13 1-248	13.1-902
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13 1-249	13.1-907
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13 1-251	13 1-905
13 1-252	13 1-904
13 1-253	13 1-904
13 1-254	13 1-914
13 1-255	13 1-916
13 1-256	13 1-915
13 1-256 1	13 1-918
13 1-257	13.1-909
13 1-258	13 1-910
13 1-259	13 1-910
13 1-260	13.1-909
13 1-261	13 1-909
13 1-262	13 1-911

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13.1-263	13.1-911
13 1-264	13.1-917
13 1-265	13 1-919
13 1-265 1	13 1-919
13 1-265 2	13 1-919
13 1-266	13 1-923
13 1-267	13.1-924
13 1-268	13.1-924
13.1-269	13 1-921
13 1-270	13.1-921
13 1-271	13.1-923
13.1-272	13.1-925
13.1-273	13.1-926
13.1-274	13.1-928
13.1-275	13.1-922
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13 1-277	13 1-922
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13 1-278	13.1-929
13 1-278 1	13 1-929
13 1-279	13.1-930
13.1-280	13.1-931
13 1-281	13.1-920
13 1-282	13.1-936
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13 1-285	13 1-816

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13 1-286	13 1-817
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13 1-287	13.1-813
13 1-288	13.1-805
13 1-289	13.1-832
13 1-290	13 1-937
13 1-290 1	13.1-937
13 1-291	13.1-802
13.1-292	13.1-939
13 1-294	Repealed
13 1-295	13 1-811
13 1-296	13.1-812

Title 13.1

Industrial Development Corporations

Article 13

Chapter 11

13 1-981

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13 1-988

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13 1-142

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13 1-144

13 1-144.1

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13 1-155

APPENDIX 3

Title 58.1 Draft

D1/4/85 Cramme C1/5/85 cdh

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 58.1-2801 through 58.1-2805, 58.1-2808 and 58.1-2809 of the Code of Virginia and to repeal §§ 58.1-2800 and 58.1-2812 of the Code of Virginia, relating to stock corporations' charter, entrance and annual registration fees and annual franchise taxes.

Be it enacted by the General Assembly of Virginia

1 That §§ 58.1-2801 through 58.1-2805, 58.1-2808 and 58.1-2809 of the Code of Virginia are amended and reenacted as follows

§ 58.1-2801 Charter fees of domestic corporations.--Every domestic corporation ~~other than such as are described in § 58.1-2800~~, upon the granting of its charter, shall pay a fee into the state treasury to be ascertained and fixed as follows

~~For a company whose maximum authorized capital stock is $50,000 or less - $25;~~

~~For a company whose maximum authorized capital stock is over $50,000 and less than $3,000,000 - 40¢ for each $1,000 or fraction thereof;~~

~~For a company whose maximum authorized capital stock is $3,000,000 or more - $1,200; and~~

For any corporation whose number of authorized shares is 100,000 shares or less - $25,

For any corporation whose number of authorized shares is more than 100,000 shares and not more than 1,000,000 shares $30 for each 40,000 shares or fraction thereof in excess of 100,000 shares,

For any corporation whose number of authorized shares is more than 1,000,000 shares - $1,200, and

For a ~~company~~ *any corporation* incorporated under the Virginia Nonstock Corporation Act - $50

§ 58.1-2802 Entrance fees for foreign corporations.--Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this Commonwealth, shall pay an entrance fee into the state treasury to be ascertained and fixed as follows

~~For a company whose maximum capital stock is~~

~~1. $50,000 or less - $60;~~

~~2. Over $50,000 and not in excess $1,000,000 - $1.20 for each $1,000 or fraction thereof;~~

~~3. Over $1,000,000 and not in excess of $10,000,000 - $2,000;~~

~~4. Over $10,000,000 and not in excess of $20,000,000 - $2,500;~~

~~5. Over $20,000,000 and not in excess of $30,000,000 - $3,000;~~

~~6. Over $30,000,000 and not in excess of $40,000,000 - $3,500;~~

~~7. Over $40,000,000 and not in excess of $50,000,000 - $4,000;~~

~~8. Over $50,000,000 and not in excess of $60,000,000 - $4,500;~~

~~9. Over $60,000,000 and not in excess of $70,000,000 - $5,000;~~

~~10. Over $70,000,000 and not in excess of $80,000,000 - $5,500;~~

~~11. Over $80,000,000 and not in excess of $90,000,000 - $6,000;~~

~~12. Over $90,000,000 - $10,000; and~~

For any corporation whose number of authorized shares is 50,000 shares or less - $60,

For any corporation whose number of authorized shares is more than 50,000 shares and not more than 1,000,000 shares - $60 plus an additional sum of $30 for each 10,000 shares or fraction thereof in excess of 50,000 shares,

For any corporation whose number of authorized shares is more than 1,000,000 shares - $5,000, and

~~13. Foreign corporations~~ *Any foreign corporation* without capital stock shall pay $100 only for such certificate of authority to conduct its affairs in this Commonwealth.

~~For the purpose of this section the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock.~~

§ 58.1-2803 Charter or entrance fees on changes in authorized maximum capital stock.--Whenever by articles of amendment or articles of merger, the ~~maximum authorized capital stock~~ *number of authorized shares* of any domestic or foreign corporation or of the surviving corporation is increased, the charter or entrance fee to be charged shall be an amount equal to the difference between the amount already paid as a charter or entrance fee by such corporation and the amount that would be required by this chapter to be paid if the increased ~~maximum authorized capital stock~~ *number of authorized shares* were being stated at that time in original articles of incorporation. If no charter or entrance fee has been heretofore paid to this Commonwealth, ~~or upon any consolidation of two or more corporations into a new corporation,~~ the amount to be paid shall be the same as would have to be paid on original incorporation or application for authority to transact business.

§ 58.1-2804. Annual registration fees for domestic and foreign corporations.--Every domestic corporation, and every foreign corporation authorized to do business in this Commonwealth, whose ~~maximum capital stock is $15,000 or under~~ *number of authorized shares is 5,000 shares or less* and every such corporation organized without capital stock shall pay into the state treasury on or before March 1 in each year an annual registration fee of ~~$25~~ *$30;*

~~Such corporation whose maximum capital stock is over $15,000 and does not exceed $50,000 shall so pay an annual registration fee of $40;~~

~~Such corporation whose maximum capital stock is over $50,000 and does not exceed $100,000 shall so pay an annual registration fee of $60;~~

~~Such corporation whose maximum capital stock is over $100,000 and does not exceed $300,000 shall so pay an annual registration fee of $80; and~~

~~Such a corporation whose maximum capital stock exceeds $300,000 shall so pay an annual registration fee of $10.~~

Such corporation whose number of authorized shares is more than 5,000 shares and does not exceed 25,000 shares shall pay an annual registration fee of $70, and

Such corporation whose number of authorized shares is more than 25,000 shares shall pay an annual registration fee of $200

Such annual registration fee shall be irrespective of any specific license tax or other tax or fee imposed by law upon the corporation for the privilege of carrying on its business in this Commonwealth or upon its franchise, property or receipts Those nonstock corporations, however, incorporated before 1970 which were not liable for the annual registration fee therefor shall not be liable for an annual registration fee hereafter

The fees paid into the state treasury under this section shall be set aside as a special fund to be used only be the State Corporation Commission as it deems necessary to defray all costs of staffing, maintaining and operating the office of the Clerk of the Commission, together with all other costs incurred by the Commission in supervising, implementing and administering the provisions of Part 4 (§ 8.9-401 et seq) of Title 8.9 , Title 13.1, and Article 6 (§ 55-142.1 et seq) of Chapter 6 of Title 55 of the Code of Virginia, as amended from time to time The projected excess of fees collected over the costs of administration so incurred shall be paid into the general fund prior to the close of each fiscal year, based on the unexpended balance at the end of the prior fiscal year An adjustment of this transfer amount to reflect actual fees collected shall occur during the first quarter of the succeeding fiscal year.

§ 58.1-2805 Assessment of registration fee and forwarding of statement.–The State Corporation Commission shall ascertain from its records the ~~amount of the authorized maximum capital stock~~ *number of authorized shares* of each corporation authorized to do business in this Commonwealth, as of January 1 of each year, and shall assess against each such corporation the registration fee herein imposed A statement of the assessment, when made, shall be forwarded by the clerk of the State Corporation Commission, before February 15, to the Comptroller and to each such corporation.

§ 58 1-2808 Annual state franchise tax on domestic corporations.–Every domestic corporation except telephone, electric, gas and water companies, insurance, banking and trust companies, shall pay into the state treasury on or before March 1 of each year an annual state franchise tax to be assessed by the State Corporation Commission

The amount of such franchise tax shall be as follows

~~When the authorized maximum capital stock is~~

~~1. $25,000 and under - $20;~~

~~2. Over $25,000 and not in excess of $50,000 - $40;~~

~~3. Over $50,000 and not in excess of $100,000 - $80;~~

~~4. Over $100,000 and not in excess of $300,000 - $120;~~

~~5. Over $300,000 and not in excess of $500,000 - $200;~~

~~6. Over $500,000 and not in excess of $1,000,000 - $400;~~

~~7. Over $1,000,000 and not in excess of $50,000,000 - $400 plus an additional sum of $20 for each $100,000 or fraction thereof in excess of $1,000,000;~~

~~8. Over $50,000,000 and not in excess of $100,000,000 - $10,200 plus an additional sum of $150 for each $1,000,000 or fraction thereof in excess of $50,000,000; and~~

~~9. Over $100,000,000 - $20,000~~

When the number of authorized shares is 5,000 shares or less - $10,

When the number of authorized shares is more than 5,000 shares and not more than 10,000 shares - $15,

When the number of authorized shares is more than 10,000 shares and not more than 100,000 shares - $20 for each 10,000 shares or fraction thereof;

When the number of authorized shares is more than 100,000 shares and not more than 1,000,000 share - $200 plus an additional sum of $300 for each 100,000 shares or fraction thereof in excess of 100,000 shares up to and including 1,000,000 shares,

When the number of authorized shares is more than 1,000,000 shares and not more than 100,000,000 shares - $4,000 plus an additional sum of $500 for each 10,000,000 shares or fraction thereof, and

When the number of authorized shares is more than 100,000,000 shares - $10,000

§ 58 1-2809 Assessment of tax and forwarding statement – The State Corporation Commission shall ascertain the ~~amount of the authorized maximum capital stock~~ *number of authorized shares* of each domestic corporation as of January 1 in each year and shall assess against each such corporation the state franchise tax herein imposed A statement of such assessment, when made, shall be forwarded by the clerk of the State Corporation Commission before February 15 to each such corporation by ordinary first-class mail

2 That §§ 58.1-2800 and 58 1-2812 of the Code of Virginia are repealed

3 That the provisions of this act shall become effective January 1, 1986

APPENDIX 4

Bar Commentary

VIRGINIA BAR ASSOCIATION
VIRGINIA STATE BAR
Title 13.1 Joint Study Group

January 2, 1985

TO: The Virginia Code Commission

Gentlemen:

On behalf of the Virginia Bar Association/ Virginia State Bar Title 13.1 Joint Study Group (the "Joint Bar Committee"), we enclose for each of you a copy of comments developed by the Joint Bar Committee on the Code Commission's proposed revision of the Virginia Stock Corporation Act. This Commentary has been delivered to John Banks this morning for inclusion as an appendix to the Code Commission's Title 13.1 Report to The General Assembly, as the Commission authorized at its December 5 meeting.

As representatives of the Joint Bar Committee who had the opportunity to attend all of the Code Commission's meetings at which the revision of Title 13.1 was under consideration, we want to express to each of you the appreciation of both Bar organizations for the opportunity afforded to the Bar to work with the Code Commission on this project.

The Joint Committee believes the Code Commission's proposal represents a well-considered, balanced and much needed update of Virginia's corporation laws. The respective Bar organizations will do all they can to support this proposal before The General Assembly.

Sincerely,

F. Claiborne Johnston, Jr., for the Virginia Bar Association/ Business Law Committee

Thomas C. Brown, Jr., for the Virginia State Bar/Business Law Section

37/421
Enclosure
cc: Allen C. Goolsby, III, Esquire

VIRGINIA BAR ASSOCIATION
VIRGINIA STATE BAR

TITLE 13.1 JOINT BAR COMMITTEE

COMMENTARY ON VIRGINIA CODE COMMISSION'S PROPOSED REVISION OF THE VIRGINIA STOCK CORPORATION ACT

FOR THE

GENERAL ASSEMBLY
OF THE
COMMONWEALTH OF VIRGINIA

DECEMBER 28, 1984

VIRGINIA BAR ASSOCIATION
VIRGINIA STATE BAR
Title 13.1 Joint Bar Committee

December 28, 1984

To: The General Assembly of Virginia

Enclosed for your consideration are explanatory comments developed by the Virginia Bar Association/Virginia State Bar Title 13.1 Joint Bar Committee (the "Joint Bar Committee") with respect to the Virginia Code Commission's proposed revision of the Virginia Stock Corporation Act. The Joint Bar Committee has followed closely the work of the Code Commission and has kept each of the respective Bar organizations apprised as this work has developed. As a result, the Virginia Bar Association, the Business Law Section of the Virginia State Bar and the Joint Bar Committee has each given its formal endorsement to the Stock Act legislation approved by the Code Commission, and each group strongly supports passage of this legislation by the General Assembly.

The Joint Bar Committee was organized in December, 1983, to review and comment upon an early draft of a revised Virginia Stock Corporation Act. The Committee was comprised of sixteen lawyers representing the Business Law Committee of the Virginia Bar Association, the Business Law Section of the Virginia State Bar and the Corporate Counsel Section of the Richmond Bar Association. The Committee, whose members are listed below, was constituted to be representative of different geographical areas of Virginia and also to be representative of lawyers representing both publicly and closely-held corporations. The Committee was greatly assisted in its work by an Advisory Group which included Professor Daniel T. Murphy of the University of Richmond Law School, and Allen C. Goolsby, III and John W. Edmonds, III, both of the Richmond Bar. Joel H. Peck served as a liaison representative of the State Corporation Commission, and effectively communicated to the Committee views and concerns of the Office of the Clerk of the Corporation Commission during the entire course of the Committee's work.

Since January of 1984, the Joint Bar Committee met and worked in Richmond on eight different occasions. Additionally, a number of meetings of five subcommittees were held to concentrate on specific areas of the draft legislation.

As a result of the Committee's work, a number of changes were incorporated into a second draft of the Stock Act resubmitted to the Code Commission in June, 1984. Additionally, the Committee offered a number of further suggestions to the Code Commission, the vast majority of which have been incorporated into the Commission proposal being submitted to you.

The commentary on the Commission Draft enclosed herewith is the product of the Joint Bar Committee's work on this project over the past year. A subcommittee comprised of F. Claiborne Johnston, Jr. and Thomas C. Brown, Jr., who served as co-chairmen of the Joint Bar Committee, and Stephen R. Larson, who was a representative of both Bar organizations on the Joint Bar Committee, met with the Code Commission on each occasion during its deliberations over the revised Stock Act. They, together with Allen C. Goolsby, III and Professor Daniel T. Murphy, served as an Editorial Committee to tailor the Joint Bar Committee's comments to the final Code Commission proposal.

The Joint Bar Committee's support for the Code Commission's proposed Stock Act reflects in part the Committee's belief that this proposal addresses the special concerns of both publicly and closely-held corporations without unfairly prejudicing the legitimate interests of either. A number of significant developments in the field of corporate law in recent years, affecting in particular the larger, publicly-held companies, made it imperative that Virginia reconsider carefully its general corporate laws. It has been more than 25 years since such a comprehensive effort has been undertaken. The Code Commission proposal achieves this objective, and addresses specifically many of the areas of concern that have arisen during this period. Importantly, however, the Commission proposal does not discard the accumulated experience of Virginia corporate practice, nor does it impose untried and novel concepts. Rather, it aims to retain the best elements of existing practice, in Virginia and elsewhere, in the context of a modern legislative framework.

The Joint Bar Committee believes that the Code Commission's legislative proposal is sound and desirable and will provide the Commonwealth with a modern Stock Corporation Act which will well serve the citizens of the Commonwealth, business, the Bench, and the Bar, for years to come.

Respectfully yours,

Virginia Bar Association
Business Law Committee

F. Claiborne Johnston, Jr., Richmond
Robert L. Burrus, Jr., Richmond
James S. Cremins, Richmond
G. Franklin Flippin, Roanoke
Stephen R. Larson, Richmond
Ross C. Reeves, Norfolk

Virginia State Bar
Business Law Section

Thomas C. Brown, Jr., Alexandria
Joel M. Birken, Fairfax County
Douglas W. Densmore, Roanoke
George H. Gilliam, Charlottesville
Stephen R. Larson, Richmond
Robert H. Powell, Norfolk
George H. Roberts, Harrisonburg
Robert E. Stroud, Charlottesville

Richmond Bar Association
Corporate Counsel Section

James M. White, III, Richmond
F. Case Whittemore, Richmond

Enclosure

VIRGINIA BAR ASSOCIATION
VIRGINIA STATE BAR

TITLE 13.1 JOINT BAR COMMITTEE

COMMENTARY
ON
VIRGINIA CODE COMMISSION'S
PROPOSED REVISION OF THE
VIRGINIA STOCK CORPORATION ACT

FOR THE
GENERAL ASSEMBLY
OF THE
COMMONWEALTH OF VIRGINIA

DECEMBER 28, 1984

Introductory Comment

The proposed revision of the Virginia Stock Corporation Act as recommended by the Virginia Code Commission is referred to in the following comments as the "Commission Draft". That Draft is based in substantial part upon the Model Business Corporation Act, as revised in 1984. Articles 1 through 13, 15 through 18, and Article 20 of the Commission Draft are taken from the Model Act, with variations as noted in the Commission Comments following each section in those articles. Article 14, as explained in the comment to section 13.1-725 of the Commission Draft and below, is taken in large part from similar legislation adopted in Maryland and other states. There is no Model Act counterpart to Article 14. Article 19 is taken without substantive change from Article 14 of the present Virginia Stock Corporation Act, which was added to the Code in 1979.

Provisions in both the present Stock Act (§ 13.1-133) and Non-Stock Act (§ 13.1-294) pertaining to the Corporation Commission's power to deal with unauthorized practice of law complaints have not been included in the Commission Draft. Other omissions from the present Code are noted in the Code Commission's Comments.

Permission to quote from the Official Comments to the Model Act has been granted by the American Bar Foundation. The Law & Business, Inc. division of Harcourt Brace Jovanovich, Publishers, is the publisher of the 1984 revision of the Model Act.

VIRGINIA STOCK CORPORATION ACT

Article 1

General Provisions

§ 13.1-601. Short title.

The short title establishes a convenient name for the Commonwealth's law governing corporations that issue shares. The same title is used in the existing statute.

§ 13.1-602. Reservation of power to amend or repeal.

The purpose of this section is to avoid any argument that a corporation has a contractual or vested right in any specific statutory provision. This is consistent with prior statutory and case law. See Hanshaw v. Day, 202 Va. 818 (1961).

§ 13.1-603. Act definitions.

Of the defined terms in the Commission Draft only four are found in both the Model Act and the Virginia Code: "corporation or domestic corporation," "foreign corporation," "articles of incorporation" and "subscriber". Each definition in the Commission Draft is not significantly different from the comparable definitions in the Model Act and the Virginia Code.

The principal terms in the Commission Draft that are not currently in the Virginia Code are "distribution," "principal office" and "voting group." A "distribution" includes not only a dividend to shareholders, but also any repurchase by the corporation of outstanding shares as well as the incurrence of indebtedness by the corporation for the benefit of its shareholders. Restrictions on distributions are set forth in § 13.1-653 of the Commission Draft.

In contrast to the Virginia Code, the Commission Draft provides in a number of sections that notice can be delivered to the corporation at its "principal office", and not just at its registered office.

The term "voting group" refers to all shares of one or more classes or series that are entitled to be voted and counted collectively on any matter. With respect to every matter there will be at least one "voting group" consisting of the shares of every class and series that are entitled to vote generally on the matter.

§ 13.1-604. Filing requirements.

This section substantially follows Model Act § 1.20.

Subsection D permits the filing of photocopies so long as they are signed manually. The requirement in that subsection that a document be typewritten or "printed" does not contemplate handwritten printing; rather, it refers to type-set documents.

Subsection F generally follows the Virginia Code in designating which officers may sign documents filed with the Commission. However, that subsection only requires the signature of an officer, while most provisions of the Virginia Code have required two signatures.

Subsection G provides that the annual report to the State Corporation Commission may be signed by any officer or director named therein. This subsection, which is new, should reduce the number of annual reports that have to be returned for proper execution.

§ 13.1-605. Issuance of certificates by Commission; recordation of documents.

Subsection A preserves traditional Virginia practice which requires that the State Corporation Commission must find that a document complies with the requirements of law before it issues a certificate making the document effective. This substantive review differs in a significant way from the ministeral role of the Office of Secretary of State under the Model Act. The limited scope of judicial review of Corporation Commission orders, which has been retained in § 13.1-614, is also a significant and desirable feature of the Commission Draft that is not found in the Model Act. Limited review would not be feasible if the Clerk of the State Corporation Commission did not engage in a substantive review of filed documents.

Subsection A also carries forward the present requirement for local filing of certificates issued by the State Corporation Commission. While some members of the Bar Study Group recommended that the provision for local filings be abolished, the Code Commission determined that existing practice in this regard should be continued.

§ 13.1-606. Effective time and date of document.

Section 13.1-606A allows any articles that are filed with the State Corporation Commission to specify an effective date up to 15 days after the date on which the Corporation Commission issues the certificate. This concept is new to Virginia corporate law, and will allow greater flexibility in scheduling the closing of corporate transactions especially where the closing will be held outside of the Richmond area. This will be particularly useful in transactions that require simultaneous effective dates with action taken in other states. The term "articles" as used in this section would include all articles filed with the Corporation Commission including articles of amendment, correction, merger, share exchange or dissolution.

§ 13.1-607. Correcting filed article.

This section, which is new to the Virginia Code, will give corporations greater flexibility in correcting a misstatement made in articles that have been filed with the State Corporation Commission. Because of the limited period of time (10 days) in which Corporation Commission order is subject to review and reconsideration by the Corporation Commission, subsection D provides that articles of correction must be received and reconsidered by the Corporation Commission within 9 days after the effective date of the certificate relating to the articles to be corrected.

§ 13.1-608. Evidentiary effect of copy of filed document.

This section, though similar in some respects to to Code § 12.1-20, is new to the Virginia Code. It confirms that any certificate issued by the Clerk of the State Corporation Commission regarding the admission of any document to the records of the Corporation Commission is conclusive evidence of such admission. In rendering legal opinions, corporate counsel should find this section helpful.

§ 13.1-609. Certificate of good standing.

This section, which makes a good standing certificate conclusive evidence as to the good standing of the corporation in the Commonwealth, is similar to Code § 12.1-20, with the addition of subsection D. A corporation would not be in "good standing" if it has filed articles of dissolution, which are the equivalent of a "statement of intent to dissolve" under present law. This seems appropriate inasmuch as a corporation that has filed articles of dissolution is authorized under Commission Draft § 13.1-745 to transact business only to the extent necessary to wind up its business.

§ 13.1-610. Notice.

This section, which is new to the Virginia Code, generally follows Model Act § 1.41 except that subsection A only permits the use of oral notice for meetings of the board of directors and then only if authorized in the articles of incorporation or bylaws.

Subsection G makes clear that other sections in the Act prescribing specific requirements for a particular action take precedence over the general rules stated in this section.

§ 13.1-611. Number of shareholders.

This section governs in the limited number of instances where it may be necessary to determine the number of shareholders. Inasmuch as the purpose of this provision is quite different from the limitation contained in § 13.1-514(b)(8) of the Virginia Securities Act, the decision in Pollok v. Commonwealth, 217 Va. 411 (1976) should not have any particular bearing on the interpretation of this section.

§ 13.1-612. Penalty for signing false documents.

Under Virginia law (Code § 18.2-11) a Class I misdemeanor is punishable by a jail term of up to one year, a fine of up to $1,000, or both. The section in the Virginia Code corresponding to this section states that signing a document delivered to the State Corporation Commission knowing it to contain a misstatement of fact constitutes perjury -- a Class V felony, punishable by imprisonment for up to ten years, a fine of up to $1,000, or both.

§ 13.1-613. Unlawful to transact or offer to transact business as a corporation unless authorized.

This section, which follows Code § 13.1-135, makes it a Class I misdemeanor to transact business as a corporation without incorporating or obtaining a certificate of authority to transact business as a foreign corporation. There is no comparable provision in the Model Act. See Bar Comment to section 13.1-612 concerning the punishment for Class I misdemeanors.

§ 13.1-614. Rehearing and finality of Commission action; Injunctions.

This section follows Code § 13.1-125. It provides corporations with the assurance that any articles adopted by the corporation are subject to limited review once the Commission has issued a certificate making the articles effective. To obtain a rehearing for the purpose of changing the articles requires that a petition be filed within 10 days of the effective date of the certificate. Judicial review of a Commission action is limited to a direct appeal to the Virginia Supreme Court. Further, judicial intervention to enjoin or delay any board of directors or shareholders meeting for the purpose of authorizing or consummating any amendment of the articles of incorporation, merger, share exchange or dissolution is limited to allegations of fraud or failure to provide a list of shareholders pursuant to § 13.1-661C.

Article 2

Fees

§ 13.1-615. Fees, taxes and charges to be collected by Commission.

This section follows Code § 13.1-122. The fees in question are set forth in Chapter 28 of Title 58.1 of the Virginia Code. These fees have been restructured in the Commission Draft as a result of the abolition of the concept of "par value". Under the Commission's proposals, franchise taxes, and charter and entrance fees will be based on authorized shares, as opposed to "stated capital."

§ 13.1-616. Fees for filing documents or issuing certificates.

This section is taken from Code §§ 13.1-123 and 13.1-123.1 with changes made to conform this section to modifications that the Commission Draft has made in the types of documents that must be filed with the Commission.

§ 13.1-617. Miscellaneous charges.

This section follows Code § 13.1-124 except that the State Corporation Commission's one dollar per page fee for preparing a record on appeal has been eliminated.

§ 13.1-618. Incorporators.

In the Commission Draft the only function of the incorporators is to execute and file the articles of incorporation and to complete the formation of the corporation to the extent set forth in § 13.1-623. A corporation or a partnership may be an incorporator under the statutory definition of "person".

§ 13.1-619. Articles of incorporation.

Subsection A states the minimum requirements for articles of incorporation. This subsection does not require that the names and addresses of the initial directors be included. Nor is any statement of corporate purpose required. Under § 13.1-626 every corporation incorporated under the Act is deemed to have the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation or the corporation intends to engage in a special kind of business.

Subsection B lists other provisions that may be included in the articles of incorporation. The Official Comment to Model Act § 2.02, on which this section is based, contains a lengthy but helpful itemization of the various optional provisions discussed in other sections of the Model Act which may be contained in the articles of incorporation.

§ 13.1-620. Special kinds of business.

This section has been taken from Code § 13.1-50 without change, except that the words "on January 1, 1986" in subsection D have been substituted for the words "when this act becomes effective in section 13.1-50". There is no comparable section in the Model Act.

§ 13.1-621. Issuance of certificate of incorporation.

This section is taken from Code §§ 13.1-51 and 13.1-52. In contrast to the Commission Draft, the Model Act provides that corporate existence begins when the articles of incorporation are filed.

§ 13.1-622. Liability for preincorporation transactions.

The last clause of this section would allow application of the common law concept of "corporation by estoppel" (see, e.g., Cranson v. International Business Machines Corp., 234 Md. 477, 200 A.2d 33 (1964)), but only against persons who knew that there was no incorporation. Because this provision confers the benefit of insulation from personal liability on persons who knew that in fact there was no incorporation, it seems reasonable that the provision ought to be strictly construed against such persons. They ought to bear the burden of proving that the other person also knew that there was no incorporation. The provision should be limited to cases of actual knowledge on the part of the other side, and not extended to instances in which the other side "should have known" that there was no incorporation. The Official Comment to Model Act § 2.04, from which this section is taken, contains a helpful discussion of the common law cases that have arisen in this area.

§ 13.1-623. Organization of corporation.

This section provides greater flexibility than Code § 13.1-54 by allowing the incorporator to complete the organization of the corporation if initial directors are not named in the articles of incorporation.

§ 13.1-624. Bylaws.

This section follows Model Act § 2.06. In contrast to Code § 13.1-24, this section permits incorporators to adopt initial bylaws. Under section 13.1-649 of the Commission Draft share transfer restrictions may be contained in the bylaws. The power to amend or

repeal bylaws, or adopt new bylaws after the formation of the corporation is completed, is addressed in sections 13.1-714 and 13.1-715.

§ 13.1-625. Emergency bylaws.

This section adopts Model Act § 2.07. It is similar to Code § 13.1-24.1 except that the Virginia Code section limits an emergency to an attack on the United States or a nuclear disaster while this section provides that an emergency exists if a quorum of the board of directors cannot be readily assembled because of any catastrophic event as, for example, an airplane crash.

Article 4

Purposes and Powers

§ 13.1-626. Purposes.

This section is based on the premise that corporations ought to have the maximum flexibility with respect to their present and future endeavors. Accordingly, if nothing is stated in the articles of incorporation or otherwise required by law, a corporation is deemed to be organized for the purpose of engaging in any lawful business. A corporation need state nothing in its articles of incorporation regarding purpose in order to take advantage of this statutory purpose. If the incorporators or shareholders desire a more limited purpose, the purpose desired must be stated in the articles of incorporation. An example of other provisions of Virginia law affecting the statement of purpose is Code § 13.1-543B, which deals with professional corporations.

§ 13.1-627. General powers.

Subsection A of this section lists numerous powers which corporations possess in order to accomplish their purposes. The articles of incorporation need not recite these powers in order for a corporation to exercise them. The powers exist as a matter of statutory grant. This

subsection provides that the list of powers is not an inclusive one. The articles of incorporation may also specifically provide that a corporation shall not have some of these powers and the articles may confer other powers on the corporation.

Subsection B, which is taken from Code § 13.1-2.1, lists some additional powers which corporations other than public service corporations and financial institutions enjoy.

Subsection C states that the privileges and powers granted to the corporations listed therein by other Titles of this Code prevail over those stated in this Title, except where this Title specifically provides otherwise.

Subsection D conforms the obligation of private foundations to distribute their income in accordance with the provisions of the Internal Revenue Code.

§ 13.1-628. Emergency powers.

Current Virginia law, Code § 13.1-24.1, defines an emergency in terms of an attack on the United States or any nuclear or atomic disaster. Subsection D of this section greatly expands the definition of an emergency to include any "catastrophic event." Since the types of situations which might be considered to be an emergency are so varied, a broad definition is preferable to a more specific description. Subsections A and B set forth special powers and rights that the board of directors may exercise during an emergency. Subsection C states separate rules regarding the binding effect of corporate action taken during an emergency and the insulation of the person taking such action, and others, from liability.

§ 13.1-629. Ultra vires.

This section establishes the general rule that, except as otherwise provided in this section, corporate action may not be challenged on the grounds that the corporation lacks or lacked the power to take the action. The decision in Beaver v. First National Bank, 202 Va. 807 (1961) nas equal application under this section as under

Code § 13.1-5. Subsection B states the following three exceptions: a shareholder suit to enjoin the act; a proceeding by the corporation directly, derivatively or through a receiver, trustee or other legal representative against the incumbent or former directors, employees or agents; and a proceeding against the corporation before the State Corporation Commission. A proceeding brought by a shareholder to enjoin the act must be brought before or during, but not after, the corporation's action. In such a proceeding the court may enjoin or set aside the act; and it may also award compensation, excepting anticipated profits to the corporation or another party to the act for loss or damage suffered as a result of the enjoining of the act.

Article 5

Name

§ 13.1-630. Corporate name.

Subsection A of this section lists the various identifying words which must be part of a corporate name. Subsections B and C set forth certain words and material which may not be used as part of a corporate name. Subsection D establishes the procedure whereby one corporation may apply for permission to use a corporate name which is not distinguishable from the name of another corporation.

In practical effect, the test that a corporate name be "distinguishable" upon the records of the State Corporation Commission from another name already reserved or in use is not materially different from the "confusingly similar" test under Code § 13.1-6. Thus, the decisions in Cavalier Poodle Club v. Cavalier Poodle Club, 206 Va. 945 (1966) and Posso and Mastraco, Inc. v. Giant Food Center of Virginia, Inc., 200 Va. 159 (1958) should still provide useful analyses.

§ 13.1-631. Reserved name.

This section generally preserves existing Virginia practice. It sets forth the procedure by which a corporate name, meeting the criteria of Code § 13.1-630, may be reserved for a 120 day period. Such reservation may be

renewed for successive 120 day periods. The section does permit a reserved name to be transferred to another person.

§ 13.1-632. Registered name.

This section sets forth the procedure by which a foreign corporation may register its corporate name in the Commonwealth. Registration of the name does not constitute an application for a certificate to transact business within the Commonwealth; however, the registration terminates under a new provision when the foreign corporation incorporates a domestic corporation using the registered name or the foreign corporation obtains a certificate of authority to transact business in Virginia or consents to another foreign corporation transacting business in Virginia under the registered name.

§ 13.1-633. Property title records.

This section preserves existing Virginia practice. It permits a corporation whose name has been changed by amendment of its articles of incorporation or merger or which has succeeded to ownership of another corporation to obtain a certificate from the State Corporation Commission reciting the change of name or succession. Recordation of the certificate will help to maintain continuity of title records. The section permits a similar certificate from a foreign jurisdiction to be recorded in Virginia.

Article 6

Office and agent

§ 13.1-634. Registered office and registered agent.

Subsection A of this section requires all corporations, domestic and foreign, to maintain a registered office and registered agent within the Commonwealth and states the registered agent's qualifications. Subsection B is a new provision which makes clear the limited nature of the duties of a registered agent. His sole duty, consistent with § 13.1-637, is to forward all notices served on him to

the corporation's last known address. In the past, registered agents have been thought by some law enforcement officials to carry responsibilities which exceeded the limited role of a registered agent.

§ 13.1-635. Change of registered office and registered agent.

This section sets forth the procedure to be followed by any corporation, domestic or foreign, in order to change its registered office or agent, and by a registered agent who changes his business address. Such changes will no longer have to be authorized by a resolution adopted by the board of directors.

§ 13.1-636. Resignation of registered agent.

Subsection A establishes the procedure whereby a registered agent may resign. His agency authority and responsibility is terminated on the thirty-first day after he files the statement required by this section with the State Corporation Commission. Although Code § 13.1-10.1, providing for resignation of a registered agent, was repealed in 1981, a similar provision has been in effect in Code § 12.1-43 since 1971. That provision is deleted in the Commission Draft.

§ 13.1-637. Service on corporation.

This section sets forth various means by which a domestic or foreign corporation can be served with process, notice or any demand. Subsection A constitutes the corporation's registered agent as the corporation's agent for purpose of service of process. This section allows the registered agent to designate, by a notarized written instrument, a person in his office as a person upon whom service may be made. When any such person is served, a photographic copy of the notarized written instrument is to be attached to the return. This procedure should facilitate service matters, particularly in the case of persons who serve as registered agent for a large number of corporations.

As provided in subsection B, if a corporation fails to appoint or maintain a registered agent, or if the registered agent cannot be found, the Clerk of the State Corporation Commission shall be an agent of the corporation upon whom process, notices or demands may be served. He shall forward the process, notice or demand to the corporation by registered or certified mail.

Subsection C states that the two means of service set forth in subsections A and B are not the only means, nor are they the required means, by which a corporation may be served.

Subsection D provides that the names and addresses of a corporation's registered agent and office, its principal office and directors and officers as filed with the State Corporation Commission are conclusive for the purpose of service of process.

Article 7
Shares and Distributions

§ 13.1-638. Authorized shares.

This section follows Model Act § 6.01 and covers material presently contained in Code §§ 13.1-12 and 13.1-13. Sections 13.1-12 and 13.1-13 provide generally that the corporation has the power to issue such number and classes of shares as are provided in the articles of incorporation; and that the articles may state the relative rights and preferences of preferred or special classes of shares. Section 13.1-638 carries forward these general concepts in subsections A and C; but it does not use the terms "preferred" or "special classes".

This section, by eliminating denomination of the shares as preferred, common or special, focuses on the distinction among classes through the substantive rights of the shares as provided for in the articles, or by the directors. Section 13.1-638C lists various usual distinguishing rights of classes, while section 13.1-638D states that the list is not exhaustive. The section requires a "distinguishing designation" for each class, thereby allowing the draftsman to continue to refer to classes of preferred shares, but it eliminates any statutory legal consequences of the designation chosen.

Importantly, the Official Comment to Model Act § 6.01 states that if the articles authorize only one class of shares, no designation or description of the shares is required, it being understood that these shares have both the power to vote and the power to receive the net assets of the corporation upon dissolution. Additionally, the Official Comment states that "If more than one class is authorized and both fundamental characteristics are placed exclusively in a single class, that class may simply be described as 'common shares.'"

§ 13.1-639. Terms of class or series determined by board of directors.

This section is similar to the provisions of Code § 13.1-14, except that it does not refer to preferred or special classes. It permits the board of directors, if

authority to do so is contained in the articles, to fix the terms of a class or series of shares by an amendment to the articles of incorporation without the necessity of holding a shareholders meeting. Under present law, similar action is taken through approval by the board of articles of serial designation. The Commission Draft thus results in all charter provisions being contained in a single document, the articles of incorporation. Separate articles of serial designation will no longer be used. Other instances in which the articles can be amended without shareholder action are covered in section 13.1-706.

§ 13.1-640. Issued and outstanding shares.

There is no comparable provision in present Virginia law. Section 13.1-640 allows, if the articles so provide, all shares of stock to be redeemed, whether they are called preferred or common, so long as one share remains outstanding which possesses unlimited voting rights and the right to receive the net assets of the corporation on dissolution. The provision that all shares can be redeemed, so long as one share possessing the full rights referred to remains outstanding resolves an uncertainty in present law - can common shares be redeemed? By one school of thought they can, if a class of non-redeemable common is outstanding. This, in turn, leads to the question whether the redeemable shares were in fact common, or were preferred or special. Section 13.1-640 eliminates the issue by doing away with designations of preferred, common or special, and allowing all shares to be redeemed so long as one share possessing full rights remains outstanding.

§ 13.1-641. Fractional shares.

This section changes present Virginia law by allowing a corporation to issue fractional shares if it wishes to do so. Except in limited circumstances, fractional shares are presently prohibited by Code § 13.1-21. This section would provide Virginia corporations with a degree of flexibility comparable to that found in Del. Gen. Corp. Law § 155. Section 13.1-641A gives the board of directors the right to determine whether or not to issue fractional shares, to pay the fair dollar value of the fractions, or issue scrip.

§ 13.1-642. Subscription for shares before incorporation.

The Official Comment to Model Act § 6.20, from which this section is taken, observes that while preincorporation subscriptions entered into simultaneously by several subscribers may be considered a binding contract between or among the subscribers, not all factual situations lend themselves to analysis under contract law. This section is intended to provide a simple set of legal rules applicable to the enforcement of preincorporation subscriptions by the corporation after the incorporation. The Official Comment to the Model Act notes that this section does not address the extent to which preincorporation subscriptions may constitute a contract between or among subscribers. Section 13.1-642A provides that a subscription agreement may be revocable by its terms, or may provide for any period of irrevocability. The present rule in Virginia is that a subscription may not be cancelled without the unanimous consent of the subscribers. Marcuse v. Broad-Grace Arcade, 164 Va. 553 (1935). Section 13.1-642 would permit this requirement to be altered by the subscription agreement itself.

Section 13.1-642E allows the corporation to sell shares which have been forfeited for nonpayment but requires payment to the subscriber or his representative of the excess over the amount owed the corporation.

Section 13.1-642F explicitly provides that a post-incorporation subscription agreement is a contract between the subscriber and the corporation. The section does not attempt to address the issue whether, and to what extent, other subscribers are also parties to the contract.

§ 13.1-643. Issuance of shares.

This section is one of the first, in order of occurrence, to give effect to the Model Act's financial provisions. It substantially changes Virginia law, as stated in Code §§ 13.1-17 and 18, by eliminating the concepts of par value, stated capital, capital surplus and treasury stock. Accordingly the allocation of the consideration received for shares to stated capital and capital surplus as provided in Code § 13.1-18, and the determination of the consideration which must be paid for newly issued or treasury shares, as stated in Code §§ 13.1-17 and 18, are unnecessary.

The Official Comment to Model Act § 6.21, on which this section is based, explains that the concepts of stated capital and capital surplus were eliminated to avoid confusion, provide greater flexibility to corporations, and eliminate the possibility of "watered stock" liability by removing par value concepts. The "watered stock" liability which exists in many states under the par value concept had already been abrogated in Virginia by statute. (Code § 13.1-17; see Vann v. Industrial Processes Co., Inc., 247 F. Supp. 14 (D.D.C. 1965)).

Section 13.1-643B explicitly authorizes promissory notes, and contracts for future services as valid consideration for shares. Code § 13.1-17 is silent on this point. However, these items presumably are valid consideration under existing law, inasmuch as the former prohibition against them was eliminated from Code § 13.1-17 in 1975.

Section 13.1-643 does not require that the board determine the "adequacy" or the "value" of the consideration received for shares for all purposes. The "adequacy" determination referred to in section 13.1-643C relates only to whether shares are validly issued and are fully-paid and non-assessable. Such a determination does not necessarily address, for example, the question whether existing shareholders have been subjected to unreasonable dilution. Code § 13.1-17 requires that the directors place a dollar value on the consideration, which valuation is deemed conclusive in the absence of fraud. This "absence of fraud" standard has been replaced throughout the Commission Draft by the general "good faith" standard as set forth by section 13.1-690. The Official Comment to Model Act § 6.21, which ought to be considered carefully in the interpretation of this section, states that the directors need not, although they may, place specific dollar values on non-cash consideration. The Comment recognizes that some value must be placed on consideration for accounting purposes but that such values are not necessarily the responsibility of the board of directors.

As provided in section 13.1-643B, receipt of a contract for future services or a promissory note constitutes consideration. Shares issued in exchange for these types of consideration are fully paid and may be issued upon receipt of such consideration. The corporation may escrow, credit distributions, or otherwise restrict the transfer of shares issued for future services or promissory notes until the services are performed or the promissory note paid.

Care must be taken not to confuse subsections C and D of section 13.1-643. Subsection C provides that issued shares are deemed fully paid and non-assessable when the corporation receives the consideration for which they were issued. In the case of shares issued for future services or promissory notes, the consideration is received by the corporation for purposes of this section when the corporation accepts the contract for future services or the promissory note. Subsection D contains several techniques which the corporation can use to insure that the shareholders fulfill their contractual obligations. This subsection presupposes that the shares have been issued. Subsection D does not mean that the consideration for the shares has not been received by the corporation, for purposes of this section, until the contract for services has been performed or the promissory note paid.

One other change made by this section is the elimination of the right of the shareholders, as provided in Code § 13.1-17, to restrict by resolution the board's authority to issue shares. Instead, this section allows the shareholders to reserve that power for themselves in the articles of incorporation.

§ 13.1-644. Liability for shares issued before payment.

Section 13.1-644B should be read in conjunction with § 13.1-643D, which provides that the board may escrow or restrict the transfer of shares issued for promissory notes or future services.

The Official Comment to Model Act § 6.22, from which this section is taken, notes that the Model Act leaves to the Uniform Commercial Code questions with respect to the rights of subsequent purchasers of shares and the power of the corporation to cancel shares if the consideration is not paid when due. See Code §§ 8.8-202 and 8.8-301.

§ 13.1-645. Share dividends.

This section recognizes that a share dividend involves the issuance of shares without consideration, and the definition of "distribution" in section 13.1-603 excludes a "share dividend."

The Official Comment to Model Act § 6.23, from which this section is taken, states that the par value statutory treatment of share dividend transactions distinguished a share "split" from a dividend. In a share "split" the par value of the former shares is divided among the new shares and there is no transfer of surplus into the stated capital account as in the case of a share "dividend." The Comment observes that because the Model Act has eliminated the concept of par value, the distinction between a "split" and a "dividend" has not been retained. A distinction continues in other contexts, however--for example, with corporations that have optionally retained par values.

§ 13.1-646. Share options.

Section 13.1-646 follows existing law except that it more clearly permits the articles of incorporation to eliminate the need for shareholder approval than does existing Virginia law.

§ 13.1-647. Form and content of certificates evidencing shares and form of bonds.

The Official Comment to Model Act § 6.25, from which this section is taken, states that this section sets forth the minimum requirement for share certificates. The provision in section 13.1-647C regarding the statement on each certificate of the relative rights, preferences and limitations applicable to each class does not require new common stock certificates to be issued if subsequently a preferred class is issued. Rather the statement of relative rights of a particular class or series is to be provided on certificates representing shares of that particular class or series.

This section does not change the result in cases such as Sylvania Indus. Corp. v. Lilienfeld's Estate, 132 F.2d 887 (4th Cir. 1943) to the effect that a certificate of stock is not the stock itself, but mere evidence of ownership. See section 13.1-648 on certificateless shares.

§ 13.1-648. Shares without certificates.

The issuance of "uncertificated" shares must be authorized by affirmative board action. Sections 13.1-647 and 13.1-648 appear to permit any combination of shares to be issued by a corporation in certificated or uncertificated form, so long as the shares are so designated by the board.

The Official Comment to Model Act § 6.26, from which this section is taken, points out that detailed rules with respect to the issuance, transfer, and registration of both certificated and uncertificated shares appear in article 8 of the Uniform Commercial Code, as adopted in Virginia effective January 1, 1985.

§ 13.1-649. Restriction on transfer of shares or other securities.

There are no provisions in the Virginia Code which correspond to section 13.1-649. The Official Comment to Model Act § 6.27, from which this section is taken, provides a number of illustrative examples of restrictions permitted by this section. Existing Virginia law permits restrictions in the articles of incorporation which are reasonable and not contrary to public policy. Monacan Hills v. Page, 203 Va. 110 (1951). Reasonable restrictions presumably may appear in an agreement between shareholders and the corporation or among the shareholders themselves, inasmuch as in Monacan Hills, supra, the Virginia Supreme Court sustained the restrictions by reference to "the principle that the charter is a contract between the corporation and the stockholders and between the stockholders themselves." It is less clear whether such restrictions presently may appear in the bylaws, though Code § 13.1-24 states that the "Bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation."

In view of the authorities referred to above, section 13.1-649C does not appear to change existing law in any significant respect. It is less clear whether each of the enumerated types of restrictions in § 13.1-649C and D would be sustained by the Virginia courts under existing Virginia law. For example, subsection C 3 ("any other reasonable purpose") must be deemed broader than the existing common law principle invoked in Monacan Hills,

supra, and the "not manifestly unreasonable" provision in subsections D 3 and D 4 is more permissive than the common law doctrine.

In Monacan Hills, the court stated that it is "well settled that such restrictions are to be strictly construed." The official Comment to Model Act § 6.27, from which § 13.1-649 is derived, indicates, however, that the specification of reasonable rules to govern transfer restrictions is intended to encourage a more favorable judicial reception and less "rigid" adherence to the traditional strict construction rule.

§ 13.1-650. Expense of issue.

A provision of this type has not been thought necessary to the Virginia Stock Act in past years, but similar provisions appear in numerous state corporate codes.

§ 13.1-651. Shareholders' preemptive rights.

This section follows the "opt out" approach of Code § 13.1-23, rather than the "opt in" approach of Model Act § 6.30. Thus, unless preemptive rights are abolished or altered in the articles, the rights as set forth in this section exist. It is important to note that the right conferred by this section can be expanded if provided for in the articles.

Under the Model Act, there are no preemptive rights unless provided in the articles. The Model Act contains a substantive set of rights, however, which exist if so provided in the articles. This section adopts substantially those same substantive rights, but in the "opt out" form. The rights exist unless limited or denied in the articles. The Model Act contains an exemption from preemptive rights for shares issued within six months of the date of incorporation. This exemption is not adopted in the Commission Draft. This exemption would allow a corporation to raise capital early in its existence without regard to any preemptive right of the holders of previously issued shares. However, it may be those same initial shareholders who most need the advantage of preemptive rights.

This section contains a much expanded statement of the procedure for waiving or exercising the right than exists in the present statute.

§ 13.1-652. Corporation's acquisition of its own shares.

The major differences between the share acquisition provisions of the Commission Draft and those of the Virginia Code result from the elimination in the Commission Draft of the concepts of stated capital, treasury shares and cancellation of shares. Section 13.1-652 provides that reacquired shares constitute authorized but unissued shares unless the articles of incorporation prevent reissue, in which case the number of authorized shares is reduced by the number of shares reacquired. The accounting implications of the proposed procedure should be considered.

This section deletes all references to stated capital and requires the filing of articles of amendment to record the reduction of authorized shares. Code § 13.1-63 is concerned primarily with cancellation of shares and reduction in stated capital. It requires the filing of articles of reduction to record the amount by which stated capital is to be reduced upon cancellation of the shares. Since the concept of stated capital is eliminated in the Commission Draft, the provisions for cancellation of shares as set forth in Code §§ 13.1-63, 65 and 66 are meaningless. The consequence of those sections was to reduce stated capital, and if the articles so provided, reduce the number of authorized shares. Model Act § 6.31, on which this section is based, makes reference to cancellation of reacquired shares if the articles prohibit reissuance of reacquired shares. But there is no legal significance under the Model Act or the Commitssion Draft to the term cancellation.

§ 13.1-653. Distributions to shareholders.

This section, which adopts Model Act § 6.40 without change, is substantially different from present Virginia law. The elimination of par value, stated capital and surplus requires that a different standard for testing distributions be applied than is presently used. The Official Comment to Model Act § 6.40 is extremely important in understanding and applying this section.

Commission Draft section 13.1-603 defines "distribution" as any transfer of money, property (except the corporation's own shares) or incurrence of indebtedness to or for the benefit of shareholders in respect of the corporation's shares. The Official Comment to Model Act § 6.40 indicates that the transactions included in this definition are dividends, acquisitions of shares, and distributions in voluntary or involuntary liquidation. The currency with which the distribution may be made includes both money or property and debt.

Section 13.1-653C provides that a distribution may be made in any amount so long as after giving effect to it the corporation is solvent in both the equity and balance sheet sense. Subsection C 2, in establishing the balance sheet solvency test treats the sums payable to satisfy the liquidation preference of any shares like a liability. After a distribution, remaining assets must at least equal liabilities plus the amount of the liquidation preferences. The equity insolvency test requires subjective judgments as to liquidity and the future course of a corporation's business. These judgments, though obviously quite difficult to make, are not significantly different from the tests required under present Code § 13.1-62. The Official Comment to Model Act § 6.40 discusses the equity solvency test in some detail and provides a helpful framework within which these judgments can be made.

Section 13.1-652D provides that the equity insolvency test and the balance sheet solvency determination may be made on the basis of any reasonable accounting practices and principles, fair valuation or any other method reasonable in the circumstances. This clearly gives the directors broad latitude, including the latitude in appropriate circumstances to make both balance sheet and equity insolvency determinations based on "fair value" valuations, though such valuations might not be acceptable under generally acceptable accounting principles. Commission Draft section 13.1-690 establishes the standard of conduct which the directors must exercise in making the solvency determinations and section 13.1-692 provides explicit liability for a director voting for an unlawful distribution unless that standard of conduct is met.

The Official Comment to Model Act § 6.40 indicates that the drafters were unwilling to adopt a statutory enactment of generally accepted accounting principles. Section 13.1-653D imposes only a statutory standard of

reasonableness, and authorizes use of any method of balance sheet analysis which satisfies that standard. While this approach allows directors to apply a broad range of accounting methods, it does not establish an explicit safe harbor from liability for distributions made on the basis of any particular system of accounting. To the extent the Commission Draft can be said to provide a safe harbor, it does so through the protection afforded directors who meet the standards of section 13.1-690B.

By the terms of section 13.1-653E 1 the legality of a distribution by reacquisition of shares is measured at the earlier of (i) the date the property or money is transferred or debt is incurred or (ii) the shareholder ceases to be a shareholder with respect to the acquired shares. If payment for the shares is by promissory note, or some other form of installment purchase, the test is applied when the debt is incurred, not when the payment is made.

Model Act § 6.40, and this section, establish rules governing distributions only for corporate law purposes. As stated in the Official Comment to Model Act § 6.40, federal bankruptcy laws and state fraudulent conveyance laws are designed for different purposes, although both may treat the issue of insolvency. There is not necessarily consistency between the law as stated in this section or the explanation in the Official Comment to Model Act § 6.40 and the interpretations of insolvency or its consequences under the bankruptcy or fraudulent conveyance statutes.

Article 8

Shareholders

§ 13.1-654. Annual meeting.

The only significant difference between this section and present Virginia law is the codification in section 13.1-653C of the generally accepted principle that the failure of a corporation to hold an annual meeting in accordance with its bylaws will not affect the validity of any corporate action.

§ 13.1-655. Special meeting.

This section substantially expands the present Virginia statute, Code § 13.1-25. For example, section 13.1-655A 2 requires that the shareholders demanding a special meeting of a closely-held corporation deliver to the secretary of the corporation one or more written demands setting forth the purposes of the special meeting. And by section 13.1-655E, only business within the purpose or purposes stated in the notice for special meetings may be transacted at such meeting. This latter requirement is a codification of the principle implied in Noremac v. Centre Hill Court, 164 Va. 151 (1935), and French v. Cumberland Bank & Trust Company, 194 Va. 475 (1953). Section 13.1-655B allows the articles of incorporation to increase or decrease the percentage of shareholders needed to demand a special meeting under subsection A 2.

Unless a different date has been fixed by the corporation, section 13.1-655C fixes the date the first shareholder signs a written demand as the record date for determining which shareholders are entitled to demand a special meeting. The provisions of section 13.1-655C fixing the record date for determining the shareholders entitled to demand a meeting are separate from the provisions of section 13.1-658C and 13.1-660 which determine the record date for determining the shareholders entitled to notice and to vote at a meeting.

Section 13.1-655A 2 raises the percentage of eligible votes necessary to demand a special meeting from ten percent as required by Code § 13.1-25 to twenty percent. This provision applies only to closely-held corporations (which represent the overwhelming number of domestic corporations), thereby allowing larger corporations to fix the percentage in their articles of incorporation or bylaws.

Among larger publicly-held corporations, there is increasing concern with the present statutory rule permitting a special meeting to be called by the holder of 10% or more of a corporation's shares, in that it allows a potential acquiror to demand a meeting after acquiring a relatively small percentage interest. It is generally thought that this statutory right cannot be altered by the articles of incorporation or bylaws so as to increase the required percentage ownership necessary to call a meeting. Wall Street advisers have urged some of Virginia's largest corporations to reincorporate elsewhere because of this

provision. Section 13.1-655 adopts the so-called "Delaware approach" to this problem. Under Delaware law a special meeting may be called only by the board or the individuals authorized to do so by the articles or bylaws (Del. Gen. Corp. Law § 211). Subsection A 1 of section 13.1-655 substantially tracks the Delaware language.

§ 13.1-656. Court-ordered meeting.

This section provides a remedy for shareholders if the corporation refuses or fails to hold a shareholders meeting as required by sections 13.1-654 or 13.1-655. The Official Comment to Model Act § 7.03, from which this provision is taken, makes clear that the court may exercise its discretion in determining whether or not to order a meeting held. The Official Comment also states that it is the shareholder who carries the burden of showing that he is entitled to the order.

Section 13.1-656 does not include a provision found in the Model Act permitting the court to fix the quorum requirements for a court-ordered meeting. The Official Comment to Model Act § 7.03 states that this provision was included in the Model Act to avoid the situation where a majority shareholder frustrates a court-ordered meeting by not attending and preventing the existence of a quorum. The policy reason for permitting a court to vary the normal quorum requirement in such circumstances is not clear, and the Commission Draft omits any such provision.

Insofar as concerns attorney's fees for a plaintiff proceeding under this section, the Commission Draft does not intend to alter the result in Reilly Mortgage Group, Inc. v. Mount Vernon S.&L. Ass'n., 568 F. Supp. 1067 (E.D. Va. 1983).

§ 13.1-657. Action without meeting.

The sentence concerning the withdrawal of consent reflects a position taken in the Official Comment to Model Act § 7.04, from which this section is derived. The addition of this statutory language eliminates confusion as to the time at which any action taken by unanimous written

consent is effective, and the consequence of the withdrawal of any consent prior to that time. The last sentence of subsection A, regarding the effective date of action taken by unanimous written consent, parallels section 13.1-685, and the commentary to that section is also applicable here.

As provided in section 13.1-657D, the Commission Draft requires that notice of proposed action by the shareholders be given to non-voting shareholders (as for example for mergers, sales of assets other than in the regular course of business, dissolution, and amendments to the articles of incorporation), and the written consents must recite that the notice was given to the non-voting shareholders at least 10 days before action is taken. The Virginia Code has no comparable provision, even though notice to non-voting stockholders is required in certain cases, e.g., Code § 13.1-70.

§ 13.1-658. Notice of meeting.

This section merely expands the provisions of Code § 13.1-26. It extends from 50 days to 60 days the maximum time period in advance of a meeting during which notice must be given, and adds dissolution to the list of transactions for which at least 25 days notice to shareholders must be given. Unless otherwise fixed by the corporation, the record date for determining which shareholders are entitled to notice of and to vote at the meeting is the close of business on the day before the "effective date" of the notice to shareholders. The "effective date" is defined in section 13.1-610C and is the date of mailing of the notice, consistent with Code § 13.1-26. Unless the bylaws require otherwise or unless a new record date is required, if a meeting is adjourned to a different date, time, or place, notice need not be given if the new date, time, or place was announced prior to adjournment.

Section 13.1-658B provides that unless the articles of incorporation require it, the notice of an annual meeting need not state the purpose for which the meeting was called. This provision is consistent with existing case law. See Miller v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, 187 Va. 889 (1948).

Section 13.1-658F carries forward the provisions of the last paragraph of Code § 13.1-26, added in 1984. This section relieves a corporation of the burden of giving notice to stockholders if annual reports and proxy statements for at least two consecutive annual meetings have been returned undeliverable. There is also an alternative test based on undeliverable dividend checks. This exemption from the notice requirements, which will primarily benefit larger, publicly-held corporations, corresponds to a provision in the federal proxy rules (Rule 14a-3) adopted by the Securities and Exchange Commission in 1983.

§ 13.1-659. Waiver of notice.

This section is consistent with the provisions of Code § 13.1-27. It requires that the waiver be delivered to the secretary of the corporation and it describes in more detail the effect of a shareholders attendance at a meeting. These provisions basically provide that attendance alone waives objection to lack of notice or improper subject for discussion, unless the shareholder specifically objects. Scott County Tobacco Warehouses, Inc. v. Harris 214 Va. 508 (1974) held that attendance and participation constituted a waiver of objection.

In certain situations (for example, a merger, the sale of the assets other than in the regular course of business, dissolution or amendment of the articles of incorporation) a waiver of notice, in order to be effective, must be obtained from both voting and non-voting shareholders, inasmuch as both types of shareholders are entitled to notice of meetings at which such specified actions are to be presented for approval.

§ 13.1-660. Record date.

The Official Comment to Model Act § 7.07, from which this section is taken, states, among other things, that a record date may not be fixed retroactively. This point is reflected in section 13.1-660A, whether the record date is established by the bylaws or by action of the board of directors. The Official Comment also points out that if neither the bylaws nor the board of directors fix a record date for a specific action, the section of the Act that

deals with that action itself fixes the record date (for example, section 13.1-658D).

§ 13.1-661. Shareholders list for meeting.

This section is, for the most part, a restatement of Code § 13.1-30. The requirement of the last sentence of section 13.1-661B, relating to the right to inspect the shareholders list of certain larger, publicly-held companies prior to a meeting does not apply to inspection rights during a meeting. The right to inspect is not the same as the right to "inspect and copy" under section 13.1-771, and the varying rights under these sections are independent of each other.

§ 13.1-662. Voting entitlement of shares.

Section 13.1-662 follows the language of Code § 13.1-32 insofar as it generally specifies that, unless the articles of incorporation otherwise provide, each outstanding share is entitled to one vote on each matter voted on at a shareholders' meeting. The extent to which, under present law, voting rights may be varied in the articles of incorporation is not clear. Fractional or multiple votes per share, or nonvoting shares, are often used and are clearly permissible. But the policy of the State Corporation Commission for many years has been to refuse to accept for filing provisions in articles providing for per capita voting, on the theory that voting rights of a particular class or series may not be varied within such class or series, even though authorized by the articles.

Recently, the Commission refused to accept for filing an amendment to articles of incorporation establishing differential voting rights within a class quite similar to those permitted by the Delaware Supreme Court in Providence & Worchester Co. v. Baker, 378 A.2d 121 (1977). Whether such an amendment would be authorized by section 13.1-662 is also unclear. In the Exposure Draft to the Revised Model Business Corporation Act, the Official Comment explicitly embraced the conclusion of the Providence & Worchester Co. decision. In the final version, the Official Comment to Model Act § 7.21 altogether omits reference to the concept of differential voting rights in general, and to the Providence & Worchester Co. decision in particular.

§ 13.1-663. Proxies.

Altnough there have been no reported Virginia cases on the point, at the present time Virginia would presumably follow tne common law rule that the death or incapacity of the appointing shareholder revokes a proxy. Section 13.1-663E modifies that rule and allows the corporation to accept the votes of the proxyholder until the appropriate corporate officer or agent receives notice of the shareholder's death or incapacity. As noted in the Official Comment to Model Act § 7.22, in view of the widespread dispersal of shareholders today it is not feasible for the corporation to learn of such events independent of notice. Accordingly the modification to the common-law rule seems appropriate. This section appears not to affect the validity of the proxy appointment or its manner of exercise as between the proxy and the personal representative of the decedent or incompetent. This relationship would continue to be governed by the law of agency.

The Official Comment to Model Act § 7.22 notes that the general test adopted for irrevocable appointments of a proxy is the common law test that all appointments are revocable unless "coupled with an interest." The specific examples of appointments "coupled with an interest" that are provided in section 13.1-663D are not exhaustive and other arrangements may also meet the test.

§ 13.1-664. Shares held by nominees.

There are no provisions in the Virginia Code corresponding to section 13.1-664. This section recognizes tne common practice for shares to be held in street name and authorizes, but does not require, corporations to establish a procedure to facilitate direct communication between the corporation and the beneficial owner. The procedure adopted by the corporation is also discretionary for the shareholder (the nominee), who must elect to follow the procedure adopted by the corporation.

The definition of "shareholder" in section 13.1-603 includes beneficial owners to the extent they obtain the rights of shareholders pursuant to the procedure authorized by this section.

§ 13.1-665. Corporation's acceptance of votes.

The substance of section 13.1-665 is new, except for subsection C which is taken from Code § 13.1-32. The only similarity to any other existing provisions of the Virginia Code is the establishment of presumptions of validity of proxies in certain situations. Code § 13.1-32 establishes a presumption of validity for proxies executed by another corporation, a partnership and fiduciaries and provides that the burden of proving invalidity shall be on the challenger.

This section does not place the burden of proving invalidity on the challenger as the Virginia Code does. Instead the presumption of validity may be conditioned, at the request of the corporation, upon presentation of evidence satisfactory to the corporation of matters such as fiduciary status. This approach is desirable since under section 13.1-665D the corporation may reject a vote of a proxy if the agent tabulating votes, acting in good faith, has reasonable doubt concerning the authority of a signatory. It is not unreasonable to reject a proxy's vote if the evidence which may be required by statute is requested and not provided. The Official Comment to Model Act § 7.24, from which this section is derived, states that in a proxy fight or other contested issue a more cautious attitude toward proxies may be adopted by a corporation in determining whether it has "reasonable doubt" concerning a proxy. The Official Comment also notes that Model Act § 7.24 does not address the question whether an action was properly or improperly taken or approved. This is ultimately a matter for judicial resolution through review of the results of an election in a suit to enjoin or compel corporate action. The Official Comment also observes that, similarly, Model Act § 7.24 does not address the liability of the proxy to the shareholder for exercising authority contrary to or beyond the autnority granted him. These matters are governed by the law of agency and not by this section.

The American Society of Corporate Secretaries has established principles for the acceptance of proxy appointments in routine elections in which there is no proxy contest. The Official Comment to Model Act § 7.24 sets forth a number of useful examples of the application of section 7.24 to specific fact situations based on these principles.

§ 13.1-666. Quorum and voting requirements for voting groups.

This section expands, and in certain respects changes, present law regarding quorum and voting requirements. Section 13.1-666A makes clear that different quorum counts may be necessary, depending on the matter under consideration. Thus, the articles might provide different quorums for different matters, for example, a majority for election of directors and two-thirds for merger. If a meeting were called to consider both matters and if 60% of the shares were represented, the meeting could proceed with the election of directors, but could not proceed to vote on the merger. Unless the articles otherwise provide, a majority of the shares must be represented to constitute a quorum. Special quorum and voting requirements for approval of conflict of interest transactions by members of the board of directors are provided in section 13.1-691.

Section 13.1-666B changes present Virginia law as stated in Louisa Oil Corp. v. Quigley, 217 Va. 898 (1977). That case held that the withdrawal of a majority shareholder from an annual shareholders meeting "broke" the quorum. This section overrules that holding and restores the common-law approach, which provides that once a share is represented for any purpose, it is deemed present for all purposes. This is different from the rule established for directors meetings, where a number of directors sufficient to constitute a quorum must be present at the time the action is taken. See Commission Draft section 13.1-688C.

Section 13.1-666C also changes present Virginia law. Under Virginia Code § 13.1-31, once a quorum is present the affirmative vote of a majority of the shares (or such larger number as the articles or statute may require) represented and entitled to vote is necessary for passage. Accordingly, both negative votes and abstentions work against passage. Section 13.1-665C provides that, absent class voting or a requirement in the articles or statute for a higher number of affirmative votes, a matter is passed if more votes are cast in favor of it than against it. The rule would thus be that passage requires a majority of the votes cast rather than a majority of the votes present. Consequently, abstentions would have no effect.

Shares owned by a shareholder who comes to the meeting to object on grounds of lack of notice may be

counted toward presence of a quorum. Attendance at a meeting, however, does not constitute a waiver of other objections to the meeting such as the lack of notice.

The articles of incorporation may increase quorum and voting requirements, and may decrease quorum (and, subject to certain limits, voting) requirements. Present Virginia law limits the power to reduce the quorum to a minimum of one-third. The Official Comment to Model Act § 7.25 states that this restriction was eliminated from the Model Act because it was thought unreasonably confining in certain situations, such as where a class of shares with preferential rights is given a limited right to vote that may be exercisable only rarely.

§ 13.1-667. Action by single and multiple voting groups.

This section employs the notion of a "voting group" which is defined as a group of shares which under the articles or statute are entitled to vote as a separate group on a particular matter. This concept is not found in the present statute. It avoids repetitive use of language in the statute describing the shares entitled to vote separately.

§ 13.1-668. Greater quorum or voting requirements.

Subsection A is consistent with existing law. Code § 13.1-33 allows a corporation to set a greater voting requirement in the articles; it does not refer to quorums. However, § 13.1-31 would allow a greater than majority quorum requirement. The Virginia Code and Commission Draft authorize these modifications only if they are contained in the articles of incorporation; they do not authorize them to be placed in the bylaws. Section 13.1-668B differs from Model Act § 7.27 on which it is based, by providing that any amendment to the articles to change the quorum or voting requirements (to increase or decrease them) if adopted at a shareholders meeting, must be adopted at a meeting held in compliance with the quorum or voting requirements then in effect. Model Act § 7.27 requires that the quorum and voting requirements applicable at the meeting called to consider the amendments be the quorum or voting requirements proposed to be adopted, if greater than those then in effect.

§ 13.1-669. Voting for directors; cumulative voting.

Sections 13.1-669A, B and C correspond with the provisions of Code § 13.1-32. The limitation of section 13.1-669D 1 is new to Virginia. It is intended as a means of alerting shareholders to the fact that votes may be cumulated. The 48 hour notice in section 13.1-669D 2 assures that other shareholders will have the opportunity before the vote is taken to consider how to cumulate their votes.

§ 13.1-670. Voting trusts.

Code § 13.1-34 provides that the voting trustee shall keep a record of the holders of voting trust certificates. Section 13.1-670 does not specifically require voting trust certificates, but specifically provides that the list of beneficial interests shall be prepared when the voting trust agreement is signed and shall be delivered to the corporation's principal office. This section is not intended to change the result in Thrasher v. Thrasher, 210 Va. 624 (1970), where a party to a voting trust agreement was held estopped from challenging the validity of a voting trust agreement on grounds that the technical requirements of Code § 13.1-34 had not been met by the corporation.

Code § 13.1-34 expressly subjects the agreement and list to the same inspection rights of shareholders as books and records generally. The Commission Draft relies upon section 13.1-661 to secure this right.

Section 13.1-670 permits extensions of a voting trust agreement beyond the initial 10-year term. This is a helpful addition to Virginia law.

§ 13.1-671. Voting agreements.

Section 13.1-671 corresponds to the last paragraph in Code § 13.1-34, though it specifically requires a written voting agreement while the current statute does not. The Official Comment to Model Act § 7.31, on which this section is based, states that "voting agreements" are not subject to the 10-year limitation applicable to voting trusts. The Official Comment also states that this section avoids the

result reached in Ringling Bros. Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441 (Del. 1947), when the court held that the appropriate remedy to enforce a pooling agreement was to refuse to permit any voting of the breaching party's shares.

§ 13.1-672. Procedure in derivative proceedings.

There is no provision in the Virginia Code comparable to this section. The Official Comment to Model Act § 7.40, from which this section is taken, states that § 7.40 is intended to deal with the procedural requirements applicable to derivative suits brought in state courts. Rule 23.1 of the Federal Rules of Civil Procedure governs the procedural requirements on derivative suits brought in federal courts. According to the Official Comment to Model Act § 7.40, the procedural requirements imposed by § 7.40 (insofar as those requirements are adopted in this section) are as follows:

(1) The plaintiff may be either a registered or beneficial owner of shares held by a nominee in his behalf. Existing Virginia law does not clearly address this issue.

(2) The plaintiff must have been an owner of shares at the time of the transaction in question. This point is presumably consistent with existing Virginia law, though there is no Virginia case clearly on point.

(3) Option holders and convertible debenture holders are not permitted to sue. There is no prior Virginia law on this point.

(4) There must be prior notice and demand on directors in most circumstances, i.e., unless "excused". This section is consistent with the present Virginia rule. E.g., Mount v. Radford Trust Co., 93 Va. 427, 431 (1896); Liggett v. Roanoke Water Co., 126 Va. 22 (1919); Reilly Mtg. Group, Inc. v. Mount Vernon Savings & Loan Ass'n, 568 F. Supp. 1067 (E.D. Va. 1983).

(5) There need be no prior notice to or demand on shareholders. To the extent Virginia law might be construed to require notice to or a demand on shareholders, e.g., Virginia Passenger & Power Co. v. Fisher, 104 Va. 121 (1905), this section eliminates any such requirement.

(6) A court may stay a derivative suit while the board of directors investigates the subject of the suit. This provision is consistent with, though it does not attempt to codify, the ruling in Abella v. Universal Leaf Tobacco Company, 546 F. Supp. 795 (E.D. Va. 1982), and is intended to preserve the right of the board of directors to consider whether or not to seek to enforce on its own the corporation's claim.

(7) Plaintiffs are not required to post bond as security for expenses. Though this rule is not explicitly stated in the statute, the Official Comment to Model Act. § 7.40 states that this is the effect of the statute inasmuch as an earlier Model Act requirement of security for expenses has been deleted.

(8) Settlement or discontinuance of derivative litigation requires judicial approval. This point is presumably consistent with existing Virginia law, though there is no Virginia case clearly on point.

This section does not adopt a Model Act requirement that a complaint in a derivative suit must be verified. The Commission Draft allows such matters to be handled through other general procedural rules. Also, it does not adopt a Model Act provision dealing with the recovery of defendant's expenses from plaintiff in certain situations on the theory that this issue should be governed by the common law rules that have been developed by the courts.

The Commission Draft, in subsection D, permits a court to appoint a committee of two or more interested persons (not necessarily directors) to determine whether continuation of a particular derivative suit is in the best interests of the corporation. The statute does not address the substantive effect of a determination by any such

committee on the suit in question. This provision is in addition to, and not in lieu of, any other mechanisms established by the corporation to consider the same issue. For example, in Abella v. Universal Leaf Tobacco Co., 546 F. Supp. 495 (E.D. Va. 1982), the court concluded that Virginia law permits a disinterested committee of directors, appointed by the remaining directors, to determine whether or not a particular derivative action brought on behalf of the corporation should be terminated. Nothing in this section is intended to change the result reached in that case.

Article 9
Directors and Officers

§ 13.1-673. Requirement for and duties of board of directors.

This section differs from present Virginia law, as stated in Code § 13.1-35 in several respects. The more significant departure is the provision in section 13.1-673B to the effect that the business and affairs of the corporation be managed "under the direction of [the] board of directors." This change is intended, as stated in the Official Comment to Model Act § 8.01 on which it is based, to reflect the different role and function of the board in various corporations. In small closely-held corporations, the board may in fact "manage" the business. In larger publicly-held corporations, it is not feasible to impose an obligation on a board to "manage" the business. Typically the board would formulate management policy, and delegate management to the officers. In such corporations the business would more likely be managed "under the direction of" the board, rather than by the board.

§ 13.1-674. Qualification of directors.

This section broadens the present Virginia rule regarding qualifications of directors as contained in Code § 13.1-35. It allows the qualifications to be prescribed in either the articles or bylaws. Present law requires that qualifications be stated in the articles. However, given the different procedures for amending the two documents, careful consideration should be given to the placement of any provision regarding director qualifications. The bylaws, absent a special provision, may be amended by the directors; any substantive amendment to the articles requires approval of both the directors and shareholders entitled to vote.

§ 13.1-675. Number and election of directors.

Regarding subsection C, the Official Comment to Model Act § 8.03, on which this section is based, states

> The limitations on the authority of the board of directors set forth in this section are substantive restrictions that may not be changed by provisions in articles of incorporation or bylaws. For example, a general provision in bylaws granting the board of directors authority to amend bylaws does not authorize a board of directors, after shares are issued, to change the limits of a variable-range board established by the bylaws.

Section 13.1-675E adds protection for an individual elected to a position on the board without his or her consent. Such an individual must be notified of the pending election. If the individual does not wish to serve, but is nevertheless designated or elected, he or she should resign as provided in section 13.1-679.

§ 13.1-676. Election of directors by certain classes of shareholders.

This section is substantially similar to Code § 13.1-37. The Official Comment to Model Act § 8.04, on which this section is based, points out that a class (or classes) of shares entitled to elect separately one or more directors constitutes a separate voting group for purposes of the election of directors, and that directors are elected within each voting group by a plurality of votes. Under section 13.1-666, quorum and voting requirements must be separately met by each voting group.

§ 13.1-677. Terms of directors generally.

This section is substantially similar to Code § 13.1-36 except for section 13.1-677D. That provision changes present law by providing that the term of a director elected to fill a vacancy expires at the next shareholders meeting at which directors are elected. Under Code § 13.1-36 a director holds office for the term for which he is elected. Accordingly, under existing law a director elected by

the board of directors to fill a vacancy in the first of a three-year term would serve for the remainder of the term. Under the new provision the director would serve only until the next annual meeting. This permits a shareholder vote on a newly-appointed director at the earliest practical date.

§ 13.1-678. Staggered terms for directors.

The Official Comment to Model Act § 8.06, on which this section is based, points out that a staggered board of directors is sometimes used by incumbent management to make unwanted takeover attempts more difficult to effectuate. The Official Comment correctly notes that such a provision is unlikely to be effective alone to prevent hostile takeovers, inasmuch as the shareholders may in any event remove directors under Model Act § 8.08 (Commission Draft § 13.1-680) whether or not their terms are staggered. As a result, the Official Comment points out, a staggered board is likely to be used for this purpose only in conjunction with a provision that directors may be removed only for cause. Under present Virginia law (Code § 13.1-42), directors may be removed by the shareholders with or without cause. Thus, a staggered board is of dubious utility as an "anti-takeover" device for Virginia corporations at the present time. This section, taken together with Commission Draft § 13.1-680, which permits the articles of incorporation to provide that directors may be removed only with cause, may result in staggered board terms being used by more large, publicly-held Virginia corporations.

§ 13.1-679. Resignation of directors.

This new provision sets out the procedure whereby a director may resign. Vacancies created by a resignation effective at a later date may be filled before that date under Commission Draft § 13.1-682; however, the new director may not take office until the vacancy occurs.

§ 13.1-680. Removal of directors by shareholders.

Section 13.1-680A is significantly different from present Virginia law (Code § 13.1-42), which allows removal with or without cause. This provision, in combination with the section dealing with staggered terms for the board of directors (Commission Draft § 13.1-678), may provide an additional "anti-takeover" defense for larger, publicly-held Virginia corporations not heretofore available. There seems to be no reason why "cause" could not be defined in the articles of incorporation, a practice not uncommon in other states.

The Virginia Supreme Court has held that the present removal authority of Code § 13.1-42 is not inhibited by Code § 13.1-36. Scott County Tobacco Whses. v. Harris, 214 Va. 508 (1974).

This section also should be considered in tandem with section 13.1-655 (Special meetings). That section permits, in the case of larger corporations, a call for a special meeting of shareholders to be made only as provided by the articles of incorporation or bylaws, rather than upon request of 10% of the shares as is provided for in present Code § 13.1-25.

§ 13.1-681. Judicial review of elections.

The Virginia Supreme Court has stated that a predecessor of this section was intended to provide more speedy relief than could often be obtained through common law proceedings. Trial judges must be allowed wide discretion for they are expressly required to "proceed in a summary way." They may and ought to be governed by equitable principles and should deal with cases arising under the statute in accordance with substantial right and justice, but they must not be bound down to any hard and fast legal or equitable rules. Pierce Oil Corp. v. Voran, 136 Va. 416 (1923).

§ 13.1-682. Vacancy on board of directors.

Section 13.1-682A, and Model Act § 8.10 from which it is derived, authorize either the board or the shareholders to fill vacancies; and they give neither group a preference over the other in this regard. The provision of this section allowing the board to fill vacancies is advantageous for large corporations, because of the expense of calling a shareholders meeting. For the closely held corporation, it may be equally convenient for either the board or the shareholders to meet and fill a vacancy. The usual practical constraint on the board if it fills a vacancy is that if the shareholders disapprove of the director selected by a board, the shareholders can remove the director.

If the statute or articles of incorporation were to allow removal only for cause, the effect of this provision must be carefully considered since the director elected by the remaining directors could be removed only for cause.

§ 13.1-683. Compensation of directors.

Code § 13.1-35 provides that any limitation on the power of the board of directors to fix the compensation of directors must be set out in the articles of incorporation. This section permits such a limitation to be fixed either in the articles or the bylaws.

§ 13.1-684. Meetings of board of directors.

The elimination of a statutory requirement for a "written record" of the action taken at a meeting does not lessen the desirability of maintaining accurate and complete minutes of all meetings, whether held in person or by means of special communications facilities.

§ 13.1-685. Action without meeting of board of directors.

Section 13.1-685B expressly allows the action taken by written consent to be effective either on the date the last director signs or, if otherwise stated in the consent, at some other date. Where the effective date provided in the consent is to be a date earlier than the date on which the last director signs--for example, a date by which a majority have signed, the date of each directors' signature must be stated.

This section allows any action, controversial or not, to be taken by unanimous written consent. The Official Comment to Model Act § 8.21, on which this section is based, states that consents may be useful for non-controversial matters requiring prompt resolution. That statement ought not be read as a presumption that good corporate practice requires that significant matters not be acted on by unanimous consent.

§ 13.1-686. Notice of directors' meetings.

This section is similar to Code § 13.1-41, with minor changes. It includes the articles of incorporation as a document, along with the bylaws and resolutions, which may contain the notice provision for regular or special meetings.

§ 13.1-687. Waiver of notice by director.

The provisions of section 13.1-687 are substantially in accord, though not identical with, existing Virginia law. Code § 13.1-27 deals with waivers of notice for both meetings of shareholders and directors. Under the Commission Draft, waivers of notice by shareholders are treated in § 13.1-659; waivers of notice by directors are treated in this section. The Official Comment to Model Act § 7.06, from which section 13.1-659 is taken, states that the waiver rules for shareholders differ in some respects from the waiver rules for directors inasmuch as a

waiver is inferred if a director acquiesces in the action taken at a meeting even if he raised a technical objection to the notice of meeting at the outset.

Code § 13.1-27 does not expressly provide that voting or assenting to action taken at the meeting of directors constitutes a waiver by a director who has objected to holding of the meeting. Under case law in Virginia, notice was held to have been waived by shareholders who did not object to notice at the time and who participated in and voted at the meeting. Scott County Tobacco Whses. v. Harris, 214 Va. 508 (1974). Commission Draft section 13.1-687, and Model Act § 8.23 from which it is derived, provide that a director who votes for or assents to any action taken at the meeting, no matter whether the action is substantive, waives his objections.

The Official Comment to Model Act § 8.23 states that that provision is intended to be liberally construed in favor of continuing with the meeting despite technical objections. On the tacit assumption that preparation for a meeting is not a major concern, the Official Comment to § 8.23 states in part that "[i]f a director actually appears at the meeting he has probably had notice of it and generally should not be able to raise a technical objection that he was not given notice." The Comment goes on as follows: "In cases where actual prejudice occurs because of the lack of notice, as may be indicated by the absence of one or more other directors, a director must call attention to the defect at the outset of the meeting or promptly upon his arrival. That director, or a director who did not receive notice and was not present at the meeting, may then attack the validity of the action taken for want of notice" (emphasis added). It is not clear from the statute, however, that a director who appears and objects has only a "technicality" to complain of and that a showing of "actual prejudice" is a precondition to an objection. Objection to holding the meeting or transacting business ought to be legally operative, without any showing of prejudice.

Code § 13.1-27 states that a waiver of notice has the same legal effect as the giving of

proper notice. It makes clear that the waiver cures the defect and thus binds not only that director, but also any third party seeking to challenge the technical sufficiency of the notice by claiming through that director. Section 13.1-687 leaves this conclusion to inference.

§ 13.1-688. Quorum and voting by directors.

Section 13.1-688C expressly requires in the case of a meeting of directors (contrary to the rule for shareholders meetings as provided for in section 13.1-666B) that a quorum not only be present at the outset of a meeting, but be present when any action is taken, even if the absence of a quorum has not been brought to the attention of the chair. This is consistent with existing Virginia law. See Levisa Oil Corp. v. Quigley, 217 Va. 898 (1977) (case concerns the quorum requirement for a shareholders meeting.)

Under Code § 13.1-44 a director of a corporation whose dissent is not duly preserved is "presumed" to have assented to an action taken while he was present. Under section 13.1-688D, such a director is "deemed" to have assented.

Section 13.1-688C establishes the rule for counting the votes necessary for passage of matters at directors meetings. The affirmative vote of a majority of directors present, unless the articles or bylaws require a greater vote, is necessary for passage. Thus, a dissent or an abstention work equally against passage. Code § 13.1-39 is to the same effect. Section 13.1-666C establishes a different rule for voting at shareholders meetings. Under that section, a measure passes if more votes are cast in favor of it than are cast against it - i.e., approval requires a majority of the votes cast, not a majority of the votes present.

Under Code § 13.1-44, a director is presumed to have assented unless his dissent is entered into the minutes or a written dissent is filed. In either way, the director's identity is disclosed. A director abstaining is presumed to have assented. Thus, under present law, a record of the number of directors

present and the number of votes in favor of and opposed to the proposition, coupled with any notices of dissent, would be sufficient to establish who assented to a particular action. Section 13.1-688D does not require any notice of dissent. Section 13.1-688D may place more importance on the manner by which votes are recorded in the corporate records.

§ 13.1-689. Committees.

Section 13.1-689 eliminates the distinctive requirements for the creation of an executive committee as set forth in Code § 13.1-40. Section 13.1-689D also contains a more complete list of transactions which a committee may not approve than is provided in Code § 13.1-40.

As stated in section 13.1-689C, the provisions of sections 13.1-684 through 13.1-688 apply to committees, their meetings and actions.

Section 13.1-689A makes clear that membership on board committees is limited to members of the board of directors. An exception to this general rule is provided for in section 13.1-672D, pertaining to a court-appointed committee whose function is to consider and report to the court in the context of derivative litigation. The Official Comment to Model Act § 8.25, on which this section is based, does make clear that the board of directors or management, independently of this section, may establish "nonboard" committees composed of directors, employees, or others to deal with corporate powers not required to be exercised by the board of directors.

Section 13.1-689E is an important addition to the Code. The Official Comment to Model Act § 8.25 states that factors to be considered in determining whether a noncommittee director incurs liability for action taken by a committee will include

> "the care used in the delegation to and supervision over the committee, and the amount of knowledge regarding the particular matter which the noncommittee director has

> available to him. Care in delegation and supervision include appraisal of the capabilities and diligence of the committee directors in light of the subject and its relative importance and may be facilitated, in the usual case, by review of minutes and receipt of other reports concerning committee activities. The enumeration of these factors is intended to emphasize that directors may not abdicate their responsibilities and secure exoneration from liability simply by delegating authority to board committees. Rather, a director against whom liability is asserted based upon acts of a committee of which he is not a member avoids liability if the standards contained in section 8.30 [of the Model Act] are met."

§ 13.1-690. General standard of conduct for director.

This section, especially subsection A, is significantly different from the Model Act's treatment of the same subject in § 8.30. The Virginia Code contains no comparable provision. The entire issue of the appropriate standard of conduct for directors has been the subject of intense discussion and review in recent years.

The approach of the Model Act is to devise a reasonable man standard. The time and information constraints and the other exigencies faced by the directors whose judgment is being reviewed, and information regarding the make-up of the board and its role in corporate decision making, are built into the background against which the hypothetical reasonable man is to exercise his judgment. Against this background, the issue for the trier of fact is whether with respect to the issue in question the directors acted in good faith and with the degree of care that the ordinarily prudent person would have exercised.

The standard as stated in Model Act § 8.30 contains numerous elements: (i) good faith, (ii) the degree of care of an ordinarily prudent person, (iii) in a like position, (iv) under similiar circumstances. If rigorously applied the Model Act standard requires the trier of fact to construct the hypothetical reasonable man standard, building

into it all of the statutory elements. Then the trier must review the conduct in question against this standard to determine if the conduct meets the standard. Because of the numerous variables and the real, but difficult to quantify or articulate, pressures that existed at the time the judgment in question was made, the standard is difficult to construct and apply. It has several serious problems. The difficulty in construction and application may result in its not being rigorously used by the courts. Consequently, there is uncertainty as to its meaning and viability. It may be hard for the directors obligated by the standard to take it seriously if they cannot understand it or do not believe it will be employed. On the other hand, if it were rigorously applied, it is subject to the criticism that it holds directors to an unrealistic and very high standard, and that it demands too much of the director.

In contrast, Commission Draft section 13.1-690A contains two elements. The director must discharge his duties in accordance with his (i) good faith, (ii) business judgment of the best interest of the corporation. This simplicity has much to recommend it. The trier of fact need not measure the conduct in question against an idealized standard of what the reasonable man would have done. Instead, the trier will merely look to the good faith decision of the director of what is in the best interest of the corporation. This standard is not so high or uncertain as to cause concern among individuals as to whether they ought to serve.

The term "reasonable" is intentionally not used in the proposed standard. It thereby eliminates comparison of the conduct in question with the idealized standard and removes the question of how great a deviation from this idealized standard is acceptable. The question of whether the director is liable if he is "merely" negligent, as opposed to "grossly" negligent ought not be reached under this standard. Inevitably, however, the question of "reasonableness" will be reached. In determining whether a specific action of a director was his good faith judgment of the best interest of the corporation, the trier of fact will be inclined to decide if the act was reasonable under the circumstances. If so, and assuming good faith, the proposed standard will likely be satisfied. Application of the proposed standard would not require the construction of an elaborate idealized framework against which the conduct or judgment in question is measured.

Past versions of the Model Act standard have suffered from uncertainty as to whether it was applicable only to actions taken by the board or whether it also applied to the directors' failure to act, i.e., to their passive negligence or nonfeasance. Section 13.1-690 applies to conduct generally, including passive non-conduct. Subsection C reflects this by providing that a director does not become liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section. This provision is taken without change from Model Act § 8.30(d). The Official Comment to that provision of the Model Act states that this section will apply "whether or not affirmative action is in fact taken." According to the Official Comment, this includes (i) a "determination not to act", (ii) the act of delegating responsibility to others, (iii) "any conscious consideration of matters involving the affairs of the corporation", and (iv) "the determination by the board of directors of which matters to address and which not to address." "It does not apply," the Official Comment states, "only when the director has failed to consider taking action which under the circumstances he is obliged [by the standards of this section] to consider taking."

The remaining provisions of § 13.1-690 are similar to Model Act § 8.30. Subsection B addresses the right of a director to rely on others. A director relying on the specified information or individuals in making a judgment meets the standard unless he has knowledge or information making that reliance unwarranted. This subsection explicitly allows reliance unless there is knowledge making the reliance unwarranted. There appears to be no issue of whether the director should have known that reliance was unwarranted. Unless he has actual knowledge or information which calls into question the information or individual, he may rely.

§ 13.1-691. Director conflict of interests.

This section, like Code § 13.1-39.1 and many comparable statutes in other states, is merely a validating statute. If the terms of the statute are met, the contract or transaction is not void or voidable, but is a valid, binding obligation of the corporation. The statute does not directly address the question of a director's liability to the corporation for breach of fiduciary duty. An example is a transaction that was in fact unfair, because it conferred an excessive benefit on the officer or director, but was fully performed by the time the issue was raised. The corporation's right to recover the excess benefit would not

be governed by this section, but by common law of fiduciary duties. See generally, Larson, Corporate Conflicts of Interest Under the Virginia Stock Corporation Act, 9 U. Rich. L. Rev. 463 (1975); Pinto and Bulbulia, Statutory Responses to Interested Directors' Transactions, 53 Notre Dame L. Rev., 201 (1977).

Under some statutes, the question has arisen whether an unfair contract is enforceable if the board is aware of the unfairness but nevertheless approves the patently unfair contract. Some courts faced with this issue have read the fairness element into the disclosure and voting sections. See Remillard & Brick Co. v. Remillard Dondine Co., 109 Cal. App. 2d 405, 241 N.2d 66 (1952). This section does not adopt this approach.

§ 13.1-692. Liability for unlawful distributions.

Sections 13.1-692B 2 and C as drafted include notions contained in Code § 13.1-44. The Commission Draft provides that a director is liable to the corporation for an unlawful distribution, and may seek contribution from the shareholders in proportion to the amount of the unlawful distribution received by each. Inasmuch as the shareholders ought not have received the unlawful portion of the distribution in the first place, there is little harm in causing them to disgorge it. Indeed, allowing them to retain an unlawful distribution provides them with a windfall to which they are not entitled. All shareholders would be liable to contribute the unlawful portion of the distribution, regardless whether or not they were aware of the illegality. Model Act § 8.33(b)(2) would limit this right of contribution to the shareholders who knew that the distribution was unlawful. As drafted, the section eliminates the difficult issue of proving whether the shareholder knew the distribution was unlawful.

The Official Comment to Model Act § 8.33 states that:

> Although no attempt has been made to work out in detail in the Model Act the relationship between this right of recoupment from shareholders and the right of contribution from assenting directors, it is expected that a court will equitably

apportion the obligations and benefits arising from the application of the principles set forth in this section.

§ 13.1-693. Required officers.

The Official Comment to Model Act § 8.40, on which this section is based, states

> The person who is designated by the bylaws or the board as responsible for maintaining minutes of meetings and authenticating records of the corporation thereby has authority to bind the corporation by his authentication under this section. This delegation of authority, traditionally vested in the corporate "secretary," allows third persons to rely on authenticated records without inquiring into their truth or accuracy.

Under this section, the office of "Treasurer" would no longer be a required office.

§ 13.1-694. Duties of officers.

The Official Comment to Model Act § 8.41, on which this section is based, points out that the statutory methods of investing officers with formal authority as set out in this section

> . . . do not exhaust the sources of an officer's actual or apparent authority. Many cases state that specific corporate officers, particularly the chief executive officer, may have implied authority merely by virtue of their positions. This authority which may overlap the express authority granted by the bylaws, generally has been viewed as extending only to ordinary business transactions, though some cases have recognized unusually broad implied authority of the chief executive officer or have created a presumption that

> broad authority, thereby placing on the corporation the burden of showing lack of authority. Corporate officers may also be vested with apparent (or ostensible) authority by reason of corporate conduct on which third persons reasonably rely.

In addition to express, implied, or apparent authority, a corporation is normally bound by unauthorized acts of officers if they are ratified by the board of directors. Generally, ratification extends only to acts that could have been authorized as an original matter. Ratification may itself be express or implied and may in some cases serve as the basis of apparent (or ostensible) authority.

§ 13.1-695. Resignation and removal of officers.

The Official Comment to Model Act § 8.43, on which this section is based, states that

> In part because of the unlimited power of removal, confirmed by section 8.43(b), a board of directors may grant an officer an employment contract that extends beyond the term of the board of directors. This type of contract is binding on the corporation even if the articles of incorporation or bylaws provide that officers are appointed for a term shorter than the period of the employment contract. If a later board of directors refuses to reappoint that person as an officer, he has the right to sue for damages but not for specific performance of his employment contract.

Article 10

Indemnification

§ 13.1-696. Definitions.

The Official Comment to Model Act § 8.50 provides helpful commentary on each of the statutory definitions set forth in this section.

§ 13.1-697. Authority to indemnify.

This section defines the outer limits for which statutorily authorized indemnification is permitted. It is important to recognize that, in certain situations, indemnification may be permitted pursuant to articles of incorporation, bylaws, or other means authorized by section 13.1-704, that may cover conduct for which indemnification would not be permitted under this section.

§ 13.1-698. Mandatory indemnification.

This section provides for mandatory indemnification for one who "entirely prevails" in the defense of any proceeding to which he was a party. The Model Act makes indemnification mandatory for one who is "wholly successful, on the merits or otherwise." The Official Comment to Model Act § 8.52 states:

> The word "wholly" is added to avoid the argument accepted in Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. 1974), that a defendant may be entitled to partial mandatory indemnification if he succeeded by plea bargaining or otherwise to obtain the dismissal of some but not all counts of an indictment. A defendant is "wholly successful" only if the entire proceeding is disposed of on a basis which involves a finding of nonliability.
>
> However, the language in earlier versions of the Model Act and in many other state statutes that the basis of success may be "on the merits or otherwise" is retained. While this standard may result in an occasional defendant becoming entitled to indemnification because of procedural

> defenses not related to the merits--e.g., the statute of limitations or disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits in order to establish eligibility for mandatory indemnification.

The Code Commission did not intend its change in language to alter the result obtained under the Model Act.

§ 13.1-699. Advance for expenses.

The Official Comment to Model Act § 8.53, from which this section is taken, notes that:

> Section 8.53 establishes a workable standard: indemnification is permitted if the facts then known to those making the determination do not establish that indemnification would be precluded under section 8.51. The directors (or special legal counsel) making the determination under section 8.53(c) would normally communicate with counsel and the person or persons monitoring the matter for the corporation in order to gain familiarity with the status of the proceeding and the relevant facts that have emerged, but it is not required (or expected) that any form of independent investigation be undertaken for for purposes of the determination. Thus, an advance may be made under section 8.53 unless it becomes clear, from the facts at hand, that indemnification under section 8.51 cannot be provided. As additional facts become known, a different determination may be required.

§ 13.1-700. Court-ordered indemnification.

The Official Statement to Model Act § 8.54, from which this section is taken, states that:

Application for indemnification under section 8.54 may be made either to the court in which the proceeding was heard or to another court of appropriate jurisdiction. For example, a defendant in a criminal action who has been convicted but believes that indemnification would be proper could apply either to the court which heard the criminal action or bring an action against the corporation in another court. A decision by the board of directors not to oppose the request for indemnification is governed by the general standards of conduct found in section 8.30. Even if the corporation decided not to oppose the request, the court must satisfy itself that the person seeking indemnification is properly entitled to it.

§ 13.1-701. Determination and authorization of indemnification.

The Official Comment to Model Act § 8.55, from which this section is taken, states that:

Section 8.55 provides the method for determining whether a corporation should voluntarily indemnify directors under section 8.51. In this section a distinction is made between a "determination" and an "authorization." A "determination" involves a decision whether under the circumstances the person seeking indemnification has met the requisite standard of conduct under section 8.51 and is therefore eligible for indemnification. This decision may be made by the persons or groups described in section 8.55(b). In addition, after a favorable "determination" is made, the corporation must "authorize" indemnification; this includes a review of the reasonableness of the expenses, the financial ability of the corporation to make the payment, and the judgment whether limited financial resources should be devoted to this or some other use by the

corporation. Section 8.55(c) provides that "authorization" of indemnification may be made only by the board of directors, by a committee of the board, or by the shareholders. While special legal counsel may make the "determination" of eligibility for indemnification, he may not "authorize" the indemnification.

§ 13.1-702. Indemnification of officers, employees and agents.

The effect of this section is to provide mandatory and statutorily authorized indemnification to nondirector officers to the same extent as granted to directors.

§ 13.1-703. Insurance.

The Official Comment to Model Act § 8.57 notes that while insurance may provide a useful supplement to the rights of indemnification existing under statute or by other authorization, insurance typically does not cover events such as those involving "self-dealing, bad faith, knowing violations of the securities acts, or other willful misconduct."

§ 13.1-704. Application of article.

Numerous courts have upheld indemnity commitments based upon non-statutory sources, e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 580 F.2d 1222, 1227 (4th Cir. 1978). Many existing Virginia corporations currently commit themselves, in one manner or another, to provide indemnity to the fullest extent permitted by applicable law. Such provisions should be given the same force and effect under this section as under existing Virginia law.

Article 11

Amendment of Articles of Incorporation and Bylaws

§ 13.1-705. Authority to amend articles of incorporation.

Under subsection 13.1-705A, the sole test for the validity of an amendment is whether the provision could lawfully have been included in, or omitted from, original articles as of the effective date of the amendment. Older Virginia case law was to the same effect. News-Register Co. v. Rockingham Pub. Co., 118 Va. 140 (1915).

Subsection 13.1-705B states explicitly the policy of existing Virginia law. O'Brien v. Socony Mobil Oil Corp., 207 Va. 707, 719 (1967). The Official Comment to Model Act § 10.01, from which this section is taken, notes that a long list of permissible amendments contained in earlier versions of the Model Act (and in Code § 13.1-55) has been omitted as "prolix and unnecessary to carry out the policies of the section."

The Official Comment points out that the otherwise broad power of amendment may not be used to impose share transfer restrictions on previously issued shares without the consent of the holder.

§ 13.1-706. Amendment of articles of incorporation by directors.

This statute enables the board of directors to adopt certain routine or housekeeping amendments to a charter without shareholder action. Similar action may be taken by the board, without shareholder action, in restating the articles of incorporation pursuant to section 13.1-712, in creating a series of shares pursuant to authority already granted in the articles under section 13.1-639, and in cancelling reacquired shares if the articles provide they are not to be reissued, under section 13.1-652. Section 13.1-706(3) permits a stock split into a greater number of shares without shareholder approval, but because of the potential for abuse by majority shareholders, not a "reverse" stock split.

§ 13.1-707. Amendment of articles of incorporation by directors and shareholders.

This statute retains the current Virginia law requiring approval of amendments by more than two-thirds of all votes entitled to be cast by a voting group; however, the statute allows articles of incorporation to provide for a greater or lesser vote of any voting group, but not less than a majority of the shares present or represented at a meeting. The statute has the effect of enabling Virginia corporations to amend their charters so as to permit major corporate actions (e.g., charter amendments, mergers, sale of assets, etc.) to be effected by a majority vote. Many states, including Delaware, permit such action by majority vote.

The statute also contains a new provision which enables the board of directors to avoid recommending an amendment to the shareholders because of conflict of interest or other special circumstances, which must be communicated to the shareholders.

The board of directors may also condition its submission of the proposed amendment on any basis (e.g., a requirement for a greater vote than ordinarily required for approval by the shareholders).

The corporation must notify each shareholder, whether or not the shareholder is entitled to vote, of the meeting to vote on a proposed amendment. This differs from present Virginia law, though it is consistent with the present rule in the case of mergers (Code § 13.1-70) and sales of assets (Code § 13.1-77).

§ 13.1-708. Voting on amendments by voting groups.

Section 13.1-708A 4 provides that any change in the rights of a class will trigger a class vote. Prior Virginia law required that the change be "adverse" to the class.

The Official Comment to Model Act § 10.04, on which this section is based, states that the application of subsections B and C may be illustrated by the following example:

> Assume there is a class of shares with preferential rights comprised of three series, each with different preferential dividend rights. A proposed amendment would reduce the rate of dividend applicable to the "Series A" shares and would change the dividend right of the "Series B" shares from a cumulative to a noncumulative right. The amendment would not affect the preferential dividend right of the "Series C" shares. Both Series A and B would be entitled to vote as separate voting groups on the proposed amendment; the holders of the Series C shares, not directly affected by the amendment, would not be entitled to vote at all unless the shares are otherwise voting shares under the articles of incorporation, in which case they would not vote as a separate voting group but in the voting group consisting of all shares with general voting rights under the articles of incorporation. If the proposed amendment would reduce the dividend right of Series A and change the dividend right of both Series B and C from a cumulative to a noncumulative right, the holders of Series A would be entitled to vote as a single voting group, and the holders of Series B and C would be required to vote together as a single, separate voting group.

The State Corporation Commission has taken the position that Code § 13.1-57(d) requires a class vote by the holders of preferred shares convertible into common stock on any charter amendment that would adversely affect the common stock. This position has been thought by some as an unduly strict reading of the statute, on the theory that the rights of holders of convertible shares are ordinarily sought to be protected through anti-dilution clauses or other contractual type charter provisions. Thus, the deletion of pre-emptive rights, for example, will require a class vote by holders of preferred shares that are convertible into common stock. See, Freeman, Business Associations, Fourteenth Annual Survey of Virginia Law, 56 Va. L. Rev. 136-37 (1970). This result is not changed by the Commission Draft.

§ 13.1-709. Amendment before issuance of shares.

This section provides added flexibility to present Virginia law insofar as the authorization of amendments by the incorporator(s) is concerned.

§ 13.1-710. Articles of amendment.

The information required to be set forth in articles of amendment is less detailed than under present Virginia law. Articles of amendment can either state the total vote in favor of and against the proposal or the undisputed vote in favor and a statement that the vote so reported is sufficient to adopt the amendment. The latter method will be helpful where precise votes may depend on the resolution of protracted disputes regarding proxies.

§ 13.1-711. Restated articles of incorporation.

This section allows the board to restate the corporation's articles without shareholder approval. Consistent with section 13.1-706, the board may make certain editorial changes but may not make substantive changes in the articles other than those authorized by section 13.1-706(1) - (4) without shareholder approval. The Official Comment to Model Act § 10.07 states that such a restatement also may eliminate, without shareholder approval, historical or obsolete provisions that have no present relevance. Because of concern over the vagueness of these terms, the Commission Draft does not authorize such changes.

§ 13.1-712. Amendment of articles of incorporation pursuant to reorganization.

This section sets forth a procedure whereby articles of incorporation may be amended without board or shareholder approval to carry out a plan of reorganization ordered or decreed by a court under federal statute.

The Official Comment to Model Act § 10.08, from which this section is taken, states that the section applies only to amendments in articles of incorporation approved

before the entry of a final decree in the reorganization plan.

§ 13.1-713. Effect of amendment of articles of incorporation.

This section is substantially the same as present statutory law.

In contrast to the Model Act, there is no provision in the Commission Draft, or in existing Virginia law, for dissenters' rights with respect to amendments to articles of incorporation.

§ 13.1-714. Amendment of bylaws by board of directors or shareholders.

This section does not change the result in Scott County Tobacco Whses., Inc. v. Harris, 214 Va. 508 (1974) or, insofar as it was dealing with Code § 13.1-24, the result in Levisa Oil Corp. v. Quigley, 217 Va. 898 (1977).

§ 13.1-715. Bylaw provisions increasing quorum or voting requirements for directors.

This statute recognizes the concept of a bylaw fixing a greater quorum or voting requirement for the board of directors. The Official Comment to Model Act § 10.22, from which this provision is taken, notes that supermajority provisions relating to the board of directors are usually part of control arrangements in closely-held corporations, and that this section is designed with this purpose in mind.

Article 12

Merger and Share Exchanges

§ 13.1-716. Merger.

The language of the Commission Draft is similar to the language of the existing statute.

Subsection B 3 is similar to Code § 13.1-68. The Official Comment to Model Act § 11.01, on which this section is based, states that "some of the holders of a single class of shares may be required to accept securities or property while the remaining holders may be compelled to accept different securities, property or cash." This is consistent with the State Corporation Commission's interpretation of the present Virginia statute. The Commission Draft, as does the Model Act and the present Virginia statute, authorizes an exchange of stock for cash, thus permitting "cash-out" mergers.

The language of section 13.1-716D, "whether or not either or both of such corporations are actually engaged in the transaction of such business", is designed to facilitate the use of a shell corporation to effect "phantom" mergers, a commonly used acquisition technique in both regulated and non-regulated industries.

Section 13.1-716 eliminates the concept of a consolidation. As noted in the Official Comment to the Model Act, it is nearly always advantageous for one of the merger partners to be the surviving corporation. If this is not desirable, a new corporation can be formed before the merger, and all other corporations can be merged into it.

§ 13.1-717. Share exchange.

The language of this section is very close to Code § 13.1-69.1. This section establishes a procedure, binding upon all shareholders of the acquired class or series, by which a direct exchange of shares for stock of the acquiring corporation, cash, or other consideration in corporate combinations may be effected under the same safeguards applicable to statutory mergers or similar transactions.

Historically, practitioners in Virginia have had to consider carefully the federal income tax consequences of a statutory share exchange. If "tax-free" treatment were desired, such a transaction would be treated as a "B" reorganization. But in a "B" reorganization, the acquiring corporation is not allowed to pay any consideration other than its voting stock. Thus, a conflict exists between applicable tax law and the present Virginia statute, which requires that dissenters be paid by the acquiring corporation. The dissenting stockholder provisions of the

Commission Draft appear to eliminate the issue, by permitting greater flexibility in structuring the source of such payments.

§ 13.1-718. Action on plan by shareholders.

Section 13.1-718E retains the "more than two-thirds" shareholder approval requirement of existing Virginia law unless a different requirement (which may not be less than a majority of shares voted) is fixed in the articles of incorporation.

Section 13.1-718G 3 makes an important change in existing law by providing that a merger transaction need not be submitted to a vote of the stockholders of the surviving corporation if, among other things, the number of voting or participating shares to be issued in the transaction will be fewer than 20% of the number already outstanding. Generally, this provision will come into play when one of the merging companies is significantly larger than the other, and the potential diluting effect of the transaction on stockholders of the larger, surviving corporation is not deemed significant enough to justify a shareholder vote. Moreover, if the increase is greater than 20%, a stockholder vote can be avoided by using the subsidiary merger technique. The Official Comment to Model Act § 11.09, on which this section is based, states that "this anomaly reflects a compromise among basically conflicting points of view."

Section 13.1-718B 1 expressly permits a merger or share exchange proposal to be put to a stockholder vote without any board recommendation in the event of conflict of interest or "other special circumstances." While this section would allow the plan to be put to the shareholders without a recommendation from the board, the requirement of adoption of the plan by the board as provided in Section 13.1-716 is unaffected.

Section 13.1-718C allows the board to condition its submission of the plan on any basis. For example, shareholder approval might be conditioned upon the plan's receiving a "majority" of the "minority's" votes. This is a procedure often used in conflict of interest merger proposals.

Historically, the State Corporation Commission has taken the position that the requirement of shareholder approval of a plan of merger or share exchange did not permit the directors to amend the plan after a shareholder vote. Indeed, it is understood that the Corporation Commission will not accept for filing a plan of merger or share exchange containing a provision for such board modification, regardless whether the provision has been used or not. Subsection I of the Commission Draft, taken from Delaware law, would change this position, thereby allowing greater flexibility for non-substantive modifications after a shareholder vote.

§ 13.1-719. Merger of subsidiary.

The Official Comment to Model Act § 11.04, on which this section is based, notes that in some situations courts have held that "short-form" mergers of the kind authorized by this section may constitute a breach of the duty owed by the parent corporation to the shareholders of the subsidiary, citing Roland International Corp. v. Najjer, 407 A.2d 1032 (Del. 1979). The continuing validity in Delaware of the Roland decision in light of the later decision in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) is not altogether clear.

§ 13.1-720. Articles of merger or share exchange.

This section also eliminates the requirement of Code § 13.1-72 that the articles, in the case of a merger, contain a statement, expressed in dollars, of the amount of stated capital of the surviving or new corporation on the effective date of the merger.

§ 13.1-721. Effect of merger or share exchange.

It is not clear whether Virginia courts would give full effect to the statement in the Official Comment to Model Act § 11.08, on which this section is based, to the effect that a merger is not a conveyance or transfer, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. For

example, in Metro Van & Storage Co. v. Commonwealth, 216 Va. 544 (1976), the court held that a statutory merger did not enable the surviving corporation to succeed to a certificate of need and convenience held by the merged corporation. That result seems questionable in light of the language of Code § 13.1-74(d), which confers all franchises, whether "public" or "private", on the surviving corporation. Section 13.1-721A is consistent with Code § 13.1-74(d). The result in Metro Van may be limited to the context of licenses and permits for which special qualifications are required by law.

§ 13.1-722. Merger or share exchange with foreign corporation.

The Official Comment to Model Act § 11.07, on which this section is based, points out that a plan of exchange, unlike a plan of merger, need not be authorized by the state of incorporation of an acquiring foreign corporation inasmuch as the transaction does not affect the separate corporate existence of the acquiring foreign corporation.

Section 13.1-722D carries forward a provision of Code § 13.1-71 which allows a corporation required by law to be a domestic corporation to be merged into a foreign corporation. After the merger, Virginia would deem the survivor to be a Virginia corporation, even though it may also be deemed to be a domestic corporation by some other state. This unusual situation of dual or multiple domestication is generally confined to public service companies doing business in two or more jurisdictions.

Article 13

Sale of Assets

§ 13.1-723. Sale of assets in regular course of business and mortgage of assets.

The Official Comment to Model Act § 12.01, on which this section is based, adopts a view that the words "substantially all" mean "nearly all", and that court

decisions adopting a narrower construction should not be viewed as illustrating the meaning of "all or substantially all" intended by the draftsmen of the Model Act.

Model Act § 12.01 permits a corporation to transfer all or substantially all its assets to a wholly-owned subsidiary without a shareholder vote. The Official Comment notes, however, that the provision in question may not be used as a device to avoid a vote of shareholders by a multiple-step transaction. The Model Act provision seems inconsistent with other procedures for the formation of a holding company organization, all of which involve a shareholder vote in one form or another. The Commission Draft does not follow the Model Act on this point.

§ 13.1-724. Sale of assets other than in regular course of business.

The approval of most sales of "all or substantially all" of a corporation's assets gives rise to dissenters' rights under Article 15. Sales that do not give rise to dissenters' rights include (1) sales pursuant to a court order and (2) sales that require all or substantially all of the net proceeds to be distributed to the shareholders in accordance with their respective interests within one year after the date of sale.

Subsection G is a new concept in Virginia law. The Official Comment to Model Act § 12.02 says that certain corporate divisions, often called "spin offs," "split offs" or "split ups", sometimes involve transactions that may be formally characterized as transactions covered by this section when in fact they are only a step in a corporate division that does not give rise to the problem of a major change in corporate direction and therefore does not need shareholder approval. See Siegal, When Corporations Divide: A Statutory and Financial Analysis, 79 Harv. L. Rev. 534 (1966).

Article 14

Affiliated Transactions

§ 13.1-725 - 728.

This entire Article is new to the Virginia Code and is not found in the Model Act. The Article generally addresses material transactions between a corporation and a potentially dominant shareholder. The source of the Article is the growing concern about the unfairness to minority shareholders that can result when a dominant shareholder proposes to engage in a significant transaction with the corporation where his control may enable him to cause the corporation to enter into the transaction even though it may not be in the best interest of the other shareholders. More specifically, this Article is designed to limit the likelihood that someone can acquire a controlling block of the outstanding shares and then use his voting power to squeeze out the remaining shareholders at a price that does not reflect the fair value of their shares.

In the last year or so, a number of states have adopted legislation governing affiliated transactions. This Article is most similar to legislation recently enacted in the State of Maryland. See Scriggins and Clark, Takeovers and the 1983 Maryland fair price legislation, 43 Md. L. Rev. 266-91 (1984). The following is a summary of the Article.

Except as otherwise provided in § 13.1-727, § 13.1-726 prohibits any Virginia corporation from entering into any material transaction that is not in its ordinary course of business with any holder of more than 10% of its outstanding voting shares (termed an "Interested Shareholder"), unless the transaction (an "Affiliated Transaction") is first approved by the holders of two-thirds of the remaining voting shares (the "Disinterested Shareholders").

Transactions covered by this requirement include (i) mergers, (ii) share exchanges, (iii) the disposition of corporate assets with a fair market value greater than 5% of the corporation's consolidated assets, (iv) the issuance of voting shares (except pursuant to a share dividend or similar proportionate distributions) with a fair market value greater than 5% of the corporation's consolidated assets, (v) the issuance of voting shares (except pursuant to a share dividend or similar proportionate distributions)

with a fair market value greater than 5% of the aggregate fair market value of all the corporation's outstanding voting shares, and (vi) any reclassification of securities or corporate reorganization that will have the effect of increasing by 5% or more the percentage of the corporation's outstanding voting shares held by any Interested Shareholder who has not been an Interested Shareholder for at least five years. Also subject to the two-thirds Disinterested Shareholder approval requirement is any plan or proposal for dissolution of the corporation proposed by or on behalf of any Interested Shareholder.

Exceptions to the special voting requirement include any transaction approved by a majority of the directors who are not affiliated with the Interested Shareholder (the "Disinterested Directors"). Also exempt are transactions with an Interested Shareholder who already holds 90% of the corporation's outstanding voting shares or who has held 80% of such shares for at least five years. The special voting requirement does not apply to (i) any corporation that has not had more than 300 shareholders of record at any time in the last three years, (ii) any investment company registered under the Investment Company Act of 1940, or (iii) any corporation that elects not to be covered by the legislation by adopting an amendment to its articles of incorporation so stating.

Perhaps the most important exception to the special voting requirement is the "fair price" exception set forth in § 13.1-727(6). In general that exception applies to any Affiliated Transaction in which the remaining holders of each class or series of voting shares of the corporation will receive "fair value" for their shares. For shares other than preferred shares fair value is defined as an amount at least equal to the greater of (i) the highest per share price paid by the Interested Shareholder in acquiring Voting Shares during the two-year period (the "Preannouncement Period") before the date of the first public announcement of the proposed Affiliated Transaction (the "Announcement Date") or, if greater, in the transaction in which it became an Interested Shareholder, (ii) the fair market value per share on the Announcement Date or, if greater, on the date on which such person became an Interested Shareholder (the "Determination Date"), or (iii) the fair market value calculated pursuant to clause (ii) above times the highest premium the Interested Shareholder has paid in acquiring any voting shares during the Preannouncement Period. The premium would be calculated by

dividing the highest per share price paid by the Interested Shareholder during the Preannouncement Period by the per share fair market value on the first date during such period that the Interested Shareholder acquired any voting shares. For example, if the acquisition by an Interested Shareholder was by cash purchases in open market transactions and the highest price paid during the previous two years was $35 per share, and assuming that the fair market values of voting shares on the date of the Interested Shareholder's first purchase, on the Determination Date and on the Announcement Date were $30, $32 and $40, respectively, the amount required to be paid to the shareholders would be the amount per share in cash equal to the highest of (i) $35 (the highest price paid), (ii) $40 (fair market value on the Announcement Date), and (iii) $46.67 (fair market value of $40 times a premium of 1.17, calculated by dividing $35 by $30). Accordingly, to comply with the minimum price criteria, the Interested Shareholder would be required to pay at least $46.67 per share in cash to holders of voting shares in the Affiliated Transaction.

If the proposed transaction does not involve any cash or other property being received by the other shareholders, such as a sale of assets or an issuance of the corporation's securities to an Interested Shareholder, then the fair price exception would not be available and the 2/3 vote of the Disinterested Shareholders would be required unless one of the other exemptions was applicable.

Article 15

Dissenters' Rights

Introductory Comment

The concept of dissenters' rights has heretofore been subject to two principal criticisms. Dissenters have complained that the exercise of their "appraisal rights" involved too many technicalities and too much delay, expense and risk. Corporate management has argued that traditional dissenters' rights failed to protect the corporation from suits by dissenters who either have a fanciful notion of their shares' value or who attack the transaction giving rise to dissenters' rights for purposes of obtaining a nuisance settlement.

This Article addresses both of these concerns. The judicial appraisal remedy is resorted to only after the parties have had a reasonable opportunity to settle their differences through a prior payment by the corporation and by a subsequent negotiation phase. Dissenters' rights are also made the exclusive remedy except where the corporation's action is unlawful or fraudulent with respect to the shareholder or the corporation.

Consistent with this new approach, the Article speaks of "dissenters' rights to obtain payment for their shares" instead of "appraisal rights."

§ 13.1-729. Definitions.

The definitions which are set forth in this section are applicable only to Article 15. The Virginia Code does not now contain a separate section for definitions relating to dissenters' rights.

The definition of "corporation" means the surviving corporation by merger and permits a plan of share exchange to place the responsibility for dissenters' rights on the acquiring corporation. The allocation of this responsibility can be important if the exchange is intended to qualify as a tax-free reorganization.

In order to permit beneficial shareholders to take advantage of dissenters' rights, the definition of "shareholder" includes a beneficial owner of shares held by a nominee. The Virginia Code makes dissenters' rights available only to shareholders of record, though courts in other states have interpreted similar statutes to make such rights available to both record and beneficial owners.

The definition of a "dissenter" is limited to a shareholder who has performed all of the conditions imposed upon him in order to obtain payment for his shares. Under this definition, a shareholder who fails to perform any of these conditions loses his status as a "dissenter".

The definition of "fair value" is generally consistent with prior Virginia law, see Lucas v. Pembroke Water Co., 205 Va. 84 (1964); however, the definition does provide for inclusion of appreciation or depreciation in anticipation of the corporate action where "exclusion would

be inequitable." The Official Comment to Model Act § 13.01 states that this language is intended to permit consideration of factors similar to those approved by the Supreme Court of Delaware in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

The definition of "interest" is intended to make interest computations more in line with economic reality. The rate of interest is likely to be substantially higher than that traditionally given by Virginia courts. See, Macrae, Dissenting Stockholders Rights in Virginia: Exclusivity of the Cash-out Remedy and Determination of "Fair Value", 12 U. Rich. L. Rev. 505, 511 (1978).

§ 13.1-730. Right to dissent.

This section generally follows the Model Act; however, consistent with present law it does not provide for dissenters' rights upon amendments to the articles of incorporation.

This section continues the "Wall Street exception" contained in Code § 13.1-75 for shares that are widely held and publicly traded and expands the exception to include transactions in which the shareholders receive cash rather than shares of a public company.

Section 13.1-730B makes the exercise of dissenters' rights an exclusive remedy, unless the action is "unlawful or fraudulent." The Official Comment to Model Act § 13.02 says that this formulation is based upon the New York approach, and is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York, and other states with regard to the effect of dissenter's rights or other remedies of dissident shareholders. This is believed to be consistent with current law. See Comment to Section 13.1-75 in Report by the Code Commission of Virginia for Revision of the Laws Relating to Corporations (Sept. 1955), p. 67 ("this plain and efficient remedy is intended to be exclusive as in Adams v. U.S. Distributing Corp., 184 Va. 134 (1945)"). See Macrae, Dissenting Stockholders Rights in Virginia: Exclusivity of the Cash-Out Remedy and Determination of "Fair Value", 12 U. Rich. L. Rev. 505 (1978).

§ 13.1-729. Dissent by nominees and beneficial owners.

This section changes existing Virginia law as stated in Code § 13.1-75 by permitting a beneficial owner to deal directly with the issuer, rather than through the record holder, and by requiring that a record stockholder dissent as to all shares beneficially owned by a single person.

The Official Comment to Model Act § 13.03 states that in practice, a broker's customer who receives a forwarded notice of proposed corporate action and who wishes to dissent may request the broker to supply him with the name of the record shareholder (which may be a "house nominee" or a nominee of the Depository Trust Company), and a form of consent signed by the record shareholder. From that point forward, the corporation must deal with the beneficial shareholder.

§ 13.1-732. Notice of dissenters' rights.

This section requires the corporation to notify shareholders of the existence of dissenters' rights before the vote is taken on the corporate action. This notice must state that the shareholders "are" or "may be" entitled to assert dissenters' rights.

Where certain actions giving rise to dissenters' rights are taken without a vote of the shareholders (e.g. a subsidiary is merged into a parent corporation), the notice is to be given during the ten-day period after the effectuation of that corporate action.

§ 13.1-733. Notice of intent to demand payment.

This section requires the shareholder who wishes to assert dissenter's rights to give notice of his intent to demand payment before the vote on the corporate action is taken. The Official Comment to Model Act § 13.21 explains that this is designed to enable other voters to determine how much of a cash payment may be required by the exercise of dissenters' rights and to limit the number of persons to whom the corporation must give further notice. Furthermore, the shareholder giving notice must not vote his shares in

favor of the proposed transaction. This section has no applicability to actions taken without a shareholder vote.

§ 13.1-734. Dissenters' notice.

Within ten days after effectuation of a corporate action giving rise to dissenters' rights, the corporation must send a notice to all shareholders who satisfied the requirements of section 13.1-733, or, in the case of a transaction not involving a vote by shareholders, to all persons who are eligible to dissent and demand payment. The purpose of the notice is to tell the dissenters' what they must do in order to take advantage of their right of dissent.

The corporation must specify the date of the first announcement to the news media or to shareholders of the terms of the proposed corporate transaction. Persons who became shareholders on or after the date are entitled to more limited dissenters' rights. The Official Comment to Model Act §[13.22 states that the date in question is the date wnen the terms of the transaction were announced and not an earlier date when mere consideration of the proposed transaction may have been announced.

§ 13.1-735. Duty to demand payment.

This section differs from Code § 13.1-75(c)(2) in providing that dissenting shareholders must surrender their share certificates to the corporation, and in requiring that the dissenters state whether the shares were acquired before or after the public became aware of the terms of the transaction giving rise to the dissenters' rights.

The demand for payment advises the corporation of the extent of the potential cash drain resulting from the exercise of dissenters' rights.

The Official Comment to Model Act § 13.23 states that the information required by this section will enable the corporation to detect acquisitions made for speculative or obstructive purposes and to exercise a right under section 13.1-738 to defer payment of compensation for those shares. A person who fails to certify whether he acquired

his shares before, on or after the announcement date does not lose his rights as a dissenter and may be treated by the corporation as an after-acquiring shareholder under § 13.1-738.

The Official Comment to Model Act § 13.23 also points out that the deposit of the share certificates is necessary to prevent dissenters from giving themselves an option to take payment if the market price of the shares goes down but to sell their shares on the open market if the price goes up.

§ 13.1-736. Share restrictions.

This section permits the corporation to restrict the transfer of uncertificated shares from the date a demand for payment is received. It thus provides for procedures analogous to those provided for in section 13.1-735 for dealing with certificated shares in the dissent process.

§ 13.1-737. Payment.

The requirement for a payment by the corporation prior to a final agreement on value is a major change in dissenters' rights from that existing under present Virginia law. The Official Comment to Model Act § 13.25, which is the source of this provision, states that this change is justified on the ground that, because the shareholder's rights are being terminated, he should have the immediate use of the monies which are undisputed.

The Official Comment to Model Act § 13.25 states that the information required by subsection B of this section is appropriate because it is at this point that the shareholder must decide whether or not to accept the corporation's payment in full satisfaction.

The Code Commission felt it appropriate to permit dissenters to bring suit to enforce this section wherever a dissenter resides. This provision should be considered together with section 13.1-740, which authorizes the corporation to bring suit to resolve all unsettled demands for payment under the letter provision, all dissenters whose demands remain unsettled are required to be made parties to the proceeding.

Matters pertaining to the assessment by the court of costs of proceedings brought under this section are addressed in section 13.1-741D.

§ 13.1-738. After-acquired shares.

This section provides for separate treatment of shares acquired on or after the date that there was a public announcement of the terms of the corporate action to the media or to the shareholders. That date is to be specified by the corporation in the notice sent pursuant to section 13.1-734. The Official Comment to Model Act § 13.27 states that if the right to unconditional immediate payment were granted as to all after-acquired shares, speculators and others might be tempted to buy shares merely for the purpose of dissenting. The Official Comment observes that since the function of dissenter's rights is to protect investors against unforeseen changes, there is no need to give equally favorable treatment to purchasers who knew or should have known about the proposed changes.

At the corporation's option, holders of shares acquired on or after this date are not entitled to immediate payment for such shares. Instead, the corporation may make an offer of payment which is conditioned on an agreement to accept the offer in full satisfaction of the claim.

§ 13.1-739. Procedure if shareholder dissatisfied with payment or offer.

This section encourages a negotiated settlement where a shareholder is dissatisfied with a payment or offer of payment. The shareholder must state in writing the amount he is willing to accept and cannot force a judicial remedy by remaining silent. The Official Comment to Model Act § 13.28 states that this is designed to permit the corporation to make an early decision on initiating appraisal proceedings. If the dissenter does not act in good faith in making the demand, he runs the risk of having court costs and counsel fees assessed against him under § 13.1-741.

§ 13.1-740. Court action.

This section retains the concept of judicial appraisal as the ultimate means of determining fair value. Contrary to present Virginia law, this section requires the corporation to pay the full amount of the dissenters' demand if the corporation fails to bring a timely court action.

§ 13.1-741. Court costs and counsel fees.

This section provides that the costs of the judicial appraisal are generally to be assessed against the corporation. However, the power of the court to assess costs where either the corporation or a dissenter is found not to have acted in good faith is intended to encourage settlement without the need for resort to a judicial remedy. The Code Commission substituted the phrase "did not act in good faith" for the Model Act language "acted arbitrarily, vexatiously, or not in good faith" on the grounds that the Model Act language is redundant.

The Code Commission eliminated the Model Act provision permitting the court to assess counsel's fees against the losing party in order to keep the provision consistent with Code §§ 13.1-75(f) and 13.1-78(f) on this point.

Article 16

Dissolution

§ 13.1-742. Dissolution by directors and shareholders.

The Commission Draft will add desired flexibility to current law. Under current law, the directors must recommend that the corporation be dissolved. There may be special situations where, although dissolution may be in the best interest of the corporation, the directors determine not to recommend dissolution. Under the Commission Draft, directors would be permitted to submit a proposal to dissolve the corporation to the shareholders without having recommended it. The ability of the directors to condition the submission of the proposal to dissolve the corporation will also provide flexibility. For example, if dissolution is desireable only if certain anticipated events occur, the disolution can now be made conditional upon those events actually taking place.

Section 13.1-741E does not require class voting on dissolution. It allows the directors or the articles to provide for separate approval of dissolution by various voting groups. This is, for the most part, consistent with current law. The Virginia Code does not mandate class voting, but permits the articles of incorporation to determine which shares have voting rights and, in the event class voting is required, establishes the minimum number of votes needed to approve the dissolution of a corporation.

§ 13.1-743. Articles of dissolution.

The Commission Draft and the Virginia Code differ significantly in terminology dealing with articles of dissolution. Under current law, the articles of dissolution are filed only after the dissolution of the corporation has been completed and all assets of the corporation have been distributed to its creditors and shareholders. In contrast, the Commission Draft follows the Model Act in providing that the articles of dissolution may be filed at any time after dissolution is authorized. Furthermore, unlike the current statute, the issuance by the State Corporation Commission of

a certificate of dissolution would not have the legal effect of terminating the existence of the corporation. In effect, articles of dissolution in the Commission Draft are substantially the same as a statement of intent to dissolve under the Virginia Code. The status of a corporation "in dissolution" is set forth in section 13.1-745.

This change of terminology is desirable to conform dissolution terminology in the Virginia Code to that used in the Model Act and in many other states.

§ 13.1-744. Revocation of dissolution.

This section is similar to Code § 13.1-86, but the articles of revocation of dissolution are less detailed then current requirements.

The Official Comment to Model Act § 14.04, from which this section is taken, notes that the effect of articles of revocation of dissolution is to eliminate the requirement that the corporation cease to conduct its business except as part of the winding-up process and permit it to resume its business without limitation and as if dissolution had never occurred.

§ 13.1-745. Effect of dissolution.

In the Model Act and the Commission Draft, a corporation that has "dissolved" is limited to liquidating its assets and winding up its business. By contrast, Code § 13.1-90 uses the certificate of dissolution as the document terminating corporate existence.

§ 13.1-746. Known claims against dissolved corporation.

The concepts embodied in this section are new to Virginia law. This section establishes a mechanism to permit a corporation to resolve known claims prior to terminating its corporate existence. Changes from the Model Act have been made in the Commission Draft to prevent a dissolving corporation from using this statute to avoid legitimate claims. Subsection (d), which is not found in

the Model Act, ensures that a corporation will not be able to use dissolution to force a creditor to accept prepayment of long-term debt.

A section in the Model Act that permits a dissolving corporation to cut off "unkown" claims by publication has not been adopted in the Commission Draft. Substantial questions have been raised about the implication of such a statutory provision.

§ 13.1-747. Grounds for judicial dissolution.

The Commission Draft does not affect the outcome of most case law decided under corresponding sections of the Virginia Code. See Baylor v. Beverly Book Co., Inc., 216 Va. 22 (1975); White v. Perkins, 213 Va. 129 (1972); Wometco Enterprises, Inc. v. Norfolk Coca-Cola Bottling Works, Inc., 528 F.2d 1128 (4th Cir. 1976).

The provision in subsection A1a allowing dissolution to be granted when "the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock" might, however, affect the outcome of cases similar to Louis Adelman Associates, Inc. v. Goldsten, 209 Va. 731 (1969), in which the court declined to grant dissolution because no irreparable injury had been established.

The Commission Draft liberalizes somewhat the provisions on involuntary dissolution. By reducing the degree of harm that must be shown by a shareholder, the Commission Draft makes it easier for a disgruntled shareholder to "cash out" his interest in the corporation.

§ 13.1-748. Receivership or custodianship.

The Commission Draft will not affect case law which holds that a receiver appointed pursuant to statutory dissolution provisions is a receiver for the corporation and not for the shareholders. Ashburn v. Commonwealth, 199 Va. 747 (1958).

§ 13.1-749. Decree of dissolution.

This provision is based on Model Act § 14.33 except that the Commission Draft provides for the delivery of the decree of dissolution to the State Corporation Commission and directs the State Corporation Commission to enter an order of involuntary dissolution upon receipt of the decree.

§ 13.1-750. Articles of termination of corporate existence.

This section introduces new terminology, not used in either the Model Act or the Virginia Code. Present Virginia law is helpful in establishing a formal procedure for both commencing and ending the dissolution process. For no apparent reason, the Model Act provides for commencement of the dissolution process (by filing articles of dissolution) but does not provide any formal step to evidence the end of the process. In the Commission Draft, the articles of dissolution and accompanying certificate of dissolution, mark the commencement of the dissolution process. Termination of the process occurs when articles of "termination of corporate existence" are filed and a certificate of "termination of corporate existence" is issued. The new terminology is necessary in order to conform the definitions of "dissolution" and "articles of dissolution" in the Commission Draft to the Model Act definitions.

§ 13.1-751. Termination of corporate existence by incorporators or initial directors.

The Official Comment to Model Act § 14.01 suggests that this provision is intended to provide a simple method of voluntary dissolution for a corporation and is most likely to be used when the reasons for the creation of the corporation have been completely realized or will never come to fruition.

The Commission Draft would introduce a new concept into Virginia law by providing that a corporation may be dissolved without shareholder action if either shares have not been issued or the corporation has not commenced business. Present Virginia law requires tnat both conditions be satisfied. In the event shares have been

issued, dissolution may also be accomplished by the unanimous consent of the shareholders.

Consistent with the present Virginia Code, the Commission Draft does not define when business has commenced. Because this determination is an issue of fact, it can only be made on a case by case basis.

§ 13.1-752. Automatic termination of corporate existence.

Inasmuch as the language of Code § 13.1-91 is carried forward in this section without substantive change, the result in Moore v. Occupational Safety & Health Review Comm'n, 591 F.2d 991 (4th Cir. 1979) is equally applicable under the Commission Draft. See generally, Gusky, Dissolution, Forfeitures, and Liquidation of Virginia Corporations, 12 U. Rich. L. Rev. 333 (1978).

§ 13.1-753. Involuntary termination of corporate existence.

The section varies from the Model Act to reflect the unique role of the State Corporation Commission in Virginia. The reference to the rule and show cause procedure before the State Corporation Commission makes available an established system of procedure.

Likewise, the question of maintenance of registered agent and office "as required by law" seems easily within the State Corporation Commission's competence to determine, even without the aid of excessive elaboration and quantification of the kind offered in Model Act § 14.20.

This provision would not change the result in Croatan Books, Inc. v. Virginia, 574 F. Supp. 880 (E.D. Va. 1983).

§ 13.1-754. Reinstatement of a corporation that has ceased to exist.

The Commission Draft provision on reinstatement applies to corporations dissolved both voluntarily and involuntarily.

The Commission Draft follows the Virginia Code in specifically providing that "reinstatement shall have no effect on any question of personal liability of the directors, officers or agents in respect of the period between termination of corporate existence and reinstatement." While it is doubtful whether the absence of such a provision from Model Act § 14.22(c) means that § 14.22(c) intends to relieve directors of any personal liability for actions occurring in the interim period, see Moore v. Occupational Safety & Health Rev. Com'n, 581 F.2d 991, (4th Cir. 1979) at 995-996 & nn. 14 & 15 and accompanying text, retention of this unique provision from Code § 13.1-91 should spare Virginia the statutory uncertainty that has prompted considerable litigation on the interim liability issue in other jurisdictions.

§ 13.1-755. Survival of remedy after termination of corporate existence.

This section is similar in substance to Code § 13.1-101. Hence, the outcome of cases such as United States v. Village Corp., 298 F.2d 816 (4th Cir. 1962) would not be different. This section only allows the survival of a remedy for a right or cause of action existing prior to termination. If the cause of action arises after termination, literally there is no remedy.

While the termination of corporate existence does not take away any remedy available against the corporation, a known claimant could be barred under section 13.1-746 if the dissolving corporation elected to follow the provisions of that statute.

§ 13.1-756. Notification to certain clerks of termination of corporate existence and reinstatements and records thereof; exceptions.

As long as articles of incorporation are required to be filed in multiple locations this provision will be necessary in order to keep those filings current.

Article 17

Foreign Corporations

§ 13.1-757. Authority to transact business required.

This section, consistent with Code § 13.1-102, states the basic requirement that a foreign corporation must obtain a certificate of authority before it "transacts business" within the state. An inclusive definition of what constitutes the transaction of business is not attempted.

Like Code § 13.1-102.1, this section lists certain activities which do not constitute transacting business in Virginia. Sections 13.1-756B 7 and 13.1-756B 8 would exempt certain activities regarding the acquiring, securing and enforcing of debts in Virginia. Code § 13.1-102.1 lists certain related activities not included in the Commission Draft, such as employing lawyers and appraisers in connection with such investments. It qualifies all of the listed activities by providing that they do not constitute transacting business, provided the foreign corporation does not "maintain an office or other place of business in this State" nor "advertise for business in this State." The Commission Draft does not intend any change in this regard.

Sections 13.1-756B 1-6 and 13.1-756B 9-10 are new but appear consistent with existing Virginia case law. Section 13.1-756B 10 requires that an isolated transaction must be completed within 30 days in order not to constitute "transacting business." The Official Comment to Model Act § 15.01 on which this section is based states that an isolated transaction completed within 31 days presumably would constitute "transacting business."

§ 13.1-758. Consequences of transacting business without authority.

This section significantly departs from Code § 13.1-119 by eliminating the provision that directors, officers or agents doing business in the state on behalf of a foreign corporation which has not obtained a certificate of authority are jointly and severally liable on certain contract and tort claims. The elusiveness of the "transacting business" concept makes elimination of this unduly harsh penalty appropriate. However, this section

should also be read in conjunction with section 13.1-613 which makes it a misdemeanor for persons (including individuals) to transact business in the state as a corporation unless properly qualified. Otherwise, this section is not intended to change the results of the case law which has developed under Code § 13.1-119.

§ 13.1-759. Application for certificate of authority.

The provision in Code § 13.1-106(k) for service of process has not been carried forward in this section inasmuch as the point is covered in section 13.1-767E for withdrawn foreign corporations.

§ 13.1-760. Amended certificate of authority.

The requirement in Code § 13.1-112 that a foreign corporation file all amendments to its articles of incorporation has been thought necessary to permit the State Corporation Commission to monitor changes in stated capital for purposes of collecting annual registration fees. While relevant information could be obtained through the required annual report, the State Corporation Commission continues to believes it is helpful to require that all charter amendments be filed in Virginia.

§ 13.1-761. Effect of certificate of authority.

Subsection C is a statutory rejection of the result in such cases as Western Air Lines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Reptr 719 (1961), where a California court applied California's cumulative voting rules to a Delaware corporation whose principal offices were in California. Neither the Commission Draft nor the Virginia Code defines the phrase "internal affairs". Whether the Virginia rule is constitutionally compelled is unclear. See Shaffer v. Heitner, 433 U.S. 186, 215 n.44 (1977).

§ 13.1-762. Corporate name of a foreign corporation.

Consistent with its approach in the case of domestic corporations, the Commission Draft does not impose on the State Corporation Commission the responsibility of deciding issues of unfair competition or commercial similarity of names of foreign corporations. The Commission Draft changes the provision in Code § 13.1-104 that the corporate name of a foreign corporation shall "not be the same as, or confusingly similar to" another corporate name, and adopts the Model Act standard that the corporate name must be distinguishable upon the records of the Corporation Commission from another corporate name. As a practical matter, these tests are essentially the same.

§ 13.1-763. Registered office and registered agent of foreign corporation.

The comment to Commission Draft § 13.1-633 is applicable here with respect to registered agents for foreign corporations.

Subsection B has been added in light of unfortunate incidents, not reflected in reported case law, in which various law enforcement officers have sought to hold registered agents pesonally responsible for substantive duties and responsibilities imposed by law on corporations and their officers.

§ 13.1-764. Change of registered office or registered agent of foreign corporation.

The Commentary to Commission Draft § 13.1-634 is applicable here with respect to the registered office and agent for a foreign corporation. This section is not intended to change the result in Trueblood v. Grayson Shops of Tennessee, Inc., 32 F.R.D. 190 (E.D. Va. 1963).

§ 13.1-765. Resignation of registered agent of foreign corporation.

See commentary to Commission Draft § 13.1-635.

§ 13.1-766. Service of process on foreign corporation.

Inasmuch as this section carries forward Code § 13.1-111 in substantial part, the case law that has developed under that section is equally applicable to this section. See also commentary to Commission Draft § 13.1-637. Code § 8.01-288 providing for the effectiveness of service which reaches the person to whom it is directed, except in certain enumerated cases, may be relevant to this section. See Pennington v. McDonnell Douglas Corp., 576 F. Supp.868 (E.D. Va. 1983).

§ 13.1-767. Withdrawal of foreign corporation.

The Official Comment to Model Act § 15.20, from which this section is taken, states that a foreign corporation that ceases to transact business in a state but fails to obtain a certificate of withdrawal will continue to be subject to service of process and liable for franchise and other taxes.

§ 13.1-768. Automatic revocation of certificate of authority.

The State Corporation Commission is not required to take any affirmative action advising of its action revoking a certificate of authority under this section.

§ 13.1-769. Revocation of certificate of authority by Commission.

A registered agent of a foreign corporation whose certificate of authority has been revoked should resign in the manner provided by statute if the agent wishes to be relieved of his duties.

Article 18
Records and Reports

§ 13.1-770. Corporate records.

This section lists specifically the books and records which a corporation must maintain.

Code § 13.1-47 requires a corporation to keep "books and records of account," "minutes of the proceedings of its stockholders and directors," and a "record of stockholders." These broad categories contain uncertainties. Listing the specific records that a corporation must keep eliminates much of the uncertainty created by the current statute. The Official Comment to Model Act § 16.01 provides helpful guidance as to a corporation's responsibility to keep records.

§ 13.1-771. Inspection of records by shareholders.

This section divides the shareholder's inspection right into several categories. Subsection E explicitly acknowledges that the rights articulated in this section do not affect the right to inspect the shareholders list in conjunction with the sharenolders' meeting (§ 13.1-661); the right to inspect in the course of litigation; or the power of a court to compel production of corporate records for the benefit of a shareholder, whether or not they are covered by tne shareholder inspection rights as set forth in this section. This last provision is thought to preserve the common law inspection rights of a shareholder.

The section divides the records subject to inspection into two categories and establishes different prerequisites to the inspection of the separate categories. As a result, as to certain records the section departs significantly from present law as set forth in Code § 13.1-47 and Bank of Giles County v. Mason, 199 Va. 176 (1956).

First, section 13.1-771A provides that the shareholder need only give five days advance written notice before he may inspect the records listed in section 13.1-770E. The records covered by this separate inspection right may properly be regarded as public documents or, as stated in the Official Comment to Model Act § 16.02, on

which this section is based, they "deal with the shareholder's interest as such in the corporation."

In order to inspect the records listed in section 13.1-770B, nowever, the shareholder must meet additional prerequisites. The explicit conditioning of the right conferred in section 13.1-771B on a showing of good faith and proper purpose, without similiarly conditioning the right conferred in section 13.1-771A implies that shareholders may exercise the right conferred in section 13.1-771A without regard to a demonstrated good faith or proper purpose. This is reasonable, inasmuch as the records available under the section 13.1-771A inspection right are either of public record, or are directly related to the shareholder's status in the corporation. The section would not appear to authorize a shareholder to act in "bad faith".

§ 13.1-772. Scope of inspection right.

The provisions of section 13.1-772C allowing the corporation to impose a reasonable charge makes clear that the corporation may charge more than merely the direct reproduction costs. The Official Comment to Model Act § 16.03, on which this section is based, makes clear that the corporation may charge its indirect costs, such as the labor costs of assembling information and reproducing documents.

§ 13.1-773. Court-ordered inspection.

In a suit involving a corporation's refusal to allow inspection of records under section 13.1-771B, the shareholder bears the burden of proving that the corporation refused the inspection and that he met the prerequisites to inspection. Present Virginia law, as stated in Bank of Giles County v. Mason, 199 Va. 176 (1956) places the burden of proof on the plaintiff. This section does not change that rule. Subsection C does change the ruling in Reilly Mortgage Group, Inc. v. Mount Vernon S.&L. Ass'n, 568 F. Supp. 1067 (E.D. Va. 1983) to the effect that there is no statutory authorization for awarding attorney's fees to a shareholder-plaintiff in successful actions to compel.

§ 13.1-774. Financial statements to shareholders.

Section 13.1-774B requires that if financial reports are not reported on by a public accountant, and if a shareholder expressly requests it, the designated officer must provide the shareholder with a statement of the basis of the accounting used in preparation of the statements. Presumably a general statement of the means used to prepare the statements is sufficient. A particularized statement of deviations from generally accepted accounting principles is not required. It is recognized that this section may impose more rigorous record-keeping requirements on small, closely-held corporations. Nevertheless, the distribution sections, Commission Draft sections 13.1-653 (distributions to shareholders) and 13.1-692 (liability for unlawful distributions), require the directors to make certain judgments on the basis of accounting records and statements. In order to make these judgments the board ought to have available the basis on which the statements were prepared. Thus, this section will not typically require the corporation to prepare information that would not otherwise be necessary.

§ 13.1-775. Annual report of domestic and foreign corporation.

Section 13.1-604F of the Commission Draft authorizes the annual report required by this section to be executed in the name of the corporation by any officer or director listed in such report.

Article 19

Proceeding for Determination of Shareholders

§ 13.1-776-777.

This statute is primarily designed to facilitate administration of the escheat laws, and is carried forward in the Commission Draft on the understanding that the State Treasurer's Office believes this to be a helpful addition to the Stock Corporation Act.

Article 20

Transition Provisions

§ 13.1-778. Application to existing corporations.

Sections 13.1-778 and 779 must be read together. By the terms of section 13.1-778, the statutes embodied in the Commission Draft are applicable to all corporations existing at the time of the effective date or organized thereafter. The articles of incorporation of all such corporations are subject to the provisions of the Act. Section 13.1-779 states the exceptions to this rule. Section 13.1-779A 2 provides that rights, privileges, remedies, etc. acquired, accrued or incurred under a statute before its repeal continue to be governed by the statute as it existed before repeal. Such rights or remedies are limited to those rights and remedies enforceable at the time of repeal. See also commentary to Commission Draft § 13.1-602. The provision making this Act applicable to all existing "domestic corporations" means all existing domestic stock corporations. See Commission Draft § 13.1-603 (definition of "corporation").

§ 13.1-779. Saving provision.

This section, more explicitly than the present statute, states the law applicable to activities partially completed at the time the new Act replaces the old. The Official Comment to Model Act § 17.03 states that the saving provisions of this section are derived from section 25 of the Uniform Statutory Construction Act, which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1965.

§ 13.1-780. Severability.

No comment.