REPORT OF THE
STATE CORPORATION COMMISSION
ON

Hostile Corporate Takeovers in Virginia

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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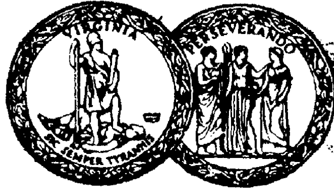

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STATE CORPORATION COMMISSION

November 12, 1988

TO: The Honorable Gerald L. Baliles
Governor of Virginia
and
The General Assembly of Virginia

We are pleased to transmit this Report of the State Corporation Commission on Hostile Corporate Takeovers in Virginia.

The study was initiated and the report prepared pursuant to House Joint Resolution 139 of the 1988 Session of the General Assembly of Virginia.

We wish to express our appreciation to members of the Advisory Committee who provided valuable assistance throughout the course of the study.

Respectfully submitted,

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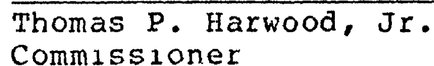

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Glossary*

Arbitrageur - a professional stock trader who profits from differences in price, as in the simultaneous purchase of stock in a company being acquired and sale of stock in its proposed acquirer. Arbitrageurs attempt to profit from takeovers by cashing in on the expected rise in the price of the target company's shares.

Business Combination/Moratorium Statutes - statutes which prohibit a person who has acquired a specified percentage of shares from engaging in a business combination with the corporation for a moratorium period (three or five years), unless the acquirer receives approval by a majority of disinterested directors and two-thirds of the disinterested holders of voting shares.

Business Judgment Rule - a legal concept embodied in various state corporation laws which has provided management and boards of directors with virtual immunity from shareholder suits because their decisions can be challenged only on very limited grounds. Directors and managements of target companies often invoke the rule in defending themselves against shareholder suits which accuse them of acting in their own self-interest during takeover bids. Recent court decisions have lessened the immunity provided by the rule.

Control Share Acquisition Statutes - statutes which deny voting power to an acquirer of "control shares" unless the majority of "disinterested" stockholders vote to confer voting power.

Control Shares - share which, when added to other shares owned by the acquirer, equal or exceed specified threshold levels.

Creeping Takeover - the gradual accumulation of a company's stock through purchases in the open market. Since federal law requires no public disclosure of stock ownership or takeover intentions until one's holdings total 5 percent of a company's shares, a bidder may control a substantial portion of the target company's stock at the outset of a takeover contest.

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*Source: Barron's Dictionary of Finance and Investment Terms

Golden Parachutes - lucrative contract given to a top executive to provide lavish benefits in case the company is taken over by another firm, resulting in the loss of the job.

Greenmail - payment by a takeover target to a potential acquirer, usually to buy back acquired shares at a premium. In exchange, the acquirer agrees not to pursue the takeover bid further.

Heightened Disclosure Statutes - statutes which are similar to the Williams Act and typically require filing certain disclosure documents with the corporation and/or the state regulator.

Hostile Tender Offers - offers made by a third-party bidder directly to shareholders of a target, but opposed by the management and directors of the target.

Leveraged Buyout - a transaction in which a group of investors acquires and "takes private" a publicly-owned company (or a division or subsidiary of a firm). The acquisition is usually initiated by an investment banker, often in partnership with members of the firm's management. The transaction also depends on borrowing most of the purchase price, using the firm's assets as collateral. Leveraged buyouts have been undertaken to prevent hostile takeovers.

Poison Pill - strategic move by a takeover target company to make it's stock less attractive to an acquirer. For instance, a firm may issue a new series of preferred stock that gives the shareholders the right to redeem it at a premium price after a takeover. This strategy, when triggered, sharply increases the company's level of debt and will raise the cost of an acquisition.

Raider - a person, group, or company attempting to execute a hostile takeover. The term is frequently applied to those who specialize in hostile takeovers.

Redemption Rights Statutes - statutes which require that an acquirer, after having obtained a specified percentage of stock, give notice to the other shareholders and give those shareholders the right to demand a fair value payment for their shares.

Supermajority/Fair Price Statutes - statutes which prohibit any business combinations between corporations and interested shareholders unless approved by a specified supermajority vote of shareholders or unless they meet certain fair-price or fair-value requirements.

Takeover - change in the controlling interest of a corporation.

Target Company - firm that has been chosen as attractive for takeover by a potential acquirer.

Tender Offer - a public offer to buy some or all of the stock of a corporation within a specified time period. Notice of the offer must be filed with the Securities and Exchange Commission on schedule 14D-1, disclosing, among other things, certain financial information about the bidder. The price offered is generally well above the current market price of the stock, to induce stockholders to tender their shares to the bidder.

Two-Tier Tender Offer - an offer to pay a certain amount per share, usually in cash, for a controlling interest in a corporation's stock, and then to acquire the remainder of the stock at a lower price, usually by means of an exchange of stock or a combination of cash and stock. Bidders using this technique hope that shareholders will "stampede" to tender their shares for the higher price offered on the "front end" of the deal, regardless of the wishes of the target company's management. This type of offer is also known as a "front-end-loaded tender offer."

White Knight - friendly acquirer sought by the target of an unfriendly takeover.

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HOSTILE CORPORATE TAKEOVERS IN VIRGINIA

EXECUTIVE SUMMARY

This study was undertaken in accordance with HJR No. 139, which identified the primary study objectives:

- Determine the extent of the problems with hostile corporate takeovers in Virginia and their impact on the Commonwealth's economy.

- Consider how other states and the federal government, including court decisions, addressed issues of hostile corporate takeovers.

- Consider possible legislation to protect Virginia's corporations and employees from the adverse effects of such takeovers.

Two bills, HB 983 and HB 984, addressed the subject in the 1988 Session. HB 983 was adopted to amend Article 14 of the Virginia Stock Corporation Act. The second bill, HB 984, was held over for consideration in the 1989 Session and is treated at some length in this study.

The major topics in this report include: (1) economic perspectives, takeover experiences, and policy considerations; (2) regulatory programs of other states; (3) takeover regulation in Virginia; and (4) conclusions.

A review of economic literature reveals a sharp diversion of views, ranging from the view that there is a strong need to regulate the takeover process to the view of free-market economists who hold that such regulation undermines operation of free-market forces and should be avoided.

A review of corporate takeovers presents a collage of diverse and often conflicting information. However, it is clear that takeovers are changing the face of corporate America. Today, the number and size of corporate takeovers is enormous. Hundreds of billions of dollars and thousands of people at investment banks, commercial banks, and law firms are now involved in takeovers. The lines between so-called corporate raiders and other takeover bidders have become blurred, as major corporations and investment

bankers have become major participants. Foreign participation is substantial; in 1987, foreign transactions accounted for 11 percent of all the mergers and acquisitions in the United States.

Over the years, a number of corporate takeovers have occurred in Virginia; for purposes of illustration, the study reviews thirteen relevant cases and suggests that there is no reason to believe that the Virginia experience differs significantly from the nation as a whole. Certainly these cases serve to document the legitimate concerns expressed by the General Assembly in HJR No. 139.

The study proceeded on the basis that there is a close relationship between economic perspectives, takeover experience, and policy issues. After a review of economic perspectives and takeover experience, a series of conclusions related to policy considerations were formulated. The primary policy related conclusions:

- There is no certainty concerning whether hostile takeovers are good or bad. Existing empirical analyses provide little insight and few guidelines on the proper role of regulation of corporate takeovers.

- The fundamental goal of corporate takeover regulation is not to protect the corporation from hostile takeovers but to protect the shareholder and the corporation from abusive practices and inequities that often occur in connection with takeover activities.

- Government should provide a level playing field, meaning that the rules of the game be fair to all participants. Recognizing that the state has a legitimate interest in the corporation, its employees, the community, and economic stability, a balanced set of rules is desirable.

A review of current state regulatory programs reveals that there is no uniformity of state regulation of corporate takeovers nor any clear evidence of the impact of such statutes on takeover activities. In general, states that do regulate takeovers use one or more of four basic statutory approaches:

- Control Share Acquisition Statutes allow shareholders to collectively decide on a change of control. Once an acquirer exceeds certain

thresholds, he is denied all voting power of control shares unless approved by a majority of disinterested shareholders.

- Business Combination/Moratorium Statutes prohibit a person who has acquired a certain percentage of shares from engaging in a business combination with the corporation for a period of years, unless the acquirer receives approval by a majority of disinterested directors and a supermajority of disinterested shareholders. These statutes protect against potential abuses by those who would use corporate assets to finance their transactions.

- Fair Price Statutes require certain business transactions to be approved by a supermajority of shareholders or by a payment of a fair price to all shareholders. These statutes are designed to ensure that all shareholders are treated equally and receive the same price for their shares.

- Redemption Rights Statutes require an acquirer, after reaching a specified percentage of stock, to give shareholders the right to demand a fair value payment for all their shares.

Nineteen states have adopted a control share type statute and sixteen have business combination/moratorium statutes (seven have adopted both). Fair-price/value provisions are generally incorporated in such statutes. Four states have only fair-price/value statutes. Two states have redemption rights statutes. Two states have takeover statutes that do not fall within the above classifications. Fifteen states have no statutory provisions related to takeover regulation.

Virginia has adopted various forms of legislation dealing with corporate takeovers (a fair-price provision in 1985 and a business combination/moratorium provision in 1988). In addition, the General Assembly is considering HB 984, which is a type of control share acquisition statute. This study reviews Virginia's existing law as well as the pending HB 984. Major findings include:

- A control share acquisition statute may be effective because it allows shareholders to evaluate proposed changes in control of the corporation. Shareholders are protected from

coercion in tendering their shares and are given time to consider proposals that may be in their best interest and make informed decisions. These statutes may encourage corporate raiders by giving them the ability to announce that a target corporation is for sale and, at the same time, hamper management's ability to take effective action. Indiana's control share share acquisition statute has been upheld as constitutional by the United States Supreme Court in CTS Corp. v. Dynamics Corp.

- Virginia's Take-Over-Bid Disclosure Act, through adverse court decisions, has been limited in its effectiveness and may be unconstitutional.

After reviewing the identified policy considerations, examining regulatory programs of other states, and analyzing Virginia's current statutes and pending legislation, the following study conclusions were formulated for consideration by the General Assembly.

- Virginia's Take-Over-Bid Disclosure Act has served a purpose in the past. However, in light of its limited effectiveness and possible unconstitutionality, it should be repealed. If it is repealed, the General Assembly should consider addressing creeping tender offers, perhaps as a new provision in the Stock Corporation Act.

- The General Assembly should monitor the experience with HB 983 and similar legislation in other states.

- The General Assembly should consider whether the benefits of a control share acquisition statute justify its adoption. The consensus of the Study Advisory Committee and Staff is that a control share acquisition statute is desirable and could benefit shareholders and Virginia corporations.

- If the General Assembly determines that it is desirable to adopt a control share acquisition statute, several suggested amendments to HB 984 should be considered by the General Assembly:

    - The acquisition of additional shares within the range of voting power for which approval has already been granted should be added as an "excepted acquisition" to clarify what is now only implicit in HB 984.

- The applicability of the statute should be changed to an "opt-out" provision rather than an "opt-in" provision, thus making the statute automatically effective for public corporations in Virginia. This "opt-out" provision should be implemented through the corporation's articles of incorporation or bylaws.

- The fair market value determination for redemption rights should be changed to the average price paid for the shares.

I. INTRODUCTION

Recognizing that, in recent years, there has been increased activity of hostile corporate takeovers affecting corporations throughout the United States, as well as Virginia, the 1988 Session of the General Assembly, through House Joint Resolution No. 139, requested the State Corporation Commission to study hostile corporate takeovers in Virginia. The Resolution states that, in 1985, as part of the revision of the Stock Corporation Act, Virginia enacted statutes (Article 14) designed to discourage certain types of transactions that involve an actual or threatened change in control of the corporation, and that such provisions may need to be strengthened or modified.

Two bills, HB 983 and HB 984, addressed the subject in the 1988 Session. HB 983 was adopted to amend Article 14 of the Virginia Stock Corporation Act. The second bill, HB 984, was held over for consideration in the 1989 Session and is treated at some length in this study.

Scope and Purposes

Based on the provisions of HJR No. 139, the following study purposes are formulated:

1. To determine the extent of the problems with hostile corporate takeovers in Virginia and their impact on the Commonwealth's economy.

2. To consider the approaches of legislatures and courts in other states and at the federal level to treat the issues raised by hostile corporate takeovers.

3. To consider possible legislation to protect Virginia's corporations and employees from the adverse effects of such hostile takeovers. That is, statutes appropriate to govern the takeover process in Virginia.

4. To summarize and communicate the resulting findings and conclusions in a well-balanced report to the General Assembly of Virginia.

The scope of this study may be defined by a series of specific study objectives:

1. Establish a Study Advisory Committee consisting of state officials and attorneys who practice

corporate law to review, evaluate, and comment on the draft material and the report developed by the Study Team.

2. Identify and describe: (1) the scope and nature of hostile corporate takeovers in recent years, both nationally and in Virginia; (2) the economic, social, and public interest impacts of such takeovers on the corporation, its employees, and the public; and (3) the resulting problems and associated policy issues.

3. Identify, review, and evaluate: (1) statutes of other states and the related model statute governing hostile corporate takeovers; (2) Federal government statutes and court decisions that impact, or could impact, such takeovers; and (3) Virginia statutes governing business corporations in terms of scope, purpose, and legislative intent.

4. Identify and review detailed provisions and the significant legal issues involved in the statutes governing hostile corporate takeover legislation.

5. Formulate reasonable regulatory policy considerations to provide a basis for effective legislation; review and assess statutes of other states, the model act, and existing and pending Virginia statutes in the context of the identified policy considerations.

6. To the extent appropriate, define clearly the requirements for any amendments to Virginia statutes governing corporate takeovers.

Approach and Methodology

The first phase of this study involved development of a systematic approach to the study. A detailed study work plan was formulated; study scope and purposes were defined; and staff assignments were determined. A Study Advisory Committee was established.

The second phase involved: (1) a detailed review and analysis of 1988 corporate takeover legislation and the Take-Over-Bid Disclosure Act; (2) a comparative analysis of HB 984 with the Model Act and HB 983 with the comparable Delaware and New York statutes; and (3) a review and analysis of recent actions taken by other states to amend their business corporation laws to address takeovers.

Based on such initial review and analysis, a series of policy issues, questions, and considerations were identified and discussed. This was followed by a review and assessment of the characteristics, extent, and economic impacts of takeovers, especially hostile takeovers, both at the national level and in Virginia.

As material was prepared, a series of discussions was held with individual members of the Study Advisory Committee. There were three formal meetings with the Study Advisory Committee. One, in May, was held to review study scope and purposes, discuss underlying policy issues and questions, and examine the specific provisions of HB 983 and HB 984. A second meeting was held in July to discuss potential changes to the provisions of HB 984 and to review and discuss tentative study findings and conclusions. A final meeting was conducted in August to review and evaluate a draft study report. The report was finalized in September.

Research methods included: comprehensive literature and statute research; review of court decisions and pending court cases; staff review with other state regulatory commissions; and selected interviews with key officials. Extensive documentation and analysis was conducted covering the materials developed during the literature search. Comparative analysis of statutes included identifying strengths and weaknesses of various approaches to takeover regulation.

Staff relied on a collaborative approach to the study, working closely with the Study Advisory Committee whose members were kept informed of progress and of findings and conclusions as they emerged.

Report Organization

This report is arranged into seven chapters, excluding the Executive Summary and the appendices, as follows:

- Introduction

- Historical Overview - presents a regulatory framework of recent state statutes governing corporate takeovers in the context of related court decisions.

- Economic Issues and Hostile Takeovers - discusses the broad economic issues underlying takeovers; presents a general overview of hostile corporate takeovers, both nationally and in Virginia.

- Policy Considerations - identifies and briefly reviews the underlying policy considerations and issues related to government regulation of corporate takeovers.

- Current Regulatory Programs - reviews the scope and characteristics of state regulation and provides a summary of other states' takeover statutes; contains a detailed analysis of control share acquisition statutes and a summary of federal statutes and initiatives.

- Regulation in Virginia - identifies current Virginia statutes, including the Take-Over-Bid Disclosure Act; provides a summary of pending HB 984 and identifies issues raised from comparing HB 984 to the Model Act (for control share acquisition statutes).

- Study Results: Findings and Conclusions - presents findings and conclusions developed during the course of study, addressing economic issues and policy considerations, regulatory programs of other states, and potential legislation for Virginia.

II. HISTORICAL OVERVIEW

Over the past twenty years, takeovers have emerged as an increasingly popular method for gaining control of a corporation. There has been a growing concern by corporate management, shareholders, and others over corporate takeovers and the need to regulate tender offers. This concern has resulted in a multiplicity of state statutes, judicial decisions, and federal initiatives.

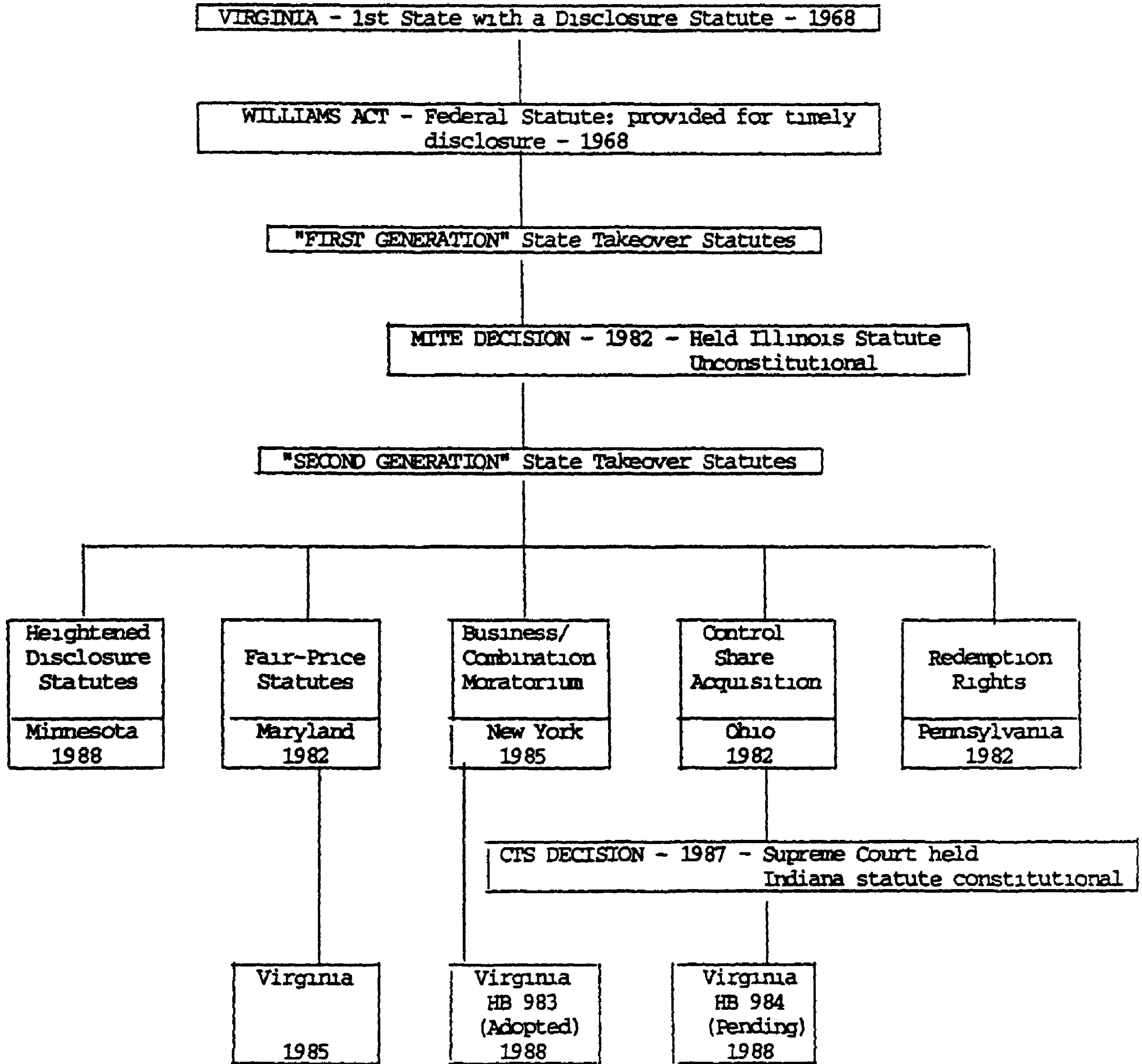
Virginia, in 1968, was the first state to adopt a take-over-bid disclosure act. This act required a bidder to disclose information concerning tender offers and future plans or proposals involving material changes in the corporation. In addition, this statute required certain procedures to be followed in a tender offer, including a hearing to determine if the offeror had complied with the act.

Federal regulation of tender offers began with the passage of the Williams Act, also in 1968. The Act essentially requires an offeror to provide shareholders of the target corporation with detailed and timely disclosure when the offeror acquires shares for an attempted corporate takeover. It also provides shareholders with other protections. These provisions are designed to ensure that shareholders are treated equally and can make informed decisions to tender their shares. (See Appendix F)

Following passage of the Williams Act, numerous states adopted what have become known as "first generation" takeover statutes, regulating takeover bids directly. These state disclosure statutes closely paralleled the Williams Act, but added notification and hearing requirements not contained in the federal law. In nearly every case where bidders challenged these state takeover bid disclosure statutes, the lower federal courts found they were preempted by the Williams Act or violated the commerce clause of the United States Constitution. Finally, in 1982, the Supreme Court held in Edgar v. MITE Corp., 457 U.S. 624 (1982), that the Illinois takeover bid disclosure statute was unconstitutional. The court invalidated provisions requiring pre-offer notification, administrative hearings, and substantive reviews, since

Exhibit 1

Historical Overview:
State Regulation of Takeovers



these provisions impermissibly burdened interstate commerce and were preempted because they purported to regulate takeover bids in a manner that interferred with the Williams Act.

Following the decision in MITE, a series of "second generation" state takeover statutes were enacted. These new statutes were formulated to govern the internal affairs of corporations organized under the laws of their state of incorporation rather than to regulate takeover bids directly. "Second generation" statutes took four distinct approaches.

1. Ohio's control share acquisition law (1982) provides that a majority of disinterested shareholders must approve the acquisition of control shares by any person. "Control shares" are defined as shares which, when acquired, would give voting power above certain threshold percentages, usually 20%, 33-1/3%, and 50%.

2. Maryland's fair price statute (1982) regulates the transactions an acquirer can enter into after a successful takeover bid. Certain business transactions must be approved by a supermajority vote of shareholders or by a payment of a fair price to all the shareholders. This type of statute is designed to address some of the abusive aspects of two-tiered tender offers. In 1985, Virginia enacted this type of legislation.

3. Pennsylvania's redemption rights statute (1982) converts partial offers into offers in which, upon a person's acquisition of thirty percent of a firm's stock, all of the remaining shareholders are entitled to have the corporation redeem his shares on demand for an amount in cash equal to the fair value of the shares.

4. New York's business combination/moratorium statute (1985) prohibits an interested shareholder from engaging in any "business combination" with the target firm for five years after becoming an interested shareholder, unless the corporation's board of directors and disinterested shareholders approve the transaction. The purpose of this type of statute is to discourage highly leveraged takeovers by bidders who intend to finance the transaction through any liquidation of all or a part of the target firm's assets. In 1988, Virginia enacted this type of legislation.

A number of states have adopted one or more of these

approaches, with the control share acquisition statute appearing to be the most prevalent form. In addition to these basic approaches, some states have adopted heightened disclosure statutes which are mirrored from the Williams Act.

Concern arose over the constitutionality of "second generation" statutes. Two issues were predominant. It was argued that "second generation" statutes unduly burden interstate commerce in violation of the commerce clause and are preempted by the Williams Act.

In CTS Corp. v. Dynamics Corporation of America, 481 U.S. 69 (1987), the Supreme Court sustained the Indiana control share aquisition statute against both preemption and commerce clause issues. The court found that the control share statute only governed internal affairs of corporations, a matter traditionally within exclusive state jurisdiction. Following the CTS decision, there was renewed interest in "second generation" state statutes. Some 29 states have amended their business corporation acts to include provisions governing takeovers. HB 984 is similar in structure to the Indiana statute upheld by the Supreme Court in CTS.

Second generation takeover legislation continues to evolve. Most recently, Delaware has enacted a business combination/moratorium statute, effective February 1988. This statute is similar to New York's statute but is less restrictive by providing only a three-year moratorium, compared to the five-year moratorium in New York, and inserting additional exemption provisions. The U.S. District Court has upheld the constitutionality of Delaware's statute in BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988). However, Wisconsin adopted a similar statute which was struck down as unconstitutional by the district court in RTE Corp. v. Mark IV Industries, Inc., 1988 FED. SEC. L. REP. (CCH) ¶93,789 (E.D. Wis., May 6, 1988). The court there found that the statute was preempted because it frustrated the purposes of the Williams Act. HB 983, adopted in the 1988 General Assembly Session, adds elements to the Code of Virginia similar to these business combination/moratorium statutes, the constitutionality of which remains subject to litigation.

State takeover statutes are still in an evolutionary phase. Some constitutional issues remain unresolved and new issues are arising. In response to this increased scope of regulation, new tactics of "raiders" will certainly emerge.

III. ECONOMIC ISSUES AND HOSTILE TAKEOVERS

In today's business environment, takeovers have essentially created a market in corporate assets. Many investors (especially speculators and corporate raiders) now direct their attention to a corporation's "undervalued" assets. They then attempt to gain control of a corporation in order to sell much of those assets. In such a situation, often the investor sells some of the corporate assets just to finance the acquisition of a corporation.

Takeovers are often justified by pointing to the resulting, often dramatic, increases in stock prices. However, there is great concern that some of these takeovers are not in the public interest. In such a takeover-oriented environment, corporate management may find it difficult to take a long-term view of their business enterprise. They might avoid the inherent risks of large capital investments or new technology, because of the potential negative impacts on current corporate assets and earnings. Cash resources may be used to finance or fend off a takeover instead of being used to enhance production. Similarly, emphasis may be placed on acquiring securities as a more attractive investment than strengthening corporate assets.

In today's environment, corporate management may borrow against those assets and buy back significant blocks of stock in order to maintain the current market value of the corporation's shares. Such "leveraging" of corporate assets, which is reflected in the rising debt-to-equity ratio of American corporations, could make these corporations prone to bankruptcy in times of severe economic distress.

From this perspective, there is a strong need to regulate the takeover process, to place restrictions on the transfer of assets that may result from a "breakup," and to restrict the voting rights of corporate raiders.

Free-market economists, on the other hand, as a matter of economic principle, believe in an "efficient market" that should not maintain "undervalued" assets. From this perspective, corporate restructuring resulting from "asset redeployment" by incumbent management can carry as heavy an economic and social cost as "bust-up" or "dismemberment" by hostile takeovers. It is noted that if a corporation is "dismembered", buyers must be found who consider the productive ability and value of these dismembered parts to exceed the price they pay. It follows, therefore, that the productive ability and value of these dismembered parts

should increase on the aggregate and that such dismemberments may lead to more efficient use of assets. Such economic changes will be better over the long run when they result from free-market forces, including individual investment decisions. Regulation that restricts the exercise of equity ownership rights, including the basic right to vote, undermines operation of the free-market forces and tends to insulate management from responsiveness to that free market. Such regulation protects incumbent managements from responsibility to equity investors. Such a perspective holds that there is no principled distinction between arbitrageurs and other shareholders. Both groups are presumably interested in profit, quick or otherwise. Both groups have done exactly the same thing: allocated financial resources in return for ownership of a fraction of a corporation. Both groups should be treated equally. Free-market economists believe that takeovers, or the threat of potential takeovers, are a strong incentive for managerial performance and that any restrictions of takeovers will be ultimately counterproductive.

Some believe that takeover issues are best addressed through the internal rules of the corporation. For example, it is appropriate for a corporation to issue nonvoting shares or to issue shares with special terms and conditions. However, what is important is that each corporation remain free to choose its own method of ownership.

It appears that most corporate restructuring of recent years may not be a result of hostile takeover activities, or of mergers/acquisitions, but may result from basic economic conditions-industrial overcapacity, deflation, slow growth, and intense foreign competition.

To date, empirical analyses have provided little insight into resolving the controversy over the economic impacts of takeovers. They certainly fail to provide guidance on such critical issues as whether unwanted takeovers are good or bad for the country, the competitive position of American industry, or the effective management of corporations. Evidence of impact on employees, communities, states, customers, and consumers is unclear at best. It appears that how the issue of takeovers is initially perceived, in terms of underlying economic principles, determines what samples are selected for empirical analyses, thereby determining the results of subsequent analysis--a type of self-fulfilling prophecy. Certainly there appear to be many individual examples but few undisputed conclusions or generalizations.

Corporate Takeovers in the 80's

This study has uncovered no one source of consistent information on the extent and nature of corporate takeovers in today's business environment. There is extensive information from many sources, presenting a collage of diverse and often conflicting information. Representative selections* are contained in the following paragraphs.

In 1984 and 1985, of the over 6,000 mergers and acquisitions, only 263 were tender offers and of those, only 76 were identified as "hostile." In 1985, five of the 24 corporate transactions of one billion dollars or more arose from hostile takeover attempts. In 1986, there were 40 hostile takeover attempts; 15 were successful. In the past six years, approximately two percent of 7,000 mergers (or 140) were classified as "hostile."

In a recent study of 56 hostile tender offers made between 1975 and 1983, 55 percent of the bidders' companies outperformed the target company, and in 45 percent of the cases, the target companies outperformed the bidders. In another study, stock price gains of targets in successful tender offers averaged 30 percent, while in other successful mergers the average increase in stock prices was 20 percent.

In response to raiders, Safeway was taken private in 1986 through a leveraged buyout (LBO), and since that time, it has sold or closed down approximately 730 stores. Carl Icahn took over control of TWA in January 1986, just after TWA had reported a net loss of $62 million; TWA earnings for 1987 were the best in TWA's history. Union Carbide survived a takeover attempt by GAF but in the process, more than doubled its debt, agreed to sell several profitable divisions, and cut 20 percent from its U.S. payroll. Owens-Corning Fiberglas Corporation survived an

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* These selections were taken from aricles in recent issues of The Wall Street Journal, Business Week, and Fortune magazines.

attempted takeover by Wickes Cos. but put up its Aerospace & Strategic Materials Group for sale, began to cut salaried work force by 40 percent, and began dismantling its research facility. Walt Disney survived takeover attempts to become one of the most profitable corporations in the entertainment business with major expansions and profitable new ventures.

In response to hostile takeover attempts, companies such as Holiday, Colt Industries, Westinghouse, and FMC undertook major recapitalizations and stock buybacks. (FMC's debt has risen from 17 percent to 80 percent of capitalization.) Unocal survived an attempted takeover by T. Boone Pickens but took on $4 billion of debt in the process. It is estimated that with corporate debt historically high and pretax profits flat, such interest costs are eating up more than 50 percent of corporate pretax earnings.

Junk bonds (bonds with a credit rating of BB or lower) are often used to finance takeovers. Corporate senior debt rated AAA has shrunk from 56 percent a decade ago to 27 percent today (1986). Junk bonds have risen from 9 percent of the market to 21 percent today (1986).

Late in 1986, Revco went private in a $1.25 billion leveraged buyout by exchanging $703 million in junk bonds for equity. In July 1988, Revco filed for bankruptcy under Chapter 11, the first time a major LBO has gone bankrupt.

In hostile takeovers, investors typically receive 25 to 40 percent more than the previous market price, with some receiving significantly higher premiums. In 1988, General Electric bought Roper for a 170 percent premium over Roper's initial market price. In the same year, Bridgestone, a Japanese firm, bought Firestone for a 124 percent premium, and Kelso bought American Standard for a 114 percent premium.

Foreign participation in the takeover activity is substantial. American investments appear to be increasingly attractive to foreign investors in light of the low dollar and other factors. British businesses paid $31 billion to purchase 262 American businesses in 1987. In total, overseas acquirers spent a record $40.6 billion for U.S. real estate and corporations, including $17 billion in the manufacturing sector. Foreign buyers, in the early months of 1988, spent more than $10 billion for acquisitions in the manufacturing sector. In 1987, foreign transactions accounted for 11 percent of all the mergers and acquisitions in the United States. In 1986, the West German chemical firm of Hoecht agreed to buy Celanese for $2.8 billion; Sweden's Electrolux took over White Consolidated Industries for $750 million; and Fujitsu of

Japan agreed to pay $220 million for 80 percent of Fairchild Semiconductor. Japan's Dainippon initiated a hostile takeover of Sun Chemical Corporation. Sun remained independent but only after selling its ink unit to Dainippon, the object of the raid in the first place.

The lines between so-called corporate raiders and other takeover bidders have become blurred. Eastman Kodak agreed to a $5.1 billion rescue of Sterling Drug from F. Hoffmann-La Roche. Black & Decker made a hostile takeover bid for American Standard. General Electric's bid for Roper was hostile; Roper had already agreed to be bought by Whirlpool. Pirelli made a hostile bid for Firestone after Firestone agreed to sell its tire division to Japan's Bridgestone.

In 1987, of the ten top corporate transactions, five were leveraged buyouts and three were purchases of U.S. firms by overseas investors, two of them British. Borg-Warner (for $4,174,579,000) went private after raider attempted takeovers (Irwin Jacobs and GAF). British Petroleum acquired Standard Oil (for $7,995,213,000), and Morgan Stanley participated in a leveraged buyout of Burlington Industries (for $2,497,667,000) after a takeover attempt by Asher Edelman and Dominion Textile. In 1987, $135 billion was spent for takeovers; over $100 billion was spent for takeovers by June 1988. In August 1988, Rupert Murdoch, heading an Australian firm, agreed to acquire Triangle Publications (TV Guide, Seventeen, Daily Racing Form) for three billion dollars, becoming the largest U.S. publisher of consumer magazines.

Recent months (in 1988) have seen little activity from well known so-called corporate raiders such as Goldsmith, Perelman, Pickens, Icahn, and Bilzerian. Investment bankers in recent years have often become equity partners in major corporate takeovers. Last year, 1987, Shearson was an equity partner in a hostile takeover of Koppers ($1.7 billion bid by English builder, Beaser). First Boston acquired 40% of United Brands; Morgan Stanley owns 37 percent of Burlington Industries; Merrill Lynch took controlling interest in Borg-Warner (after a $4.7 billion buyout) and in Supermarkets General ($2 billion). Morgan Stanley has nearly one billion dollars equity participation in major corporations, including Container Corporation of America ($230 million), Burlington ($168 million), Colt Industries ($165 million), and Sterling Chemical ($163 million).

Investment bankers and their backers now have as much as $15 billion for equity investments. Leveraged in traditional buyout fashion, that equity base might support up to $150 billion in debt for future corporate acquisitions.

In the first quarter of 1988, there were 16 hostile all-cash tender offers. All 16 companies were taken over, nine by the hostile bidder and seven by white knights.

It is estimated that 50,000 people at investment banks, commercial banks and law firms are now involved in takeovers.

Virginia Takeover Experience*

The actual number and nature of corporate takeovers in Virginia cannot be determined with precision, since well documented records of takeovers and attempted takeovers are not maintained. Over the years, a number of takeovers have occurred, some certainly hostile. Thirteen hostile takeovers or attempted takeovers have been identified and are summarized briefly in the following paragraphs. While these examples are not all inclusive, they do serve to document the legitimate concerns expressed by the General Assembly in HJR No. 139.

American Furniture Company. In 1978, Telvest, Inc. announced plans to acquire through open market purchases a portion of American Furniture Company shares and filed suit in the U. S. District Court in Richmond alleging that the Virginia Take-Over-Bid Disclosure Act was unconstitutional. It sought to enjoin American and the SCC from interfering with Telvest's proposed purchases. Judge Merhige granted a preliminary injunction and American appealed. Before the Fourth Circuit's decision was announced, the Virginia General Assembly amended the Take-Over-Bid Disclosure Act. American then amended its complaint to plead violation of the new statute. Telvest ultimately agreed to sell Telvest shares (about 15%) to American at the market price and to refrain from further attempts to acquire American.

In 1986, when American stock was selling at about $10.50 per share, LADD Furniture initiated acquisition discussions with American that resulted in Board approval

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* Members of the Study Advisory Committee provided profiles of significant cases involving Virginia takeovers from which the Study Staff selected representative examples.

of an all cash merger for $15.50 per share. Most of American's management was retained, and most of the manufacturing facilities continued to operate.

Ametek/Robertshaw Controls. In the early 1980s, Ametek, a NYSE listed company, acquired approximately 10% of Robertshaw Controls and announced its intent to try to increase its ownership position to approximately 45 percent through purchase of a share block in Robertshaw Controls, then owned by Reynolds Metals. Because Robertshaw Controls was a Delaware corporation, the Virginia Take-Over-Bid Disclosure Act had no impact on this acquisition.

Eventually, Reynolds Metals refused to sell its stake in Robertshaw Controls, and Ametek sold its shares back to Robertshaw Controls. In the mid-1980s, Reynolds Metals reassessed its position and sold its shares of Robertshaw to a U.K. company that made a tender offer. Robertshaw disappeared as an independent Virginia-based company.

Associated Dry Goods. A hostile tender offer was made for Associated Dry Goods. The Associated Board rejected the offer and adopted a poison pill. Litigation followed over the validity of the poison pill. After briefs were filed and the day before the hearing, the parties negotiated an increased price that was accepted unanimously by the Associated Board. The ultimate price reflected a large premium over the trading market before the initial offer ($300 plus million).

Citizens Trust Company. Citizens Trust Company, Portsmouth, Virginia, was a small, local bank holding company for the Citizens Trust Bank, the largest locally-owned bank in the Tidewater region. By the early 1980s, one shareholder of Citizens Trust Company had accumulated approximately 20% of the common stock. At the time, the stock traded at approximately $20 to $22 per share.

Unknown to management and the Board of CTC, the shareholder negotiated to sell his stock position to a major statewide banking organization. Management and the Board opposed this sale transaction but were unsuccessful in blocking it. When the banking organization persisted in its efforts to acquire control through an offer valued by CTC at approximately $39 per share, CTC sought competing bids from other bidders. A negotiated transaction with another major Virginia banking organization resulted, with CTC shareholders receiving $48.50 per share. Subsequently, many of the CTC senior employees left CTC to organize a new independent Tidewater bank.

Craddock-Terry Shoe Corp. In 1976, when C-T's stock was trading at $6.50 per share, Caressa, Inc. made an unsolicited, hostile tender offer for 51% of the

outstanding shares of C-T at $9.00 per share. At C-T's request, the SCC scheduled a hearing on the adequacy and accuracy of Caressa's proposed tender offer material, the first such hearing under Virginia's Take-Over-Bid Disclosure Act. During the SCC proceeding, C-T scheduled a stockholders' meeting to consider an amendment to its articles of incorporation to require a supermajority vote of stockholders to approve the transaction. When C-T shareholders approved this by over 90 percent, Caressa abandoned its plans for a tender offer.

In 1986, when C-T's stock was trading at about $16 per share (as a result of rumors of a leveraged buy-out by management), several prospective purchasers approached C-T. Among these was HH Holdings, a highly leveraged venture capital group with no experience in the shoe business. Although it had tentatively approved a management buyout at $15 per share, C-T's Board approved an all cash offer for $20 per share by HH Holdings. Thereafter, the new owners replaced much of the C-T management and undertook to "streamline" the company's manufacturing and marketing operations.

In October 1987, the Company entered bankruptcy. Its assets are now being sold, but there will likely be little for the equity or subordinated debt investors. C-T's production facilities in Lynchburg and several southside Virginia communities are idle.

<u>Dan River, Inc.</u> In the mid-1970s, a Hong Kong based company attempted to acquire Dan River. This was successfully resisted through litigation premised primarily on antitrust considerations.

In 1982, Carl Icahn announced plans to acquire a portion of Dan River for cash and threatened thereafter to squeeze out the remaining shareholders with a merger. Icahn also filed suit to enjoin enforcement of the Virginia Take-Over-Bid Disclosure Act. This litigation was suspended by an agreement by Dan River and the SCC to give Icahn 72-hours notice before seeking to enforce the Virginia statute. During the litigation, Dan River was able to arrange an Employee Stock Option Plan-based leveraged buy-out by management for $22 per share cash which Icahn agreed not to oppose. In order to service the LBO debt, Dan River has had to sell off substantial assets, but management remains intact and the company's principal production facilities in Virginia remain in operation.

<u>Equitable General Corporation</u>. In 1977, Equitable General Corporation, McLean, Virginia, became the object of an unsolicited takeover by American General, a major insurance holding company in Houston, Texas. Equitable's objective was to remain independent, but once other bidders

became interested, an auction market developed and the company agreed to a $51 per share offer. Its per share price had been about $20 before the first overture from American General.

Financial General Bankshares/Foreign Interests. In the early 1980s, a Washington, D.C.-based bank holding company which controlled, among other things, the First American bank organization in Northern Virginia, was the object of a hostile takeover by foreign interests. Financial General Bankshares was a Virginia corporation. The foreign interests first undertook a proxy contest against Financial General's management and then later succeeded in negotiating a purchase of a controlling interest in Financial General subject to a later takeover. Financial General is controlled today by a three-man group of voting trustees, acting on behalf of the foreign interests. This takeover does not appear to have had any adverse impact on Virginia shareholders or customers, or on any communities in which First American does business.

Garfinckel. During negotiations between Allied Stores and Garfinckel, Brooks Brothers, Miller & Rhoads, Inc. to sell Garfinckel's Miller & Rhoads division, Allied Stores made a hostile tender offer for all of Garfinckel's stock. A large block of shares had been held by one family (more than 20 percent). When Allied initiated its tender offer, it had a binding agreement to acquire that stock. Later, Allied revised its price conditioned on approval of the offer by Garfinckel's Board. With great reluctance, the Garfinckel Board accepted Allied's offer. Subsequently, most of Garfinckel's management left. Allied has since been acquired in another hostile transaction and many divisions have been sold, including Garfinckel. Today, Miller & Rhoads is privately held.

The Lane Company. When the Lane Company received a proposal for a merger from Interco, the Lane directors were initially opposed. Interco increased the pressure by filing law suits in Virginia, South Carolina, and Mississippi, where Lane had operations, seeking injunctions against enforcement of state anti-takeover statutes. All litigation was suspended by agreements not to invoke the state statutes except after 72-hours notice.

After extensive negotiations, the Lane Board, by a split vote, agreed to recommend the merger to shareholders. At the shareholder meeting, the vote was largely in favor of the merger despite opposition from certain members of the Lane family who were substantial stockholders. The merger was approved. Following the merger, most Lane management was retained, and the company reportedly operates with substantial autonomy. However, now (August

1988), Interco has become the target of a $2.47 billion dollar tender offer from the Rales brothers of Washington.

Media General Corporation. In early 1988, Burt Sugarman initiated an offer to acquire all of the outstanding stock of Media General, consisting of publicly-held Class A stock and Class B stock, which is not publicly traded but held by one family. The family and the Media General board strongly opposed the offer. The subsequent proxy contest and litigation received national attention because it represented the first hostile takeover effort to obtain control of a corporation with a dual class capital structure. The resulting votes and court ruling were favorable to the family interests. Sugarman interests currently hold more than 10 percent of Class A stock, giving no indication of their future intentions (as of August 1988).

Richmond Corporation - Goldsmith/Continental Group. In the mid-1970s, Continental Group, Stamford, Connecticut, acquired Richmond Corporation and its principal operating subsidiaries, Lawyers Title Insurance Corporation and Life Insurance Company of Virginia. This acquisition was opposed by incumbent management of Richmond Corporation but was finally concluded with the divided support of the Richmond Corporation Board of Directors. Lawyers Title and Life of Virginia continued to operate somewhat autonomously under Continental Group's ownership. In 1984, a British financier, Sir James Goldsmith, announced his intention to acquire control of Continental Group. This proposal was opposed by Continental Group's management. An auction process resulted and control of Continental Group was acquired by a privately-owned concern, Peter Kiewit & Sons, Omaha, Nebraska. In order to pay down acquisition indebtedness, Peter Kiewit sold both Lawyers Title (to Universal Leaf) and Life of Virginia (to Combined Insurance, Chicago).

Universal Leaf Tobacco Company. In 1976, Universal Leaf was the subject of an unexpected takeover bid by Congoleum Corporation, Chicago, Illinois. Universal Leaf was successful in forcing Congoleum Corporation to withdraw its offer. It is clear that Congoleum had very little understanding of Universal Leaf's business and that a successful takeover would have been detrimental to Universal Leaf. Its success in causing Congoleum to withdraw its offer was in large part attributable to the pending litigation under the Virginia Take-Over-Bid Disclosure Act.

The information compiled in this study indicates that takeover activity has been substantial. There is no reason to believe that the Virginia experience differs significantly from that of the nation as a whole. Economic dislocations are often the result of a takeover, as the Craddock-Terry Shoe Company case and others illustrate.

IV. POLICY CONSIDERATIONS

A review of the literature, state statutes, federal initiatives, and a variety of court decisions presents a very unclear view of government regulation of corporate takeovers in today's business environment. To date, court decisions do not provide a consistent set of ground rules. Federal initiatives provide few insights. State statutes reflect no clear consensus on the regulation of corporate takeovers. Empirical analyses to date are murky.

While there is general agreement that there is a large and growing number of corporate takeovers, the number and significance of hostile takeovers is less clear.* A corporate takeover may or may not be perceived as "hostile", depending upon the circumstances. Hostile offers may become friendly, and friendly offers may become hostile, again depending upon circumstances. In hindsight, individual cases of hostile takeovers may be judged good or bad, that is, have positive or negative economic impacts.

Hostile takeover attempts often have negative impacts because of defensive actions of management, e.g., acquiring unneeded debt, selling off valuable assets, or paying greenmail. The type of "offeror" who is initiating the takeover appears to be changing from a so-called "corporate raider" to public corporations supported directly or indirectly by an investment banker. Today there is major participation by foreign investors in takeovers. The interest of the "offeror" may be broadening as well from a quick profit to long-term profit. Still, from such a mixed and shifting set of statutes, opinions, economic issues, and circumstances, a broad set of public policy considerations may be formulated, at least for purposes of review and analysis.

The first basic policy consideration is recognizing the fact that Virginia's domestic corporations represent and affect a variety of constituencies, including Virginia shareholders, employees, customers, suppliers, and local communities whose welfare is important to the Commonwealth's interest. However, in developing regulatory

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* Hostile tender offers are defined as offers made by a third-party bidder directly to shareholders of a target corporation but opposed by the management and directors of the target corporation.

programs, a balance must be made between the public interest and the forces of the efficient free market. Certainly, the Commonwealth has a substantial and legitimate interest in regulating the internal affairs of its domestic corporations.

Second, while there have been abuses in many hostile takeover activities, hostile takeovers are not inherently bad. The fundamental goal of corporate takeover regulation is not to protect the corporation from hostile takeovers but to protect the shareholder and the corporation from unfair practices and abuses that often occur during takeover activities.

There is general agreement that it is in the public interest for government to provide a level playing field, meaning that the rules of the game be fair to all participants. The rules should not favor one group over another, although one group, the shareholder, may need more protection than the others.

There is also general agreement that there should be full and complete disclosure of takeover proposals to ensure that both shareholder and management make informed judgments. The rules of the game should provide that adequate time be allowed for shareholders to consider and act upon that information and that shareholders are not coerced to tender their shares. All shareholders should be treated equally and receive a fair price for any shares involved in a takeover.

There are two underlying policy questions. One, is it desirable to restrict business combinations (through moratorium statutes) after a hostile takeover has been completed? Two, is it desirable to regulate changes in control of a corporation (through a control share acquisition statute)?

Business combination moratorium statutes, which become effective after a hostile takeover has been completed, are directed at "corporate raiders" who finance their acquisitions through heavy borrowing and then sell assets of the corporation to repay these loans. Such statutes prevent these "corporate raiders" from making such an acquisition in the first place. The policy issue: should regulation place limits on the actions of a free market economy?

The proponents of a control share acquisition statute are of the view that (1) stockholders have a right to vote on significant matters not in the ordinary course of business; (2) a single (or group) shareholder's acquisition of a controlling block of shares can be, or is, a fundamental and far-reaching event for a corporation and

its shareholders; and (3) shareholders should vote collectively on such an issue. On the other hand, the effect of such statutes is to negate the rights of an acquirer to be on an equal footing with all other shareholders, i.e., hold voting rights in all shares owned. Virginia does not currently have a control share acquisition law, and adoption of HB 984, a form of such legislation, raises a policy issue for the General Assembly. The fundamental policy issue to decide: does the control share acquisition statute establish a needed level playing field, or does it favor management by disenfranchising the acquirer's right to vote based on owned stock?

Moreover, the question arises whether additional legislation is needed after adoption of HB 983 last year. Unlike HB 983, a control share acquisition law could have significant effects on the activities of takeover bidders who may not intend to finance the takeover by selling corporate assets. Another consideration affecting the discussion on additional legislation is the current controversy over the constitutionality of business combination or moratorium statutes (HB 983) and "first generation" takeover laws (Virginia Take-Over-Bid Disclosure Act).

V. CURRENT REGULATORY PROGRAMS

Scope of State Regulation

Current state corporate takeover statutes may be grouped into four general categories of statutes: (1) control share acquisition, (2) fair price, (3) business combination/moratorium, and (4) redemption rights. The statutes of many states fall into more than one category, and within a category there may be a number of variations in specific provisions, depending upon the state. There are also other, less common regulatory provisions in some states.

Control Share Acquisition Statutes

Control share acquisition statutes deny voting power to an acquirer of "control shares" unless the majority of "disinterested" stockholders vote to confer voting power. "Control shares" are defined as shares which, when added to other shares owned by the acquirer, equal or exceed specified threshold levels. A number of these statutes also provide for a detailed statement concerning the acquirer and the facts and circumstances of the acquisition. A variation of such statutes (Ohio) requires shareholder approval prior to acquiring shares if that results in ownership above a certain percentage.

The practical consequence of these types of statutes is that they enable shareholders to assess the attractiveness of the offer, while protecting themselves by still being able to tender their shares. These statutes also delay the takeover process, giving management time to bargain with the raider or to adopt defensive measures to prevent the takeover. However, an acquirer can condition his offer upon approval of voting rights. If the shareholders approve, the directors are put in an awkward position in which they cannot adopt defensive measures without substantial risk of violating their fiduciary duties. The U.S. Supreme Court upheld this type of statute as constitutional in CTS Corp. v. Dynamics Corporation of America, 481 U.S. 69 (1987).

Supermajority/Fair Price Statutes

Supermajority/fair price statutes prohibit any business combinations between corporations and interested shareholders unless approved by a specified supermajority vote of shareholders or unless they meet certain fair-price or fair-value requirements. Such statutes are generally

designed to discourage "front-end loaded, two-tier" tender offers and to protect shareholders from receiving a lower price during a second step of the takeover transaction. There is no direct restraint on takeover bids.

These statutes ensure equal treatment among shareholders and restrict the bidder's ability to coerce shareholders into tendering their shares. However, such statutes may encourage shareholders to delay tendering their shares, making it more difficult for an acquirer to obtain shares initially. Federal district courts have generally upheld these statutes.

Business Combination/Moratorium Statutes

Business combination/moratorium statutes prohibit a person who has acquired a specified percentage of shares from engaging in a business combination with the corporation for a moratorium period (three or five years), unless the acquirer receives approval by a majority of disinterested directors and two-thirds of the disinterested holders of voting shares. After the moratorium, the person can engage in a business combination, but some statutes require the acquirer to seek approval by a majority of shareholders, excluding his shares. Other post-moratorium exceptions include transactions in which shareholders receive a "fair price" for their shares and transactions with the consent of the disinterested directors.

Business combination/moratorium statutes are designed to prevent abuses occurring in the second step of a takeover. These statutes discourage leveraged buyouts in which an acquirer liquidates valuable assets to finance the takeover.

The business combination/moratorium statutes serve several useful purposes. First, these statutes encourage an acquirer to negotiate with the board of directors. Such negotiations may result in an increase in wealth for the shareholders, as well as a more profitable venture for the corporation. Second, these statutes may be more equitable than control share acquisition statutes because they only limit an acquirer's voting rights concerning specified self-dealing transactions. The acquirer is free to vote on other substantial issues, most significantly the election of the board of directors. Finally, these statutes help curb abuses, such as leveraged buyouts, which are effective after one has acquired control shares.

The constitutionality of business combination statutes has not yet been definitively resolved. While a federal district court upheld Delaware's business combination statute in BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D.

Del. 1988), a Wisconsin district court in RTE Corp. v. Mark IV Industries, Inc., 1988 FED. SEC. L. REP. (CCH) ¶93,789 (E.D. Wis. May 6, 1988), recently held a similar statute unconstitutional, being preempted by frustrating the purposes of the Williams Act since directors had a virtual veto power over shareholders.

Redemption Rights Statutes

Redemption rights statutes require that an acquirer, after having obtained a specified percentage of stock, give notice to the other shareholders and give those shareholders the right to demand a fair value payment for their shares. Such a statute is intended to treat all shareholders equally after the takeover has occurred. Typically, these statutes do not directly prohibit acquisitions above a threshold amount.

Heightened Disclosure Statutes

These statutes are similar to the Williams Act and typically require filing certain disclosure documents with the corporation and/or the state regulator. For example, disclosure is required regarding the effect of the takeover on the target company's operations, employees, suppliers, customers, and the communities in which it operates. These statutes enable the shareholders to have access to information of the takeover, so that they are on equal footing with the acquirer. Generally, these statutes are constitutional as long as they do not conflict with the Williams Act or require hearings by state officials.

Other Regulatory Initiatives

A few states have adopted legislation directly regulating issues such as "greenmail", golden parachutes, or poison pills; other statutes have attempted to clarify or expand the traditional duties and responsibilities of the board of directors. A number of states have enacted provisions that permit the board of directors to consider long-term interests, as well as other constituencies, in discharging their fiduciary duties.

Other States: Summary of Takeover Statutes

Of the 50 states, 19 have control share acquisition statutes in one form or another (See Exhibit 2). In general, they track the Indiana statute which the U.S. Supreme Court held constitutional in 1987. Three states, California, Illinois and Virginia, have pending control share legislation. In 1988, New Hampshire introduced a control share acquisition statute which passed the House but was defeated in the Senate.

Of the states that have adopted control share acquisition statutes, seven have also adopted business combination/moratorium statutes: Arizona, Idaho, Indiana, Minnesota, Missouri, Tennessee, and Wisconsin. Sixteen states, including Virginia and the above identified seven, have business combination/moratorium statutes. (See Exhibit 4). Thus, a total of 28 states have either a control share acquisition statute, a moratorium statute, or both. Fair price/value provisions are generally incorporated in such statutes. Four states have fair price/value statutes but neither control share acquisition nor moratorium statutes: California, Illinois, Maryland, and Mississippi. Two states, Pennsylvania and Maine, have redemption rights statutes. Two states, Nebraska and New Mexico, have statutes not otherwise classified. Fifteen states have no statutory provisions related to regulation of corporate takeovers: Alabama, Alaska, Arkansas, Colorado, Iowa, Montana, New Hampshire, New Mexico, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, Vermont, and West Virginia. Six of these states do have disclosure statutes, but the majority appear to be either not enforced or unconstitutional.

Analysis of Control Share Acquisition Statutes

Comparative Analysis

Control share acquisition statutes are designed to respond to different abuses of the tender offer process than other takeover legislation. These statutes are aimed directly at those takeover bidders who have the ability to finance their deals but may be interested solely in short-term profits at the expense of the corporation. Shareholders are given the chance to evaluate the proposed change in control and determine if it is in their best interests.

Exhibit 2

Summary of State Control Share Acquisition Statutes*

Current Statutes:

No.	State	Effective Date	Comments
1.	Arizona	07/22/87	In response to bid for Greyhound.
2.	Florida	07/02/87	In response to bid for Harcourt Brace Jovanovich.
3.	Hawaii	07/01/87	Amended 1987 statute - held unconstitutional.
4.	Idaho	03/22/88	
5.	Indiana	04/01/86	Held constitutional, 1987, U.S. Supreme Court.
6.	Kansas	04/21/88	
7.	Louisiana	06/11/87	
8.	Massachusetts	07/21/87	Challenged as unconstitutional; revision pending. In response to bid for Gillette Company.
9.	Michigan	04/01/88	
10.	Minnesota	06/01/87	In response to bid for Dayton-Hudson.
11.	Missouri	09/28/87	Original statute, in a bid for TWA, unconstitutional.
12.	Nevada	07/01/87	
13.	North Carolina	05/13/87	In response to bid for Burlington; revision pending.
14.	Ohio	02/12/88	Revision to 1982 Act. Control over acquisition of shares rather than voting rights.

* Source: Draft by the ABA-NASAA Joint Committee on Model Control Share Acquisition Statutes, March 24, 1988.

Exhibit 2 (continued)
Summary of Control Share Acquisition Statutes

No.	State	Effective Date	Comments
15.	Oklahoma	06/24/87	Unconstitutional as applied to foreign corporations.
16.	Oregon	08/01/87	
17.	Tennessee	03/11/88	
18.	Utah	05/29/87	
19.	Wisconsin	04/22/86	Reduced voting rights at 20% level, without approval.

Pending Statutes:

No.	State	Comments
1.	California	Introduced 03/05/87; future action appears remote.
2.	Illinois	Introduced 03/21/87; passed Senate, held in House committee; no action 1988 (two other bills introduced in 1988 session).
3.	Virginia	Introduced 01/28/88; passed House, held in Senate committee.
4.	New Hampshire	Introduced 01/06/88; passed House, defeated in Senate.
5.	Nebraska	Introduced 01/13/88; has a Shareholder's Protection Act which would repeal the Corporate Takeover Act.

Exhibit 3

Summary of Business Combination/Moratorium Statutes

No.	State	Effective Date	Duration
1.	Arizona	07/22/87	3 years
2.	Connecticut	07/07/88	5 years
3.	Delaware	02/22/88	3 years
4.	Georgia	03/03/88	5 years
5.	Idaho	03/22/88	3 years
6.	Indiana	04/01/86	5 years
7.	Kentucky	07/15/88	5 years
8.	Minnesota	06/01/87	5 years
9.	Missouri	06/23/86	5 years
10.	New Jersey	01/23/86	5 years
11.	New York	12/16/85	5 years
12.	Pennsylvania	03/23/88	5 years
13.	Tennessee	03/11/88	5 years
14.	Virginia	03/31/88	3 years
15.	Washington	08/11/87	5 years
16.	Wisconsin	09/11/87	5 years

Of the sixteen states with moratorium statutes, four states provide a three-year moratorium, twelve states provide a five-year moratorium.

Other takeover measures seek different goals. Fair price statutes ensure that all shareholders are treated equally and receive a fair price for their shares. The business combination/moratorium statutes, such as Virginia's HB 983, are designed to protect against abuses associated with an acquirer financing his transaction by selling corporate assets of the acquired corporation. This may be harmful when corporate raiders sell off valuable assets of the corporation to pay back huge debts incurred in their efforts to take over the corporation. These statutes become operative after a successful takeover. The business combination/moratorium statutes also limit an acquirer's voting power in certain self-dealing transactions. However, the acquirer is still able to vote on other corporate matters; most significantly the acquirer may vote on the election of the board of directors. Control share statutes, on the other hand, eliminate the voting power of shares acquired in a control share acquisition. Finally, other defensive measures a corporation adopts may be struck down by the courts early in a takeover process.

Practical Consequences of CSA Statutes

Control share acquisition statutes require disinterested shareholders to approve voting rights of control shares, providing shareholders with a number of advantages. First, the statute enables shareholders to assess the attractiveness of an offer while protecting themselves from being frozen out at a lower price. Shareholders accomplish this by tendering their shares but retaining the option to vote against the offer. Second, the control share acquisition statute prohibits irrevocable proxies. An irrevocable proxy occurs when the authorization to vote for a shareholder cannot be changed or terminated by the shareholder. Shareholders who grant proxies conferring voting rights may change their minds until the date of the vote. This provision is extremely helpful in giving shareholders every opportunity to evaluate the takeover. Finally, the control share acquisition statute protects the independent shareholder against both contending parties. Neither the offeror nor management has an advantage in communicating with the shareholders. Control share acquisition statutes place investors on equal footing with the acquirer and ensure that the majority rules, thus protecting shareholders from some of the coercion involved in tender offers.

Control share acquisition statutes may also delay the tender offer process by permitting management to schedule a vote up to 50 days after a bidder files an acquiring person statement. This allows management the opportunity to negotiate with the bidder and perhaps increase

shareholders' wealth. Shareholders further benefit by having time to consider options and desirable alternative proposals. Thus, shareholders can evaluate the situation and make informed decisions.

Control share acquisition statutes have been criticized as making it easier for a bidder to announce to the world that the company is for sale, when perhaps the bidder is not serious about purchasing it. The acquirer can make a tender offer conditional upon shareholder approval and not actually consummate the purchase of shares. Thus, a bidder can put a corporation "in play" simply by announcing a proposed control share acquisition and calling for a shareholder vote, although the voting provisions, coupled with the prohibition of irrevocable proxies, may offset the usefulness of this tactic.

The control share acquisition statute directs the decision of a change in control to the shareholders. Most often, a corporate raider will condition a tender offer upon a favorable vote. Management may then be limited in its ability to adopt defensive measures for fear of breaching its fiduciary duties. These statutes may therefore stifle management's ability to take effective action.

Arbitrageurs and institutions often play a significant role in takeovers. Control share acquisition statutes may result in vigorous proxy fights with bidders dealing directly with the shareholders. Arbitrageurs are generally interested in short-term profits and would favor any offer resulting in greater premiums. Due to the delay from control share statutes, arbitrageurs may be forced to invest capital for a longer period of time and incur increased costs and interest. A corporation having a longer time perspective may benefit from such statutes that restrict the activities of arbitrageurs.

Control share acquisition statutes may increase the cost of a tender offer. The acquirer must pay for the costs of a special meeting and solicit proxies separately. The bidder may be forced to contact thousands of shareholders. The delay factor may also increase costs. If the acquirer makes a conditional tender offer, he may receive the requisite approval, only to find management has sold key assets or triggered large debts. The bidder is then left paying for a lot of stock in a company that does not have the same characteristics or value.

Discouraging takeovers may sometimes protect poor management and hamper more productive use of corporate resources. Control share acquisition statutes may inhibit desirable takeovers and undermine the shareholders' ability to acquire a higher premium for their shares.

The U.S. Supreme Court in _CTS Corp. v. Dynamics Corporation of America_, 481 U.S. 69 (1987), upheld the constitutionality of Indiana's control share acquisition statute. Control share acquisition statutes that closely parallel Indiana's statute will in all likelihood be similarly upheld.

The Study Advisory Committee concluded that overall analysis indicates that control share acquisition statutes are desirable and could benefit shareholders.

Federal Statutes and Initiatives

Federal regulation of tender offers began in 1968 with the Williams Act which contains disclosure requirements and other substantive provisions. The purpose of the Act is to protect shareholders.

Currently, several legislative initiatives affecting takeovers are pending at the federal level. The Tender Offer Reform Act of 1987 (H.R. 2172) has been proposed by Congressman John D. Dingell (Michigan) and would preempt state regulation of tender offers by its one share/one vote provision, thus limiting the ability of boards of directors to protect shareholders from abusive takeover tactics. In addition, this proposed bill would close the current "10-day window" loophole which permits a bidder to acquire 5 percent of a target company's shares and not announce his acquisition for up to ten days. The bill would also eliminate creeping tender offers. Senator William Proxmire (Wisconsin) also proposed a bill (S. 1323) which would require greater disclosure of attempts to control a company and would limit raider tactics. Recently, the SEC adopted a one share/one vote provision for exchange listing purposes but exempted its effect on control share acquisition statutes.

Although there seems to be great concern over takeovers at the federal level, no legislation is expected this year.

VI. REGULATION IN VIRGINIA

Virginia Statutes and Legislation

The primary legal basis for the regulation of corporate takeovers in Virginia is contained in two Acts found in Title 13.1 of the Code:

1. Take-Over-Bid Disclosure Act, Chapter Six, Sections 13.1-528 through 13.1-541; and

2. Virginia Stock Corporation Act, Chapter Nine, Article 14, "Affiliated Transactions", Sections 13.1-725 through 13.1-728.

The original 1985 "Affiliated Transactions" legislation, modeled after the Maryland statute, was a "fair price" statute under which any takeover must be approved by a supermajority vote of the shareholders or by a disinterested board of directors, or the acquirer must pay a fair price for all shares. House Bill 983, a business combinations/moratorium statute, adopted by the General Assembly in the 1988 Session, amends 13.1-725 through 13.1-727, repeals 13.1-728, and amends 13.1-730 (Right to dissent), Article 15, Dissenters Rights. The 1988 amendment (HB 983) prohibits an interested shareholder from engaging in any "business combination" with the target firm for three years, unless the target firm's board and shareholders approve the transaction. This amendment is similar to legislation recently adopted in Delaware.

House Bill 984 (1988 Session), which passed the House but was continued to 1989 in the Senate Commerce and Labor Committee, would amend Chapter Nine by adding Article 14.1, Sections 13.1-728.1 through 13.1-728.9, relating to control share acquisitions.

Summary of House Bill 984

The pending HB 984 is a control share acquisition statute providing that a majority of disinterested shareholders must approve voting rights of acquired control shares. HB 984 is designed to ensure that shareholders acting as a group can make collective decisions regarding a change of control. The following is a summary of major provisions of HB 984.

"Control Share Acquisitions". A control share acquisition occurs when one acquires or beneficially owns shares that, as an aggregate, control voting power within a

percentage range of ownership. The following are the percentage ranges:

"(i) one-fifth or more but less than one-third of such votes;

(ii) one-third or more but less than a majority of such votes;

(iii) a majority or more of such votes."

When an acquirer controls shares over a threshold level, he must seek approval from the disinterested shareholders to exercise the voting power of these shares.

"Interested shareholders" include the acquirer, any officer, or any employee who is a director.

"Issuing Public Corporation". HB 984 applies to issuing public corporations which are defined as domestic corporations with more than 300 shareholders. No other criteria are established.

"Excepted Acquisition". The following are exceptions to control share acquisitions listed in HB 984:

1. Shares acquired before January 26, 1988;

2. Shares acquired through a legal contract executed before January 26, 1988;

3. Shares acquired by the laws of descent and distribution;

4. Shares acquired to satisfy a pledge or security interest;

5. Shares acquired as part of a merger or plan of share exchange with the issuing public corporation;

6. Shares acquired through a tender or exchange offer, pursuant to an agreement with the issuing public corporation;

7. Shares acquired directly from the issuing public corporation, its subsidiaries, or from a corporation having at least beneficial ownership of a majority of its shares; and

8. Shares acquired from one whose control shares were previously authorized voting rights.

Application. HB 984 only applies to corporations if they "opt-in" before a control share acquisition is initiated through their articles of incorporation or bylaws (adopted by shareholders). Thus, HB 984 does not automatically apply to public corporations.

Voting Rights. A control share acquisition is an acquisition, or series of transactions within ninety days, that when added to already existing shares gives an acquirer control of voting power which exceeds any threshold level. Shares acquired in a control share acquisition will have no voting rights unless authorized by the shareholders. Approval of voting rights must be given by a majority of all outstanding shares of disinterested shareholders. If the control shares do not receive voting rights, then the acquirer retains voting power only for any shares acquired prior to the control share acquisition. If the control shares are transferred to one not engaged in a control share acquisition, the voting power of the shares would be restored.

Control Share Acquisition Statement. An acquiring person may, if he so desires, deliver a control share acquisition statement to the issuing corporation after a control share acquisition or before a proposed one. The statement must contain information concerning the acquirer's identity, number of shares he controls, financial capacity, plans to liquidate, merge, etc., and any other material information that may affect the decision of shareholders to grant voting rights.

Meeting of Shareholders. At the time of delivery of a control share acquisition statement, the acquiring person may request a special meeting of shareholders to consider granting voting rights. Within 10 days, the directors of the corporation must establish the date for such a meeting. This special meeting must be held no sooner than 30 days nor later than 50 days after such a request has been delivered. The acquirer must pay all expenses related to this special meeting. Proxy votes must be solicited separately from offers to purchase stock and must be solicited not sooner than 30 days before the meeting. Irrevocable proxies are prohibited. If no special meeting is requested, the voting rights issue will be resolved at the next annual meeting of shareholders.

Notice to Shareholders. Notice to shareholders of the special meeting must be given promptly. The notice should contain a copy of the control share acquisition statement and a statement by the board of directors of the issuing corporation of its recommendation as to whether to grant voting rights.

Redemption. The issuing corporation is allowed to redeem at fair value control shares acquired if no control share acquisition statement has been filed after 60 days from the last acquisition of such shares. Also, if shareholders do not approve voting rights for control shares, then those shares may also be redeemed at fair value by the issuing corporation during the 60-day period following such meeting.

Dissenter's Rights. If an acquirer's control shares constitute a majority of the voting power of the corporation and these shares have been accorded full voting rights, then dissenting shareholders have the right to receive "fair value" for their shares. "Fair value" is defined as being not "less than the highest price per share paid in a control share acquisition, as adjusted for any subsequent share dividends or reverse share splits or similar changes".

Nonexclusivity. Provisions of this article shall not limit nor require any action by the board of directors or shareholders. A director may consider that the best interests of the corporation are served by its continued independence.

Issues Raised by HB 984/Model Act Comparison

Recently, the American Bar Association (ABA) and the North American Securities Administrators Association (NASAA) have developed a model state control share acquisition act. The following paragraphs identify issues raised by the significant differences between HB 984 and the Model Act.

1. In reference to "excepted acquisitions," the Model Act excludes "Acquisition of additional shares within the range of voting power for which approval has already been granted...." The purpose of such a provision is to clarify a point now only implicit in HB 984 but which apparently was the original intent of the bill. Thus, HB 984 should conform to the Model Act and make this exception explicit.

2. The Model Act, unlike HB 984, does not exempt shares that were previously authorized voting rights by shareholders which are then transferred to another acquirer. The new owner must seek approval of voting rights again. A benefit of this Model Act provision is to allow shareholders the opportunity to evaluate the new acquirer, a provision that is consistent with the purposes of the Act. On the other hand, it appears unreasonable to give voting rights to a

control block of stock and then, upon its transfer, take those rights away. The purpose behind HB 984's exception is to avoid taking away an element of wealth which shareholders have agreed to accept. However, a person can still disperse the control block in lower increments. The Model Act reasons that the issue is not about giving the block of stock additional value but allowing an identified person to have control of the corporation. Under the Model Act, the shareholder would be allowed to reassess the situation where a new control owner is involved. Conversely, the purpose of the control share acquisition statute is aimed at hostile takeovers, rather than a private transaction where an existing owner of control shares negotiates and sells his shares. In fact, there would be no real incentive for the shareholders to be concerned with this second sale because they have no premium to gain. Therefore, it seems reasonable to follow the existing exception found in HB 984.

3. HB 984's definition of "issuing public corporation" does not require additional criteria creating a nexus to the state of incorporation (e.g., a minimum number of shareholders within the state). The CTS decision held that additional nexus criteria reinforced its constitutionality because it affected a substantial number of shareholders in the state, protection of whom is a legitimate state interest. Indiana and the Model Act both include additional nexus criteria. However, the CTS court did not appear to make it mandatory to have such nexus criteria in order to be constitutionally sound. It is a long recognized principle that states have the right to regulate the internal governance of corporations they create. Omitting additional criteria also ensures that all corporations are covered by no more than one state act. Thus, HB 984 should remain with no nexus criteria and be applicable only to corporations incorporated in Virginia.

4. The Model Act provides an "opt-out" provision rather than the "opt-in" provision found in HB 984 for application of the statute. The current "opt-in" provision of HB 984 makes the statute applicable only to corporations that choose to be covered by the Act. The "opt-out" approach makes the statute automatically applicable, with the corporation having the right to remove itself from the coverage under the Act. HB 984 should be amended to follow the Indiana and Model Act approaches with an "opt-out" provision for effective implementation of the statute. Some corporations, however, may find it difficult, as well as expensive, to "opt-out" by shareholder approval.

Thus, a corporation should be able to elect not to be subject to the control share acquisition statute if such corporation's articles of incorporation or bylaws so provide. (Exhibit 4 identifies the "opt-out" provisions of other states.)

5. HB 984 controls the voting rights of all shares acquired in a control share acquisition. For example, if an acquirer has 15 percent of shareholdings and in one transaction goes to 21 percent, that person may lose voting rights to all but the previous 15 percent. The Model Act would only remove voting rights in the one percent in excess of the 20 percent threshold, leaving 20 percent voting power. This latter approach appears to be consistent with the purpose of a minimum threshold. However, removing voting rights in all control shares leaves the parties virtually in the same position they started. In addition, removing voting rights in all shares acquired in the control share acquisition gives an incentive to the bidder to make a bigger investment before launching a tender offer. This provision may deter some bidders who are not serious because of the potential loss of voting rights resulting from such tactics. If the bidder does not get the approval of voting rights in the control shares acquired, he should not be able to vote any of those shares. The Advisory Committee concluded that HB 984 should remain as stated and remove voting rights of all shares acquired in a control share acquisition.

6. The Model Act mandates delivery of a disclosure statement while HB 984 makes it optional, but the acquiring person cannot demand a shareholder vote without a disclosure statement. There is concern that states cannot mandate the disclosure statement because the Williams Act may preempt such a requirement. However, as long as the disclosure statements are not more extensive and the timing requirements allow compliance with both acts, preemption appears to present no problem.

   The disclosure statement provides supplemental information concerning a control share acquirer, even if there is no intent to invoke a shareholder vote. Moreover, the corporation may repurchase the shares of an acquirer who does not deliver a disclosure statement. Mandating the disclosure statement may also deter those who might initiate the control share acquisition process just to put a company "in play", with no intention of completing the process. However, the current HB 984 addresses these problems by

Exhibit 4

Control Share Acquisition Statutes - Opt-Out Provisions

State	Opt-out	Comments
Arizona	X	articles of incorporation approved by shareholders
Florida	X	articles of incorporation or bylaws
Hawaii	X	articles of incorporation
Idaho	X	original articles of incorporation or bylaws
Indiana	X	articles of incorporation or bylaws
Kansas	X	"
Louisiana	X	"
Massachusetts	X	"
Michigan	X	"
Minnesota	Opt-in	articles of incorporation or bylaws approved by shareholders
Missouri	X	articles of incorporation or bylaws
Nevada	X	articles of incorporation
North Carolina	X	irrevocable within 90 days from board or through original articles of incorporation
Ohio	X	articles of regulation
Oklahoma	X	articles of incorporation or bylaws
Oregon	X	"
Tennessee	Opt-in	corporate charter or bylaws
Utah	X	articles of incorporation or bylaws
Wisconsin	X	articles of incorporation

NOTE: Most business combination/moratorium statutes contain opt-out provisions through articles of incorporation or bylaws. (Exceptions include Georgia and Illinois.) Many of these opt-out provisions (Delaware, for example) provide that the board of directors within 90 days of the effective date of the statute may amend their bylaws to express their desire not to be governed by the statute. The shareholders may opt-out of the statute at any time through the corporation's articles of incorporation or bylaws.

mandating the disclosure statement before allowing a shareholder vote. The provision in HB 984 should be followed.

7. HB 984 gives the corporation the right to redeem control shares at fair value if no control share acquisition statement has been delivered or if voting rights were not granted. The first part of the redemption provision requires a bidder to file a disclosure statement or take the risk of having his shares redeemed. The provision acts as a deterrence; before one buys large blocks of shares, he should be prepared to deliver a disclosure statement or have his shares redeemed by the corporation. Redeeming shares after they have been denied voting rights allows the corporation to divest itself from one who owns a sizable portion of the corporation but has no voting rights and perhaps no interest in the business of the corporation. Redemption rights may also be financially burdensome to the issuing corporation, as well as a form of greenmail. An acquirer could take advantage of any increase in stock prices resulting from his acquisition at the expense of the corporation. Thus, there is concern over the equity of fair value determination for redemption rights. HB 984 puts the fair value for redemption as of the date voting rights are denied or, if no disclosure statement has been provided, the date of the call for redemption. Other state statutes define fair value for redemption rights using various methods. These include the average price paid for control shares, the value pursuant to procedures adopted by the corporation, and the value at the time the call for redemption is made. Exhibit 5 identifies redemption rights provisions of other states with control share acquisition statutes. The Study Advisory Committee and staff concluded that a redemption rights provision is desirable and that the fair market value should be determined by the average price paid for the control shares.

Exhibit 5

Control Share Acquisition Statutes - Redemption Rights

State	Redemption*	Fair Value Determination
Arizona	X	at time call is made to redeem shares
Florida	X	pursuant to procedures adopted by corporation
Hawaii	X	at price shares acquired or book value at end of fiscal quarter
Idaho	X	at time of call for redemption
Indiana	X	pursuant to procedures adopted by corporation
Kansas	X	at time call for redemption is given
Louisana	X	pursuant to procedures adopted by the corporation
Massachusetts	X	date deny voting rights or if no disclosure statement at date corporation decides
Michigan	X	
Minnesota	X	at time call for redemption is made
Missouri	None	
Nevada	X	average price paid for control shares
North Carolina	None	
Ohio	None	
Oklahoma	X	pursuant to procedures adopted by corporation
Oregon	X	"
Tennessee	X	date deny voting rights or if no disclosure statement, date of last control share acquisition
Utah	X	
Wisconsin	None	

* All redemption rights are granted at the <u>option</u> of the corporation.

Take-Over-Bid Disclosure Act Summary

Virginia, in 1968, was the first state to enact a Take-Over-Bid Disclosure Act. This statute is aimed at protecting shareholders from hostile takeovers by providing them with sufficient information to make an informed choice about selling their shares. The Take-Over-Bid Disclosure Act applies to domestic corporations and becomes effective at the occurrence of a takeover bid. A takeover bid is defined as an offer to purchase shares which in the aggregate will exceed 10 percent. The bidder is required to make certain disclosures. Information in the disclosure statement includes the terms of the tender offer, any plans or proposals to make material changes in the corporation, financial arrangements, and the number of shares held by the bidder. The Act provides for a hearing by the State Corporation Commission to determine whether there has been adequate disclosure by the offeror. This hearing requirement is constitutionally suspect. Without this hearing provision, the disclosure requirements are substantially the same as federal requirements under the Williams Act.

The Virginia Take-Over-Bid Disclosure Act contains other specified procedures which apply to every takeover bid. These include provisions which allow tendered shares to be withdrawn within seven days from the invitation or up to 60 days if they have not been taken. The offeror must also purchase excess tendered shares pro rata and must pay any increased premium to all tendering shareholders.

Most importantly, the Take-Over-Bid Disclosure Act includes a provision designed to cover creeping tender offers. A creeping tender offer is the purchase of control of a corporation over a substantial period of time. Creeping tender offers are not regulated by federal laws. However, a recent Massachusetts decision struck down a similar state statute. The creeping tender offer provision discourages partial tender offers and is not addressed by HB 984 or Article 14 of Title 13.1 of the Virginia Code.

Although this Act has served its purpose in the past, recent court decisions have made it less than effective. The General Assembly should consider repealing the Act. However, a provision discouraging creeping tender offers appears to be both useful and desirable. Therefore, it may be appropriate to establish a creeping tender offer provision in the Stock Corporation Act.

VII. STUDY RESULTS: FINDINGS AND CONCLUSIONS

Economic issues relate to defining any problems with hostile corporate takeovers and their potential impacts on the public. Regulatory programs of other states and the federal government address the scope and characteristics of corporate takeover regulation. Potential legislation for Virginia concerns the appropriate level of regulation of corporate takeover activities within the Commonwealth.

Economic Issues and Policy Impacts

This study concluded that there is such a close interrelationship between economic issues and public policy issues that neither should be viewed in isolation. It is useful, therefore, to group findings and conclusions that relate to economic issues in the broader context of public policy issues.

Findings and conclusions:

1. The fundamental goal of corporate takeover regulation is not to protect the corporation from hostile takeovers but to protect the shareholder and the corporation from unfair practices and inequities that often occur during takeover activities, by both the "corporate raider" and management.

2. An extensive number of corporate takeovers are occurring at the national level, and there is no reason to believe that the Virginia experience differs significantly from that of the nation as a whole.

3. In today's market, sale of corporate assets resulting from hostile takeovers or leveraged buyouts has created major controversies. Many believe that such corporate restructuring is not in the public interest.

4. It is unclear whether takeovers are good or bad. Existing empirical analyses provide little insight and few guidelines on the proper role of state regulation of corporate takeovers.

5. As a matter of public policy, government should neither encourage nor discourage hostile corporate takeovers. Government, however, has a responsibility to provide a level playing field

to ensure that the rules of the game are fair to all participants.

6. Potential abuses in corporate takeover activities include:

   - Withholding takeover disclosure information needed by shareholders and corporate management to make informed judgments;

   - Providing inadequate time for shareholders and corporate management to consider fully takeover proposals and related implications;

   - Unequal treatment of shareholders, treating one group differently from another group; and

   - Coercion of shareholders to tender their shares.

Regulatory Programs of Other States and the Federal Government

General findings and conclusions:

1. Regulation of corporate takeover activity is not uniform among the states. In some states, there is essentially no regulation; in other states, there is extensive regulation. Most states that have a significant number of public corporations have acted in some way to regulate takeovers.

2. One state's regulatory approach is not necessarily superior to another's. None appear unreasonable, and all may be considered alternatives for Virginia.

3. Most second-generation state takeover statutes (e.g. HB 983 and 984) have been established so recently that there is no clear record of their impacts. It is too early to document whether such regulatory programs have achieved their defined goals. In most cases, the constitutionality of the statutes has not been tested.

4. There is pending legislation in both houses of Congress addressing a variety of issues involved

in hostile takeovers. Some are clearly federal issues; some threaten to intrude into traditional state jurisdictional areas. It is doubtful if any federal legislation will be adopted in the foreseeable future.

5. Virginia should closely monitor federal legislation and initiatives and should actively challenge any potential erosion of the states' traditional authority to regulate the internal affairs of corporations.

6. While the SEC recently established a one share/one vote rule for securities exchange listing purposes, it appears that this rule will not apply to state control share acquisition statutes.

Findings and conclusions that relate to specific types of corporate takeover statutes:

1. Many first-generation state takeover-bid disclosure statutes have been preempted by the federal Williams Act and are not enforced because of their doubtful constitutionality. Some states have recently adopted new disclosure statutes that appear to be consistent with the Williams Act.

2. A creeping tender offer provision, requiring initial takeover-bid disclosure at a two-percent threshold level for stock acquired within a two-year period, appears both reasonable and useful.

3. Super Majority/Fair Price statutes are designed to prohibit "front-end loaded, two-tier" tender offers, thus providing for equal treatment among shareholders. Such statutes appear highly desirable. Federal district courts generally uphold such statutes.

4. Business Combination/Moratorium statutes are designed to discourage leveraged buy-outs. Most states have not adopted moratorium statutes, and the constitutionality of such statutes remains subject to litigation.

5. Control Share Acquisition statutes are designed to deter the completion of hostile takeovers without adequate shareholder and management consideration. There is no complete agreement that states' policies should restrict hostile takeovers in this way, and their effectiveness in

doing so has yet to be demonstrated. The U.S. Supreme Court has upheld this type of statute (Indiana) as constitutional.

Potential Legislation for Virginia

The following study conclusions are presented for consideration by the General Assembly in deliberations concerning corporate takeover legislation:

1. The General Assembly should consider repealing the Take-Over-Bid Disclosure Act. However, consideration should be given to establishing a provision to address the creeping tender offer (in the Stock Corporation Act).

2. The General Assembly should monitor the experience with HB 983 and similar legislation in other states.

3. The General Assembly should consider whether the benefits of the control share acquisition type statute justify its adoption, as a matter of public policy, especially in light of Virginia's existing Affiliates Law (including HB 983) and the Williams Act. The Study Advisory Committee concluded that a control share acquisition statute is desirable and could benefit shareholders and corporations. A full discussion is presented in Chapter V, Analysis of Control Share Acquisition Statutes.

4. If it is determined that a control share acquisition statute is desirable, then the General Assembly should consider a number of suggested amendments to HB 984 resulting from the study's detailed review of the Model Act developed by the ABA and NASAA. These suggested amendments are identified in the following paragraphs.

There is general agreement among study staff and the Study Advisory Committee that the following changes to HB No. 984 are desirable and should be considered by the General Assembly. A full discussion of these changes are presented in Chapter VI.

1. Add: Under "excepted acquisitions" the "Aquisition of additional shares within the range of voting power for which approval has already been granted...," for the purpose of clarifying what is already implicit in HB 984.

2. <u>Change</u>: The applicability of statute from an "opt-in" provision to an "opt-out" provision to provide the basis for more effective implementation. The "opt-out" provision should be effected through articles of incorporation or bylaws.

3. <u>Change</u>: The Fair Market Value determination for redemption rights should be the average price paid for the control shares.

Legislative language to implement these changes is included in Appendix B of this report.

APPENDICES

A. House Joint Resolution No. 139

B. House Bill No. 984, with Suggested Amendments

C. HB 984/Model Act Comparison

D. House Bill No. 983

E. Summary of HB 983

F. Williams Act Summary

G. Take-Over-Bid Disclosure Act

GENERAL ASSEMBLY OF VIRGINIA -- 1988 SESSION

HOUSE JOINT RESOLUTION NO. 139

Requesting the State Corporation Commission to study hostile corporate takeovers in Virginia.

Agreed to by the House of Delegates, February 16, 1988
Agreed to by the Senate, March 9, 1988

WHEREAS, corporations are a major contributor to Virginia's economy as they pay a significant amount of taxes, provide employment to a large number of citizens, and contribute to community projects; and

WHEREAS, in recent years increased activity in regards to hostile corporate takeovers has adversely affected corporations throughout the United States, including some in Virginia; and

WHEREAS, such activity can be highly disruptive to communities by causing, among other things, high unemployment and erosion of the economy and tax base; and

WHEREAS, several states have enacted and many more are considering legislation that will block hostile corporate takeovers that they fear will cost them jobs and revenue; and

WHEREAS, in 1985, as part of the revision of the Stock Corporation Act, Virginia enacted provisions designed to discourage certain types of transactions that involve an actual or threatened change in control of the corporation, but such provisions may need to be strengthened; and

WHEREAS, Virginia has a vital interest in protecting its citizens, corporations, and itself from the adverse effects of hostile corporate takeovers; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the State Corporation Commission is requested to study hostile corporate takeovers in Virginia. The State Corporation Commission shall focus its efforts upon, but not be limited to, a determination of the extent of the problems associated with corporate takeovers in Virginia and their impact on the Commonwealth's economy, a consideration of what other states and the federal government are doing to address the problem, and a consideration of possible legislation to protect Virginia's corporations and employees from the adverse effects of such takeovers.

Upon completion of this study the State Corporation Commission should report its findings to the Governor and the 1989 Session of the General Assembly as provided in procedures of the Division of Legislative Automated Systems for processing legislative documents.

APPENDIX B

1988 SESSION

HP2869484 **ENGROSSED**

HOUSE BILL NO. 984

(As passed by the House of Delegates)

Amendments suggested by HJR 139 Study Group in [ ] -

September 1, 1988

A BILL to amend the Code of Virginia by adding in Chapter 9 of Title 13.1 an article numbered 14.1 consisting of sections numbered 13.1-728.1 through 13.1-728.9, relating to control share acquisitions.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 9 of Title 13.1 an article numbered 14.1, consisting of sections numbered 13.1-728.1 through 13.1-728.9, as follows.

Article 14.1.

Control Share Acquisitions.

§ 13.1-728.1. Definitions.-As used in this article:

"Acquiring person," with respect to any issuing public corporation, means any person who has made or proposes to make a control share acquisition of shares of such issuing public corporation.

"Beneficial ownership" means the sole or shared power to dispose or direct the disposition of shares, or the sole or shared power to vote or direct the voting of shares, or the sole or shared power to acquire shares, including any such power which is not immediately exercisable, whether such power is direct or indirect or through any contract, arrangement, understanding, relationship or otherwise. A person shall not be deemed to be a beneficial owner of shares tendered pursuant to a tender or exchange offer made by such person until the tendered shares are accepted for purchase or exchange. A person shall not be deemed to be a beneficial owner of shares as to which such person may exercise voting power solely by virtue of a revocable proxy conferring the right to vote. A member of a national

securities exchange shall not be deemed to be a beneficial owner of shares held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities and, pursuant to the rules of [such] exchange, may direct the vote of such shares, without instructions, on other than contested matters or matters that may affect substantially the rights or privileges of the holders of the shares to be voted but is otherwise precluded by the rules of such exchange from voting without instructions.

"Control share acquisition" means the direct or indirect acquisition, other than in an excepted acquisition, by any person of beneficial ownership of shares of an issuing public corporation that, except for this article, would have voting rights and would, when added to all other shares of such issuing public corporation which then have voting rights and are beneficially owned by such person, would cause such person to become entitled, immediately upon acquisition of such shares, to vote or direct the vote of, shares having voting power within any of the following ranges of the votes entitled to be cast in an election of directors: (i) one-fifth or more but less than one-third of such votes; (ii) one-third or more but less than a majority of such votes; or (iii) a majority or more of such votes. [If voting rights are granted pursuant to this article in respect of any such range to shares so acquired by any person, any acquisition by such person of additional shares shall not, for purposes of the preceding sentence, constitute a control share acquisition unless, as a result of such acquisition, the voting power of the shares beneficially owned by such person would be in excess of such range in respect of which voting rights had previously been granted.] If this article applies to acquisitions of shares of an issuing public corporation at the time of a control share acquisition of any shares of such corporation, then shares acquired by the same person within ninety days before or after such control share acquisition and shares acquired by the same person pursuant to a plan to make a control share acquisition are deemed to have been

acquired in the same control share acquisition for the purposes of this article, regardless of the applicability of this article at the time of any other acquisitions of shares during such periods or pursuant to such a plan.

"Excepted acquisition" means the acquisition of shares of an issuing public corporation in any of the following circumstances

1. Before January 26, 1988,

2. Pursuant to a binding contract in effect before January 26, 1988;

3. Pursuant to the laws of descent and distribution,

4. Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this article,

5. Pursuant to a merger or plan of share exchange effected in compliance with Article 12 (§ 13.1-716 et seq.) of this chapter if the issuing public corporation is a party to the agreement of merger or plan of share exchange;

6. Pursuant to a tender or exchange offer that is made pursuant to an agreement to which the issuing public corporation is a party,

7. Directly from the issuing public corporation, or from any of its wholly owned subsidiaries, or from any corporation having beneficial ownership of shares of the issuing public corporation having at least a majority, before such transaction, of the votes entitled to be cast in the election of directors of such issuing public corporation; or

8. In good faith and not for the purpose of circumventing this chapter by or from any person (a "transferor") whose voting rights had previously been authorized by shareholders in compliance with this article, or whose previous acquisition of beneficial ownership of shares would have been constituted a control share acquisition but for any of subdivisions 1 through 7 in this definition, however, any acquisition described in this subdivision 8 shall constitute a control share acquisition if as a result thereof any person acquires

beneficial ownership of shares of such issuing public corporation having voting power in the election of directors in excess of the range of votes within which the transferor was authorized by this article to exercise voting power immediately before such acquisition.

"Interested shares" means the shares of an issuing public corporation the voting of which in an election of directors may be exercised or directed by any of the following persons: (i) an acquiring person with respect to a control share acquisition; (ii) any officer of such issuing public corporation; or (iii) any employee of such issuing public corporation who is also a director of the corporation.

"Issuing public corporation" means a domestic corporation that has 300 or more shareholders.

"Person" means any individual, domestic corporation, foreign corporation, partnership, unincorporated association or other entity, and any associate of any such person. For this purpose, "associate" shall mean (i) any other person who directly or indirectly controls, or is controlled by or under common control with, any such person or who is acting or intends to act jointly or in concert with any such person in connection with the acquisition of or exercise of beneficial ownership over shares; (ii) any corporation or organization of which any such person is an officer, director or partner or as to which any such person performs a similar function; (iii) any other person having direct or indirect beneficial ownership of ten percent or more of any class of equity securities of any such person, (iv) any trust or estate in which any such person has a beneficial interest or as to which any such person serves as trustee or in a similar fiduciary capacity; and (v) any relative or spouse of any such person, or any relative of such spouse, any one of whom has the same residence of any such person. For this purpose, "control" shall mean the possession, direct or indirect, of the power to direct or to cause the direction of the management or policies of a person,

whether through the ownership of voting securities, by contract, arrangement or understanding, or otherwise.

The "votes" entitled to be cast by any share shall, if any voting group is entitled to vote for less than the total number of directors to be elected at any election, be determined by multiplying the number of votes entitled to be cast by the holder of such share by the number of directors for whom such holder is entitled to vote, however, beneficial ownership of a majority of the shares comprising any such voting group shall be deemed to entitle such beneficial owner to cast all the votes of the shares in such voting group.

§ 13.1-728.2. Application.-~~If~~ [Unless], at the time of any control share acquisition with respect to an issuing public corporation, such corporation's articles of incorporation or bylaws ~~{adopted by the shareholders}~~ provide that this article [does not] appl~~ies~~[y] to acquisitions of shares of such corporation, shares of such corporation acquired in such control share acquisition have only such voting rights as are conferred by § 13.1-728.3. ~~If~~ [Unless] by midnight of the fourth day following (i) the receipt at the princip~~le~~[al] office of the corporation, [of] a notice [expressly and specifically] describing a proposed control share acquisition, or (ii) in case the proposed control share acquisition is to be made by tender offer, a public announcement, the corporation's articles of incorporation or bylaws ~~do not~~ provide that this article [does not] appl~~ies~~[y], then the provisions of § 13.1-728.3 shall ~~not~~ apply to shares to be acquired in such control share acquisition.

§ 13.1-728.3. Voting rights.-A. [Notwithstanding any contrary provision of this chapter,] S[s]hares acquired in a control share acquisition have no voting rights unless voting rights are granted by resolution adopted by the shareholders of the issuing public corporation. If such a resolution is adopted, such shares shall thereafter have the voting rights they would have had in the absence of this article.

B. To be adopted under this section, the resolution shall be approved by a majority of all the votes which could be cast in a vote on the election of directors by all the outstanding shares other than interested shares. Interested shares shall not be entitled to vote on the matter, and in determining whether a quorum exists, all interested shares shall be disregarded. For the purpose of this subsection, the interested shares shall be determined as of the record date for determining the shareholders entitled to vote at the meeting.

C. If no resolution is adopted under this section in respect of shares acquired in a control share acquisition and beneficial ownership of such shares is subsequently transferred in circumstances where the transferor no longer has beneficial ownership of such shares and the transferee is not engaged in a control share acquisition, then such shares shall thereafter have the voting rights they would have had in the absence of this article.

§ 13.1-728.4. Control share acquisition statement.-Any acquiring person may, after any control share acquisition or before any proposed one, deliver a control share acquisition statement to the issuing public corporation at its principal office. The control share acquisition statement shall set forth all of the following

1. The identify of the acquiring person and each other member of any group of which the person is a part for purposes of determining the shares owned or to be owned, beneficially, by the acquiring person.

2. A statement that the control share acquisition statement is given pursuant to this article.

3. The number of shares of the issuing public corporation beneficially owned by the acquiring person and each other member of the group.

4. The range of voting power under which the control share acquisition falls or would, if consummated, fall.

5. A description in reasonable detail of the terms of the control share acquisition or the proposed control share acquisition, including but not limited to:

a. The source of funds or other consideration and the material terms of the financial arrangements for the control share acquisition;

b. Any plans or proposals of the acquiring person to liquidate the issuing public corporation, to sell all or substantially all of its assets, to merge it or exchange its shares with any other person, to change the location of its principal executive office or a material portion of its business activities, to change materially its management or policies of employment, to alter materially its relations with suppliers or customers or the communities in which it operates, or to make any other material change in its business, corporate structure, management or personnel; and

[c. Any plans or proposals of the acquiring person to acquire additional shares (including additional shares within the range set forth in the statement) or to dispose of any shares; and]

c[d]. Such other information which could reasonably be expected to affect materially the decision of a shareholder with respect to granting voting rights to shares acquired or proposed to be acquired in the control share acquisition.

6. If the control share acquisition has not taken place, representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition. For this purpose, financial capacity shall only be deemed to include (i) cash and cash equivalents in excess of normal working capital requirements and (ii) funds to be provided under legally binding commitments from financial institutions having the capability to advance such funds. If the funds to be provided under such commitments are included in the

demonstration of financial capacity, the control share acquisition statement shall be accompanied by complete copies of all such commitments and a written description of all oral understandings concerning the terms and conditions of such commitments.

§ 13.1-728.5. Meeting of shareholders.-A. If the acquiring person so requests at the time of delivery of a control share acquisition statement and gives an undertaking to pay the corporation's expenses of a special meeting, within ten days thereafter the directors of the issuing public corporation shall call a special meeting of shareholders for the purpose of considering the voting rights to be granted the shares acquired or to be acquired in the control share acquisition.

B. Unless the acquiring person agrees in writing to another date, the special meeting of shareholders shall be held within fifty days after receipt by the issuing public corporation of the request.

C. If the acquiring person so requests in writing at the time of delivery of the control share acquisition statement, the special meeting must not be held sooner than thirty days after receipt by the issuing public corporation of the acquiring person's statement.

D. If the acquiring person makes no request under subsection A of this section but delivers, no later than thirty days before the intended date of notice of an annual meeting of shareholders, a control share acquisition statement with respect to shares acquired in a control share acquisition, the voting rights to be granted such shares shall be considered by any such annual meeting.

E. Notwithstanding any contrary provision of the Virginia Stock Corporation Act, [an appointment of] a proxy that confers authority to vote on the granting of voting rights pursuant to this article shall be solicited separately from any offer to purchase, or from any solicitation of an offer to sell, shares of the issuing public corporation, and may not be solicited sooner than thirty days before the meeting unless otherwise agreed to in writing by the acquiring person and the issuing public corporation. No such proxy

[appointment] may be solicited or voted unless the proxy [appointment] expressly provides that it is revocable at all times until the completion of the vote.

F. Notwithstanding subsection A of this section, the directors of the issuing public corporation may decline to call a special meeting of shareholders requested under such subsection if they determine that, at the time of such request, the acquiring person does not beneficially own shares having at least five percent of the votes entitled to be cast at an election of directors. If the directors so decline and if the control share acquisition statement accompanying such request was delivered no later than thirty days before the intended date of notice of an annual meeting of shareholders, the voting rights to be granted shares acquired or to be acquired in the control share acquisition described in the control share acquisition statement shall be considered at such annual meeting.

[G. The control share acquisition statement required pursuant to subsections A, C, D and E of this section shall be delivered under and meet the requirements of § 13.1-728.4.]

§ 13.1-728.6. Notice to shareholders.-A. If a special meeting of shareholders is required to be called pursuant to § 13.1-728.5, notice of the special meeting shall be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for the meeting, whether or not entitled to vote at the meeting.

B. Notice of the special or annual shareholders meeting at which the voting rights are to be considered shall include or be accompanied by the following.

1. A copy of the control share acquisition statement delivered pursuant to this article.

2. A statement by the board of directors of the corporation, authorized by its directors, of its position or recommendation, or that it is taking no position or making no recommendation, with

respect to the granting of voting rights to shares acquired in the control share acquisition or the proposed control share acquisition.

§ 13.1-728.7. Redemption.-A. If authorized in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, the shares acquired in such control share acquisition with respect to which no control share acquisition statement has been filed with the issuing public corporation may, at any time during the period ending sixty days after the last acquisition of such shares by the acquiring person, be redeemed by the corporation at the ~~fair value thereof~~ [redemption price specified in subsection C of this section].

B. If authorized in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, shares acquired in such control share acquisition with respect to which the shareholders have failed to grant voting rights at a special meeting or, if no special meeting for such purpose has been convened, at an annual meeting may, at any time during the period ending sixty days after such meeting, be redeemed by the corporation at the ~~fair value thereof~~ [redemption price specified in subsection C of this section].

C. ~~For purposes of this section, fair value shall be determined as of the date on which shareholders of the issuing public corporation failed to vote to grant voting rights for the shares to be redeemed, or, if no control acquisition statement is delivered by the acquiring person, as of the date on which the issuing public corporation determines to make a redemption under this section. Such value shall be determined in accordance with procedures adopted by the issuing public corporation and without regard to the effects of denial of voting rights under the provisions of this article.~~ [The redemption price for shares to be redeemed under this section shall be the number of such shares multiplied by the dollar amount (rounded to the nearest cent) equal to the average per share price, including any brokerage commissions, transfer taxes and soliciting dealers'

fees, paid by the acquiring person for such shares. The corporation may rely conclusively on public announcements by, or filings with the Securities and Exchange Commission by, the acquiring person as to the prices so paid.]

§ 13.1-728.8. Dissenters' rights.-A. Unless otherwise provided in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, in the event shares acquired in a control share acquisition are accorded full voting rights and the acquiring person has beneficial ownership of shares entitled to cast a majority of the votes which could be cast in an election of directors, all shareholders of the issuing public corporation other than the acquiring person have the right to dissent from the granting of voting rights and to demand payment of the fair value of their shares under Article 15 (§ 13.1-729 et seq.) of this chapter as though such granting of voting rights were a corporate action described in subsection A of § 13.1-730, except that the provisions of subsection C of § 13.1-730 shall not be applicable and the failure to vote in favor of the granting of voting rights shall be deemed to constitute compliance with the requirements of subsection A of § 13.1-733.

B. For the purposes of this section "fair value" shall in no event be less than the highest price per share paid in the control share acquisition, as adjusted for any subsequent share dividends or reverse share splits or similar changes.

§ 13.1-728.9. Nonexclusivity.-Except as expressly provided in this article, neither the provisions of this article nor their application to any acquiring person shall limit actions that may be taken, or require the taking of any action, by the board of directors or shareholders with respect to any potential changes in control of any issuing public corporation. In the case of any action taken or not taken by directors, the provisions of § 13.1-690 shall apply, and, in determining the best interests of the corporation, a director may consider the possibility that those interests may best be served by the continued independence of the corporation.

APPENDIX C

HB 984/Model Statute Comparison

This section summarizes the significant differences between HB 984 and the Model Control Share Act (Model Act), recently developed by a joint committee of the ABA and NASAA.

Summary of Differences

Over 20 differences between the Model Act and HB 984 are identified. Some of the more significant differences include shareholder nexus criteria, opt-in provision, and redemption rights. In each case, the difference is identified and followed by the rationale and/or staff comment, as appropriate. The following summary is grouped by the relevant Virginia Code Section.

Va. §13.1-728.1 Definitions

"Acquiring Person" definition The Model Control Share Act (Model Act) includes in its definition persons acting as a "group" as defined in §13(d)(3) of the Securities Exchange Act of 1934. This means any group, partnership, syndicate, or other aggregation of persons acting in concert. This "group" concept is incorporated in HB 984's definition of "person."

"Beneficial Ownership" definition This is not defined in Model Act. However, it is referred to in several other definitions of the Model Act such as "interested shares," "affiliate," and "control."

"Control Share Acquisition" definition This is similar to definitions in the Model Act of "control shares" and "control share acquisition" combined. However, the Model Act limits its "control share acquisition" definition by excluding shares acquired in good faith and not for the purpose of circumventing the Act or those acquired for the benefit of others. HB 984 incorporates this provision in its "excepted acquisition" section.

"Excepted Acquisitions"

Model Control Share Act has the following additional exceptions:

- "By a donee under an *inter vivos* gift." Rationale: This usually does not involve a change in the factors

affecting corporate control and is similar to a transfer of shares pursuant to a will or descent distribution without consideration.

- "Pursuant to a transfer between or among immediate family members, or between or among persons under direct common control." Rationale: These close relationships will be included in the definition of "acquiring person" under the "group" theory, so such a transfer does not change the balance of control in the corporation; i.e., they will be considered as an aggregate in a control share acquisition regardless. HB 984 mentions family relationships in its definition of "associate." Therefore, it appears that this exclusion may be unnecessary as its application will have the same effect.

- Acquisition from any person whose previous acquisition of control shares were excluded by this section, provided the person acquiring such shares does not increase his voting power to the next threshold and there is only one transfer. Rationale: This is a "previous exclusion" provision. The acquirer of control shares receives this one-time exemption. Since the exemption applies only to one such transfer and does not attach to the block of stock, this exemption cannot be used indefinitely.

- Acquisition of additional shares within the range of voting power for which approval has already been granted, or where the range was achieved through an excluded transaction. Rationale: This clarifies what is already implicit in the act. If shares are approved to cross the one-fifth threshold, then shares up to the next threshold (one-third) are automatically approved. Once one crosses the next threshold, then another control share acquisition has taken place, and approval must be sought for the additional shares.

- Where the corporation itself causes an increase in the person's voting power. Rationale: The person holding the shares whose voting power is affected does not control the corporation's actions and thus should not constitute a control share acquisition.

- Pursuant to the solicitation of proxies. Rationale: Regular proxy solicitations could be considered control share acquisitions if they crossed the threshold. Also, proxy contests do not threaten shareholders in the same manner as do control share acquisitions.

HB 984 has the following exceptions which are not included in the Model Control Share Act:

- "Shares directly from the issuing public corporation, or subsidiaries, or from any corporation having beneficial ownership of shares of the issuing corporation having at least a majority, before such transaction, or the votes entitled to be cast in the election of directors of such issuing public corporation."

  The Model Control Act did not include an exclusion covering acquisitions of shares directly from the corporation because it was viewed as "unduly favoring management and evidencing a business protectionism motivation, particularly since it can be used as a first step in a management buy-out series of transactions." ABA-NASAA Joint Committee on Model Control Share Acquisition Statute, Public Division Draft #1, February 8, 1988 [hereinafter Model Act]

- "Shares obtained in good faith and not to circumvent the Article from any person (transferor) whose voting rights had previously been authorized by shareholders in compliance with this Article, or whose previous acquisition of beneficial ownership of shares would have been constituted a control share acquisition but for a previous exclusion."

  The Model Control Act does have a "previous exclusion" exception as provided in the second part of the above exclusion. However, the Model Act did not adopt an exclusion for shares that were previously authorized by shareholders which are then transferred. The Joint Committee believed the purposes of the control share statute have more to do with "the identity, characteristics, and plans of the specific acquiring person than with the block of stock." (Model Act §3[e][3]) Accordingly, shareholders acting collectively should determine whether the new acquiring person should be allowed voting rights based upon information on the individual acquirer, his plans, and other surrounding facts. Further, even though this may deter the acquirer's ability somewhat to alienate control shares, the opportunity still exists to sell blocks of the control shares that will not be denied voting rights.

"Issuing Public Corporation" definition:

HB 984 defines an "issuing public corporation" as a

domestic corporation that has 300 or more shareholders. No other criteria are established.

The Model Control Share Act (§3[g][1]) defines it as "any securities registered under Section 12 or subject to 15(d) of the Securities Exchange Act of 1934 and either:

1) more than 10% of its shareholders resident in the state,

2) more than 10% of its shares owned by state residents,

3) ten thousand shareholders resident the state.

The residence shareholder is presumed to be the address appearing in the records of the corporation." Banks, brokers, etc. are disregarded for purposes of calculating the percentages.

Although the Indiana statute requires an economic nexus, neither the Model Act nor HB 984 propose such criteria. In addition, HB 984 does not include the other shareholder criteria set forth in both the Indiana statute and the Model Control Share Act. It is unclear whether the CTS decision encourages additional nexus criteria, other than merely the requirement of being domestic, to ensure constitutionality of a control share statute. HB 984 would ensure that all public corporations are covered by a state statute. Conceivably, if all states adopted control share statutes (a very doubtful occurrence) and had additional criteria, then some corporations would not fall under any state act. Additionally, corporations are creatures of state law thus giving the states the constitutional authority to regulate internal affairs. Conflict of law cases involving internal governance of corporations are resolved by the law of the state of incorporation. On the other hand, the court in CTS held that the shareholder nexus criteria reinforced the Control Share Act's constitutionality because when a substantial number of a corporation's shareholders reside in the same state, that state has a legitimate interest in protecting those shareholders. Almost all states that have adopted a control share act require additional shareholder nexus criteria. Finally, HB 984 does not attempt to regulate foreign corporations.

Va. §13.1-728.2 Application

HB 984 only applies to issuing public corporations, "if, at the time of any control share acquisition, such corporation's articles of incorporation or bylaws (adopted

by shareholders) provide this article applies." This article will also apply if the corporation so authorizes within four days following notification of a proposed control share acquisition. Application of Virginia's act is an "opt-in" - the article is only effective if the corporation so provides. The Model Act, as well as the Indiana statute, automatically cover issuing corporations unless they opt-out by shareholder vote. This appears to be a more effective approach and remains consistent with the purposes of a control share act. To the extent the legislature wants to take a stronger position, adopting an opt-out provision would require a corporation's compliance, unless they provide otherwise.

<u>Va. §13.1-782.3 Voting Rights</u>

Both HB 984 and the Model Control Share Act require approval of voting rights of control shares, "by a majority of all the votes which could be cast in a vote on the election of directors by all the outstanding shares other than interested shares." Virginia's act reduces the voting rights of shares acquired in a transaction (or series of transactions within 90 days - see definition of "control share acquisition") that carries the acquirer over the threshold, leaving only the earlier acquired shares with all voting rights. The Model Act allows full voting rights for all shares up to the 20 percent threshold. Thus, for example, an acquiring person, under HB 984, who has 15 percent and goes to 21 percent of shareholdings in one transaction or within the 90-day applicable period, may lose the voting power of all shares except the previous 15 percent. For the same shareholder, the result of the Model Act would be to lose the voting power of only the one percent over the threshold, thus sustaining 20 percent of voting power. The Model Act states there is little advantage in identifying transactions that carry one over the threshold and sterilizing those shares. It also appears inconsistent with the purpose of having the bottom threshold. Conversely, leaving only previously acquired shares with voting power places the parties virtually in the same position they started before the control acquisition. This strikes an equilibrium.

The Model Act also explicitly states that the restoration of voting rights will occur if by some act of the issuing corporation the voting power of those control shares is reduced to a range previously approved or below the 20 percent threshold where no approval is necessary. This provision is justified by the fact that the corporation is responsible for the action reducing the share to non-control level. This provision <u>may</u> be implicitly understood in HB 984, but it is not explicitly stated.

The Model Act proposes that even if voting rights are denied to an acquirer, after 3 years the control shares would be automatically accorded full voting rights.

Va. §13.1-782.4 Control Share Acquisition Statement

HB 984 makes it optional to deliver an acquisition statement after any control share acquisition or before any proposed one. The Model Act mandates delivery of a disclosure statement where a control share acquisition has occurred, and makes it optional upon a proposal of control shares. Since HB 984 has this procedure of a disclosure statement, it follows that it would be more effective to mandate this information to assist shareholders in their decision to approve voting rights upon a control share acquisition. The Model Act also requires publication, which prevents "initiating the shareholder voting procedure without cost or serious consequence to the acquiring person." (Model Act, §5[a]) Otherwise, an acquirer could put a corporation into "play," invest and receive a short term profit with no intent of making the control share acquisition. The Model Act, unlike HB 984, further requires disclosure by the acquirer of the acquisition dates and prices at which such control shares were acquired. HB 984 specifies that the acquirer must reveal future plans to liquidate, merge, change location, or make any other material change. Finally, HB 984 specifies what is meant by financial capacity and requests the inclusion of copies of commitments, including terms and conditions of funds to be received.

Va. §13.1-728.5 Meeting of Shareholders

HB 984 states that directors may decline to call a special meeting, "if they determine the acquiring person does not beneficially own shares having at least five percent of the votes entitled to be cast at an election of directors." If no special meeting is called, either by reason of the directors or the acquirer has not requested one, and an acquisition statement has been delivered prior to 30 days of an annual meeting, the control share acquisition will be considered at the next annual meeting. The Model Act is silent as to the above. However, it includes a provision that if the acquirer does not receive approval, then upon his request, the issue must be considered at each subsequent annual shareholders meeting. This provision, "mitigates the punitive effects of a negative vote." (Model Act, Section 5[g]) It provides fairness to the acquirer by making it mandatory that shareholders review the request and consider changed

circumstances. Finally, HB 984 does not allow solicitation of proxy votes sooner than 30 days before the meeting unless agreed upon by the parties in writing. This attempts to ensure equal footing for management and the acquirer.

Va. §13.1-728.6 Notice to Shareholders

The Model Act states, "if the special meeting was requested by the acquiring person, the directors shall set the record date not later than 15 days after receiving the request." This 15-day period is intended to facilitate the beneficial owner inquiry. The Virginia Act does not set forth a time period for the record date. The record date is used to determine whether shares constitute "interested shares." It is "in the interest of the issuing public corporation to set an earlier record date, however, in order to try to reduce the drift of shares into the hands of arbitrageurs and other takeover speculators whose vote in the approval process may be dictated solely by short-term considerations." (Model Act, §5[d]) The Model Control Share Act requires that the notice of the special meeting sent to shareholders must include a description of any dissent and appraisal rights and any redemption rights.

Va. §13.1-728.7 Redemption

HB 984 would permit, "redemption of control shares by the issuing corporation if authorized in the corporation's articles of incorporation or bylaws before a control share acquisition has occurred, within 60 days after the last acquisition of any control shares, and if no disclosure statement has been delivered." Since the Model act makes the disclosure statement mandatory, this provision is meaningless in influencing an acquiring person to deliver such a statement. Secondly, the Virginia redemption provision permits redemption by the issuing corporation, if authorized in its bylaws or articles of incorporation before occurrence of the acquisition, of control shares that have failed to be granted full voting rights by the shareholders. This redemption may occur at any time during the period ending sixty days after such meeting. The Model Act rejected the procedure reasoning that the provision may be "regarded as providing a statutory basis for 'greenmail' or 'redemption premium' payments from the corporation to the acquirer which could be ethically undesirable, financially burdensome to the corporation and discriminatory to the shareholders." (Model Act, Additional Commentary) Finally, since the Model Act proposes restoration of voting rights after a three-year period, a redemption provision would lack utility and be inconsistent.

Va. §13.1-728.8 Dissenters' Rights

HB 984 provides that dissenting shareholders may receive "fair value" for their shares which is not less than the highest price per share paid by the acquiring person in the control share acquisition. These rights become available if the acquirer's control shares entitle a majority of votes to be cast in an election of directors, and these shares have been accorded full voting rights, unless otherwise provided in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred.

The Model Act has no such provision, finding that this procedure would put an undue financial strain on the corporation. In addition, shareholders' rights are protected from a new acquirer through their collective opportunity to vest voting rights. Finally, most state corporation laws provide general applicable dissenters' rights.

Competing Control Share Acquisition (Model Act)

The Model Act sets forth the procedure to be followed when dealing with a competing control share acquisition. This provision gives guidelines when a control share acquisition "invokes the shareholder voting procedure of an issuing public corporation before the voting rights of control shares that are the subject of a prior control share acquisition have been restored." (Model Act, §5[h]) HB 984 does not address this subject.

Special Minority Shareholder Rights (Model Act)

This provision requires that "if an affiliate of the corporation, one who controls the management and policies, one year of a vote to opt out of the Act, the acquiring person must offer to purchase all remaining shares at a price no lower than the highest price paid for the acquired shares by the acquiring person during the past year." (Model Act, §6) This section is intended to prevent abuses of the opt-out provision. Without this section, management could circumvent the requirement of a vote of disinterested shares by having shareholders vote to opt out as the first step of a control share acquisition. The above approach safeguards the rights of minority shareholders. HB 984 does not have this section since its article has an "opt-in" applicability. Further, this provision may be unnecessary since it overlaps with Virginia's already existing fair price statute (Va. Code §13.1-725 to 728). There are also other remedies available to shareholders.

1988 SESSION

VIRGINIA ACTS OF ASSEMBLY - CHAPTER 442

An Act to amend and reenact §§ 13.1-646, 13.1-725, 13.1-726, 13.1-727 and 13.1-730 of the Code of Virginia, and to amend the Code of Virginia by adding sections numbered 13.1-725.1, 13.1-726.1 and 13.1-727.1 and to repeal § 13.1-728 of the Code of Virginia, relating to affiliated transactions of stock corporations.

[H 983]

Approved 3/21/88

Be it enacted by the General Assembly of Virginia:

1. That §§ 13.1-646, 13.1-725, 13.1-726, 13.1-727 and 13.1-730 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 13.1-725.1, 13.1-726.1 and 13.1-727.1 as follows:

§ 13.1-646. Share options.–A corporation may create or issue rights, options or warrants for the purchase of shares of the corporation upon such terms and conditions and for such consideration *, if any, and such purposes* as may be approved by the board of directors. If such rights, options or warrants are to be issued to directors, officers or employees as such of the corporation or any subsidiary thereof, and not to the shareholders generally, their issuance shall be authorized by the shareholders of the corporation who are entitled to vote generally in the election of directors, or shall be authorized by and consistent with a plan approved or ratified by such shareholders, unless the articles of incorporation provide that shareholder approval is not required.

§ 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 *or with any other corporation that immediately after the merger would be an affiliate of an interested shareholder that was an interested shareholder immediately before the merger* ,

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~~ *net worth* 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~~ *net worth* 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~~ *any class of* 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~~ *of* the voting shares *, unless such power results solely from a revocable proxy given in response to a proxy solicitation made to ten or more persons and in accordance with the Securities Exchange Act of 1934 ,*

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.~~ *(i) a person shall not be deemed to be a beneficial owner of voting shares tendered pursuant to a tender or exchange offer made by such person or such person's affiliates or associates until such tendered voting shares are accepted for purchase or exchange, (ii) a member of a national securities exchange shall not be deemed to be a beneficial owner of shares held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities and, pursuant to the rules of such exchange may direct the vote of such shares, without instructions, on other than contested matters or matters that may affect substantially the rights or privileges of the holders of the shares to be voted but is otherwise precluded by the rules of such exchange from voting without instructions and (iii) a director of the corporation shall not be deemed to be a 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~~ *ten* 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~~ *1988* , 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

1. The beneficial owner of more than ten percent of *any class 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 - , *or*

2. An affiliate or associate of the corporation and at any time within the preceding three years was an interested shareholder of such corporation.

As to any corporation, "subsidiary" means any other corporation of which it owns, directly or indirectly, a ~~majority of the~~ voting shares *entitling it to cast a majority of the votes entitled to be cast generally in an election of directors of such other corporation*

"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 corporatioi entitled to vote generally in the election of directors.

§ 13.1-725.1. Affiliated transactions.—Notwithstanding any provision to the contrary contained in this chapter, except as provided in subsection B of § 13.1-727, no corporation shall engage in any affiliated transaction with any interested shareholder for a period of three years following such interested shareholder's determination date unless approved by the affirmative vote of a majority (but not less than two) of the disinterested directors and by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by the interested shareholder A corporation may engage in an affiliated transaction with an interested shareholder beginning three years after such interested shareholder's determination date, provided such transaction complies with the provisions of § 13.1-726.

§ 13.1-726. Voting requirements for affiliated transactions.– ~~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~~ r ~~any affiliated transaction constitutes more than five percent of the consolidated assets the corporation.~~

§ 13.1-726.1. Determination by disinterested directors.—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 net worth of the corporation.

§ 13.1-727 Exceptions.– *A.* 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~~ *either* of the following ~~subsections~~ *subdivisions* are met:

1. The affiliated transaction has been approved by a majority of the disinterested directors; *or*

~~2. The corporation has not had more than 300 shareholders of record at any time during the 3 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.~~ *2.* 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~~ *determination* date or (ii) in the transaction in which it became an interested shareholder, whichever is higher *, plus, in either case, interest compounded annually from the earliest date on which such highest per share acquisition price was paid, being the "share acquisition date," through the date the affiliated transaction is effected at the rate for one-year United States Treasury obligations from time to time in effect, less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of such class or series, since the share acquisition date, up to the amount of such interest* ,

(2) The fair market value per share of such class or series on the announcement date or on the determination date, whichever is higher *being the "measuring date" , plus, in either case, interest compounded annually from the measuring date through the date the affiliated transaction is effected at the rate for one-year United States Treasury obligations from time to time in effect, less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of such class or series, since the measuring date, up to the amount of such interest* ,

(3) If applicable, the price per share equal to the ~~fair market value~~ per share ~~of such class or series~~ *amount* determined pursuant to ~~paragraph 6~~ *subdivision 2* a (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~~ *determination* 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 liquidation 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.

B. The provisions of this article do not apply to a particular affiliated transaction if the conditions specified in any one of the following subdivisions are met:

1. The affiliated transaction is with (i) an interested shareholder who has been an interested shareholder continuously or who would have been such but for the unilateral action of the corporation since the latest of (a) January 26, 1988, (b) the date the corporation first became subject to this article by virtue of its having 300 shareholders of record, or (c) the date such person became an interested shareholder with the prior or contemporaneous approval of a majority of the disinterested directors, (ii) any person who becomes an interested shareholder as a result of acquiring shares from a person specified in (i) of this subdivision by gift, testamentary bequest or the laws of descent and distribution or in a transaction in which consideration was not exchanged and who continues thereafter to be an interested shareholder, or who would have so continued but for the unilateral action of the corporation, (iii) a person who became an interested shareholder inadvertently or as a result of the unilateral action of the corporation and who, as soon as practicable thereafter, divested beneficial ownership of sufficient shares so that such person ceased to be an interested shareholder, and who would not, at any time within the three-year period immediately preceeding the announcement date have been an interested shareholder but for such inadvertency or the unilateral action of the corporation, or (iv) an interested shareholder whose acquisition of voting shares making such person an interested shareholder was approved by a majority of the disinterested directors prior to such shareholder's determination date.

2. The corporation does not have more than 300 shareholders of record, unless the foregoing results from action taken by or on behalf of an interested shareholder or a transaction in which a person becomes an interested shareholder

3. The corporation is an investment company registered under the Investment Company Act of 1940.

4. The corporation's articles of incorporation initially filed with the Commission expressly provide that the corporation shall not be governed by this article.

5. The corporation, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws expressly electing not to be governed by this article, provided that, in addition to any other vote required by law, such amendment to the articles of

incorporation or bylaws shall be approved by the affirmative vote of a majority of the shares entitled to vote that are not owned by an interested shareholder An amendment adopted pursuant to this subdivision shall not be effective until eighteen months after the date such amendment was approved by the shareholders and shall not apply to any affiliated transaction between such corporation and any person who became an interested shareholder of such corporation on or prior to the date of such amendment. A bylaw amendment adopted pursuant to this subdivision shall not be further amended by the board of directors. In the event the articles of incorporation or bylaws are subsequently amended to eliminate a prior amendment electing not to be governed by this article, such subsequent amendment shall not restrict an affiliated transaction between the corporation and any person who became an interested shareholder at a time after such prior amendment became effective and who continued to be an interested shareholder immediately before and immediately after the adoption of such subsequent amendment, provided such person thereafter remains an interested shareholder continuously, or would have so remained but for the unilateral action of the corporation.

§ 13.1-727.1. Nonexclusivity.–Except as expressly provided in this article, the provisions of this article shall not limit actions that may be taken, or require the taking of any action, by the board of directors or shareholders with respect to any potential change in control of the corporation. With respect to any action or any failure to act by the board of directors, the provisions of § 13.1-690 shall apply. In determining the best interests of the corporation, a director may consider the possibility that those interests may best be served by the continued independence of the corporation.

§ 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. In the case of a plan of merger or share exchange, the holders of the class or series are required under the plan of merger or share exchange to accept for such shares anything except:

a. Cash;

b. Shares or shares and cash in lieu of fractional shares (i) of the surviving or acquiring corporation or (ii) 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 subdivisions 2 a and 2 b of this

subsection; or

3. The transaction to be voted on is an "affiliated transaction" *and is not approved by a majority of "disinterested directors"* as *such terms are* 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.

2. That § 13.1-728 of the Code of Virginia is repealed.
3. That an emergency exists and this act is in force from its passage.

President of the Senate

Speaker of the House of Delegates

Approved:

Governor

APPENDIX E

Summary of HB 983

HB 983 was passed in the 1988 Session of the General Assembly and became law, effective March 31, 1988.

This bill applies to publicly held Virginia corporations with 300 or more shareholders. The bill prohibits a corporation from engaging in affiliated transactions with an interested shareholder for three years, unless approved by a majority of the disinterested directors and the affirmative vote of two-thirds of the holders of voting shares, excluding those held by the interested shareholder.

An interested shareholder is a beneficial owner of more than ten percent of any class of outstanding voting shares.

Affiliated transactions include the following:

1) Mergers with interested shareholders.

2) Any share exchanges with an interested shareholder who thereby acquires voting shares.

3) Any sale, lease, exchange, mortgage, pledge, transfer or other disposition of corporate assets, or guaranties of indebtedness, having a fair market value in excess of five percent of the corporation's net worth, except if the transaction occurs in the ordinary course of business.

4) The sale or disposition by the corporation of any voting shares having an aggregate fair market value greater than five percent of the fair market value of all outstanding voting shares of the corporation, except pursuant to a share dividend or exercise of rights or warrants proportionate to all holders of shares.

5) The dissolution of the corporation proposed by or on behalf of an interested shareholder.

6) Any reclassification of securities which has the effect of increasing by more than five percent of the percentage of outstanding voting shares of the corporation owned by the interested shareholder.

This article does not apply to an affiliated transaction if any one of the following conditions are met:

1) The affiliated transaction is with an interested shareholder who continuously has been such or would have been but for the corporation's actions since the latest of a) January 26, 1988, b) the date the corporation became subject to this article by having 300 shareholders, or c) the date such person became an interested shareholder with prior approval by the disinterested directors.

2) The affiliated transaction is with one who becomes an interested shareholder by acquiring shares from (1) above through gift, will, or the laws of descent and distribution, or a transaction where no consideration is given.

3) The affiliated transaction is with one who inadvertently becomes an interested shareholder by the corporation's own act, and reasonably soon thereafter divests shares so as not to continue being an interested shareholder.

4) The affiliated transaction is with one whose acquisition of voting shares which made the person an interested shareholder was approved by a majority of disinterested directors.

5) The corporation has less than 300 shareholders, unless this is a result from the action of the interested shareholder.

6) The corporation is an investment company registered under the Investment Company Act of 1940.

7) The corporation's articles of incorporation filed initially with the Commission state that this article will not apply to that corporation.

8) The articles of incorporation or bylaws of a corporation are amended by a majority of disinterested shareholders expressing a desire not to be governed by this article. Such amendment will not be effective until eighteen months after approval.

A corporation may engage in an affiliated transaction with an interested person after three years provided that the transaction is approved by two-thirds of the voting shares, excluding those held by the interested shareholder.

These voting requirements do not apply if either one of the following conditions are met:

1) The affiliated transaction is approved by a majority of the disinterested directors.

2) In the affiliated transaction consideration will be paid to the holders of each class of voting shares and certain other conditions are met. These conditions include a fair price provision to be received by voting shareholders in such affiliated transaction, the consideration to be paid to the shareholders to be in the same form, that there has been no failure in the preceding three years to declare dividends nor any unreasonable reduction in dividends, and that the interested shareholder has not received any more voting shares except as part of the transaction which resulted in his becoming an interested shareholder. Also, the interested shareholder in the preceding three years shall not have received benefits by the corporation such as financial benefits or tax advantages, unless approved by the disinterested directors. Finally, a proxy or information statement must be sent describing the affiliated transaction to the holders of voting shares.

HB 983 contains a right to dissent provision. This entitles a shareholder to receive fair value of his shares in the event of certain specified corporate actions.

A nonexclusivity section is also attached which expresses that this article shall not limit nor require any action by the board of directors or shareholders with respect to a change in corporate control.

APPENDIX F

Williams Act Summary

The Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (codified as amended at 15 U.S.C. 78m (d)-(e), 78h (d)-(f) (1982), was enacted by Congress in 1968 in an effort to federally regulate tender offers. The Act requires a bidder to provide detailed information to shareholders of the target corporation, and to comply with specified procedures in a takeover bid. The main purpose of the Williams Act is to protect shareholders.

The Williams Act requires any person who acquires five percent or more of shares of a publicly held corporation to file a statement within ten days of such acquisition with the Securities and Exchange Commission. The disclosure statement should include information concerning the conditions of the tender offer, financial arrangements, the purpose and extent of the acquisitions and any plans or proposals to make significant changes in the corporation. If any material change occurs in the facts set forth in this statement, an amended filing is required.

In addition to these disclosure requirements, the Williams Act indicates procedures to be followed in the tender offer process. A shareholder may withdraw tendered shares up to seven days from the offer, or after sixty days from the commencement of the offer if the shares have not been purchased. Moreover, a bidder is required to purchase pro rata shares that have been tendered in excess of the number specified in the offer, and to pay any increase in premium to all shareholders who tender their shares.

The provisions of the Williams Act are designed to protect shareholders and to ensure equal treatment of all shareholders.

CHAPTER 6.

TAKE-OVER-BID DISCLOSURE ACT.

Sec.
13.1-528. Short title; purpose.
13.1-529. Definitions.
13.1-530. Provisions of take-over bids.
13.1-531. Disclosure; hearing.
13.1-532. Recommendations to accept or reject.
13.1-533. Deceptive practices.
13.1-534. Investigations; time for hearing; confidentiality of information and documents.

Sec.
13.1-535. Injunctions.
13.1-536. Crimes.
13.1-537. Offenses punishable by Commission.
13.1-538. Separate offenses.
13.1-539. Civil liabilities.
13.1-540. Consent to service of process.
13.1-541. [Not set out.]

§ 13.1-528. Short title; purpose. — A. This chapter shall be known as the "Take-Over-Bid Disclosure Act."

B. The purpose of this chapter is to protect the interests of offerees, investors and the public by requiring that an offeror make fair, full and effective disclosure to offerees of all information material to a decision to accept or reject a take-over bid. (1968, c. 119; 1978, c. 491.)

Law Review. — For comment on take-over bids in Virginia, see 26 Wash. & Lee L. Rev. 323 (1969). For survey of Virginia law on business associations for the year 1969-1970, see 56 Va. L. Rev. 1536 (1970). For an article on the evolution of the State Corporation Commission, see 14 Wm. & Mary L. Rev. 523 (1973). For a discussion of changes in the Take-Over-Bid Disclosure Act by the 1978 session of the General Assembly, see 12 U. Rich. L. Rev. 749 (1978). For a note on securities law developments in the area of tender offers, see 35 Wash. & Lee L. Rev. 757 (1978). For survey of Virginia law on business associations for the year 1977-1978, see 64 Va. L. Rev. 1375 (1978). For survey of Virginia administrative law and utility regulation for the year 1978-1979, see 66 Va. L. Rev. 193 (1980). For a note on the Virginia Takeover Act and the SEC Tender Offer Rule 14d-2(b), see 22 Wm. & Mary L. Rev. 487 (1981). For article on federalism and the constitutionality of state takeover statutes, see 67 Va. L. Rev. 295 (1981). For note on the constitutionality of state takeover acts, see 40 Wash. & Lee L. Rev. 1227 (1983). For note on takeover bids in light of Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983), see 18 U. Rich. L. Rev. 375 (1984).

The purpose of the Virginia statute seems consistent with, rather than antagonistic to, the purpose of the Williams Act. Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980), aff'd, 697 F.2d 576 (4th Cir. 1983).

Injunction improvidently issued. — Where the trial court laid undue and mistaken emphasis on the likelihood of success, mistook the emphasis in balancing the hardships, omitted consideration of the shareholders of the target corporation, found a conflict between the state and federal statutes where none may necessarily exist, and found an impermissible burden on interstate commerce on an insufficient record, preliminary injunction of enforcement of the Virginia Take-Over-Bid Disclosure Act was improvidently issued. Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980), aff'd, 697 F.2d 576 (4th Cir. 1983).

Applied in Telvest, Inc. v. Bradshaw, 547 F Supp. 791 (E.D. Va. 1982); Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983).

§ 13.1-529. Definitions. — As used in this chapter, unless the context otherwise requires, the term:

(a) *"Commission"* means the State Corporation Commission.

(b) *"Exempt offer"* means, with respect to any class of equity securities of the offeree company,

(i) [Repealed.]

(ii) An offer made by an issuer to purchase its own shares or shares of a subsidiary at least two-thirds of the voting stock of which is owned beneficially by such issuer;

(iii) An offer to purchase shares to be effected by a registered broker-dealer on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function, and receives no more than the customary broker's commissions, and neither the principal nor the broker solicits or arranges for the solicitation of orders to sell shares of the offeree company;

(iv) An offer to purchase shares of a class not registered pursuant to § 12 of the Securities Exchange Act of 1934;

(v) An offer which the board of directors of the offeree company recommends to the stockholders of such company, and which will require the affirmative vote of the holders of more than two-thirds of the shares entitled to vote thereon in order to be approved after a solicitation of proxies pursuant to § 14 of the Securities Exchange Act of 1934;

(vi) An offer which the Commission by order, after notice to the offeror and to the offeree company, shall exempt from the provisions of this chapter as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the offeree company or otherwise as not comprehended within the purposes of this chapter;

(vii) An offer or offers to purchase shares from not more than ten stockholders during any period of twelve consecutive months;

(viii) An offer or offers to purchase shares which, if accepted, together with the offeror's presently owned shares acquired during the preceding twelve months, would not exceed two percent of the outstanding shares of such class.

(c) *"Offeree"* means a person, whether a stockholder of record or a beneficial owner, to whom a take-over bid is made.

(d) *"Person"* means an individual, a partnership, a corporation, an unincorporated association, or a trust.

(e) *"Offeree company"* means a corporation incorporated or a real estate investment trust created under the laws of Virginia and doing business in Virginia.

(f) *"Offeror"* means a person who makes a take-over bid, and includes two or more persons,

(i) Whose take-over bids are made jointly or in concert, or

(ii) Who intend to exercise jointly or in concert any voting rights attaching to the shares for which a take-over bid is made.

(g) *"Offeror's presently owned shares"* means the aggregate number of shares of an offeree company (i) beneficially owned, and (ii) subject to a right of acquisition, directly or indirectly, on the date of a take-over bid by (1) the offeror and (2) each associate of the offeror.

(h) *"Associate of the offeror"* means

(i) Any corporation or other organization of which the offeror is an officer, director or partner, or is, directly or indirectly, the beneficial owner of ten percent or more of any class of equity securities,

(ii) Any person who is, directly or indirectly, the beneficial owner of ten percent or more of any class of equity securities of the offeror,

(iii) Any trust or other estate in which the offeror has a substantial beneficial interest or as to which the offeror serves as trustee or in a similar fiduciary capacity, and

(iv) Any relative or spouse of the offeror or any relative of such spouse, who has the same home as the offeror.

(i) *"Take-over bid"* means an offer, other than an exempt offer, made by an offeror directly or through an agent by advertisement or any other written or oral communication to offerees to purchase such number of shares of any class of equity security of the offeree company that, together with the offeror's presently owned shares, will in the aggregate exceed ten percent of the outstanding shares of such class.

(j) *"Securities Act of 1933"* and *"Securities Exchange Act of 1934"* mean the federal statutes of those names as now or hereafter amended. (1968, c. 119; 1970, c. 527; 1978, c. 801, 1979, c. 200; 1980, c. 216; 1983, c. 408.)

Law Review. — For survey of Virginia law on business associations for the year 1969-1970, see 56 Va. L. Rev. 1536 (1970). For a discussion of changes in the Take-Over-Bid Disclosure Act by the 1978 session of the General Assembly, see 12 U. Rich. L. Rev. 749 (1978). For survey of Virginia law on business associations for the year 1978-1979, see 66 Va. L. Rev. 205 (1980). For a note on the Virginia Takeover Act and the SEC Tender Offer Rule 14d-2(b), see 22 Wm. & Mary L. Rev. 487 (1981). For article on federalism and the constitutionality of state takeover statutes, see 67 Va. L. Rev. 295 (1981). For note on takeover bids in light of Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983), see 18 U. Rich. L. Rev. 375 (1984).

Former limitation on exemption under subdivision (b)(iii) declared unconstitutional. — The 1980 amendment to subdivision (b)(iii) of this section, which provided that the exemption under subdivision (b)(iii) would not apply to a person who intended to change control of the offeree company unless certain additional requirements were met, which amendment was repealed by the 1983 amendment, was declared null and void as violative of the commerce clause, U.S. Const., Art. I, § 8, cl. 3. Telvest, Inc. v. Bradshaw, 547 F Supp. 791 (E.D. Va. 1982), aff'd, 697 F.2d 576 (4th Cir. 1983).

Presumption from ownership of 10 percent of stock. — Subsection (i) of this section creates at least a presumption that the ownership of stock in excess of 10 percent in a company whose stock is publicly traded represents an effort to take over control of the company. Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980), aff'd, 697 F.2d 576 (4th Cir. 1983).

§ 13.1-530. Provisions of take-over bids. — The following provisions apply to every take-over bid:

(a) [Repealed.]

(a1) A take-over bid shall not be made for less than all outstanding shares of a class if the offeror has, within two years prior to the commencement of such take-over bid, purchased more than two percent of the shares of such class in market transactions as described in paragraph (iii) of subsection (b) of § 13.1-529.

(b) Shares deposited pursuant to a take-over bid may be withdrawn by or on behalf of an offeree at any time within seven days from the date of the first invitation to deposit shares, and, if the offeror has not taken up the shares, at any time after sixty days from the date of the first invitation to deposit shares, except as the Commission may otherwise prescribe as necessary in the public interest or for the protection of investors.

(c) Where a take-over bid is made for less than all the shares of a class and where a greater number of shares is deposited pursuant thereto than the offeror is bound or willing to take up and pay for, the shares taken up by the offeror shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of shares deposited.

(d) Where an offeror varies the terms of a take-over bid before the expiration thereof by increasing the consideration offered, the offeror shall pay the increased consideration to each offeree whose securities are taken up even if they have been taken up and paid for before the variation of the take-over bid.

(e) Where a take-over bid is sent by mail to offerees, it shall be accompanied by a copy of the statement filed with the Commission pursuant to § 13.1-531 or of the soliciting material, including such additional information as the Commission may require, contained in the Schedule 14D-1 filed in lieu of such statement. (1968, c. 119; 1979, c. 200; 1983, c. 408.)

Law Review. — For survey of Virginia law on business associations for the year 1978-1979, see 66 Va. L. Rev. 205 (1980). For a note on the Virginia Takeover Act and the SEC Tender Offer Rule 14d-2(b), see 22 Wm. & Mary L. Rev. 487 (1981). For article on federalism and the constitutionality of state takeover statutes, see 67 Va. L. Rev. 295 (1981).

Applied in Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980).

§ 13.1-531. Disclosure; hearing. — (a) No offeror shall make a take-over bid unless at least twenty days prior thereto he shall file with the Commission and with the registered agent of the offeree company a statement containing all the information required by subsection (b) of this section or a Schedule 14D-1 and either:

(i) Within ten days following such filing no hearing shall have been ordered by the Commission or requested by the offeree company; or

(ii) A hearing shall have been requested by the offeree company within ten days following such filing but the Commission shall have found that no cause for hearing exists; or

(iii) A hearing shall have been ordered by the Commission within twenty days following such filing and upon such hearing the Commission shall have adjudicated that the offeror proposes to make fair, full and effective disclosure to offerees of all information material to a decision to accept or reject the offer.

(b) The statement to be filed with the Commission pursuant to subsection (a) of this section shall include the following information and such additional information as the Commission may require as necessary in the public interest or for the protection of investors:

(i) The name, address and business experience of the offeror and each associate of the offeror;

(ii) The terms and conditions of the take-over bid, which shall include the applicable provisions of § 13.1-530;

(iii) The source and amount of the funds or other consideration used or to be used in making the take-over bid, and if any part of such funds or consideration is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of making such bid, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan or loans made in the ordinary course of business by a bank or financial institution customarily engaged in the business of making loans, it will be sufficient to so state;

(iv) Any plans or proposals that the offeror may have to liquidate the offeree company, to sell its assets to or merge it with any other person, or to make any other material change in its business or corporate structure;

(v) The number of offerors' presently owned shares;

(vi) Information as to any contracts, arrangements, or understandings with any person with respect to any securities of the offeree company, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof;

(vii) [Repealed.]

(b1) An offeror required to file a Schedule 14D-1 with the Securities and Exchange Commission pursuant to § 14 (d) of the Securities Exchange Act of 1934 may file with the Commission such Schedule 14D-1 in lieu of the statement required by subsection (a) of this section; provided, however, that the Commission may require the offeror to file such additional information as the Commission may deem necessary as being in the public interest or for the protection of investors.

(c) All written soliciting material used by the offeror in connection with the take-over bid shall be filed with the Commission and the registered agent of the offeree company not later than ten days prior to the time copies of such material are first published or sent or given to offerees.

(d) If, pursuant to any arrangement or understanding with the offeror, any persons are to be elected or designated as directors or trustees of the offeree company, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors or trustees of the offeree company, then, prior to the time any such person takes office as a director or trustee, the offeror shall file with the Commission, and transmit to all holders of record of securities of the offeree company who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by § 14 (a) or § 14 (c) of the Securities Exchange Act of 1934 to be transmitted if such person or persons were nominees for election as directors or trustees at a meeting of such security holders. (1968, c. 119; 1970, c. 527; 1977, c. 356; 1978, cc. 491, 801, 1979, c. 200.)

Law Review. — For survey of Virginia law on business associations for the year 1969-1970, see 56 Va. L. Rev. 1536 (1970). For survey of Virgina law on business associations for the year 1976-77, see 63 Va. L. Rev. 1369 (1977). For a discussion of changes in the Take-Over-Bid Disclosure Act by the 1978 session of the General Assembly, see 12 U. Rich. L. Rev. 749 (1978). For a note on the Virginia Take-over Act and the SEC Tender Offer Rule 14d-2(b), see 22 Wm. & Mary L. Rev. 487 (1981). For article on federalism and the constitutionality of state takeover statutes, see 67 Va. L. Rev. 295 (1981). For note on takeover bids in light of Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983), see 18 U. Rich. L. Rev. 375 (1984).

Applied in Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980).

§ 13.1-532. Recommendations to accept or reject. — Any written solicitation or recommendation to offerees to accept or reject a take-over bid shall be filed with the Commission not later than the time copies of such solicitation or recommendation are first published or sent or given to offerees. (1968, c. 119.)

Applied in Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980).

§ 13.1-533. Deceptive practices. — It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any take-over bid, or any solicitation of offerees in opposition to or in favor of any such take-over bid. (1968, c. 119.)

Law Review. — For a note on the Virginia Takeover Act and the SEC Tender Offer Rule 14d-2(b), see 22 Wm. & Mary L. Rev. 487 (1981).

Applied in Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980).

§ 13.1-534. Investigations; time for hearing; confidentiality of information and documents. — (a) The Commission may make such investigations within or outside of this State as it deems necessary to determine whether any person has violated or is about to violate the provisions of this chapter or any order or injunction of the Commission, and may require any person subject to the investigation to pay the actual costs of the investigation including fifty dollars per day for the time of the investigator. The Commission shall have power to issue subpoenas and subpoenas duces tecum to require the attendance of any person and the production of any papers for the purposes of such investigation. No person shall be excused from testifying on the ground that his testimony would tend to incriminate him, but if, after asserting his claim of the privilege, he is required to testify he shall not be prosecuted or penalized on account of any transactions concerning which he does testify

(b) Any hearing pursuant to § 13.1-531 (a) shall begin within forty days of the date a filing is made pursuant to such section and a decision on such hearing shall be made within twenty-five days of the conclusion of the hearing and the filing of the post-hearing briefs.

(c) Information or documents obtained or prepared by any member, subordinate or employee of the Commission in the course of any examination or investigation conducted pursuant to the provisions of this chapter shall be deemed confidential and shall not be disclosed to the public; provided, however, that nothing contained herein shall be interpreted to prohibit or limit (i) the publication of the findings, decisions, orders, judgments or opinions of the Commission; (ii) the use of any such information or documents in proceedings by or before the Commission or a hearing examiner appointed by the Commission; (iii) the disclosure of any such information or documents to any quasi-governmental entity substantially associated with the securities business approved by rule of the Commission; or, (iv) the disclosure of any such information or documents to any governmental entity approved by rule of the Commission, or to any attorney for the Commonwealth, or to the Attorney General of Virginia. (1968, c. 119; 1970, c. 527; 1977, c. 356; 1978, c. 491, 1979, c. 379.)

Law Review. — For survey of Virginia law on business associations for the year 1969-1970, see 56 Va. L. Rev. 1536 (1970). For survey of Virginia law on business associations for the year 1976-77, see 63 Va. L. Rev. 1369 (1977). For a discussion of changes in the Take-Over-Bid Disclosure Act by the 1978 session of the General Assembly, see 12 U. Rich. L. Rev. 749 (1978). For a note on the Virginia Take-over Act and the SEC Tender Offer Rule 14d-2(b), see 22 Wm. & Mary L. Rev. 487 (1981).

Applied in Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980).

§ 13.1-535. Injunctions. — The Commission shall have all the power and authority of a court of record as provided in Article IX, § 3, of the Constitution to issue temporary and permanent injunctions against violations or attempted violations of this chapter or any order issued pursuant to this chapter. For the violation of any injunctions or order issued under this chapter it shall have the same power to punish for contempt as a court of equity, and the procedure therein shall be as set forth in § 12.1-34. (1968, c. 119; 1971, Ex. Sess., c. 1.)

Law Review. — For a note on the Virginia Takeover Act and the SEC Tender Offer Rule 14d-2(b), see 22 Wm. & Mary L. Rev. 487 (1981). For article on federalism and the constitutionality of state takeover statutes, see 67 Va. L. Rev. 295 (1981).

§ 13.1-536. Crimes. — Any person who shall knowingly make or cause to be made any false statement with respect to any matter subject to the provisions of this chapter or exhibit any false paper to the Commission or who shall commit any act declared unlawful by this chapter and any offeror who shall make a take-over bid which does not comply with the provisions of §§ 13.1-530 and 13.1-531 shall be guilty of a misdemeanor, and on conviction, be punished by a fine of not less than $100 nor more than $5,000, or by confinement in jail for not less than 30 days nor more than 1 year, or by both such fine and imprisonment. Prosecutions under this section shall be instituted within two years from the date of the offense. (1968, c. 119.)

Law Review. — For a note on the Virginia Takeover Act and the SEC Tender Offer Rule 14-d(b), see 22 Wm. & Mary L. Rev. 487 (1981).

§ 13.1-537. Offenses punishable by Commission. — The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than 30 days before the date of the hearing, if it be proved that the defendant has knowingly made any misrepresentation of a material fact for the purpose of inducing the Commission to take any action or to refrain from taking action, or has violated any provision of this chapter or any order of the Commission issued pursuant to this chapter, impose a penalty not exceeding $5,000, which shall be collectible by the process of the Commission as provided by law. (1968, c. 119.)

§ 13.1-538. Separate offenses. — Each take-over bid made in violation of the provisions of this chapter shall constitute a separate offense. The Commission may request the offeror to rescind any such bid and to make restitution to the offeree, and if the offeror complies with the request no penalty shall be imposed on him on account of that illegal take-over bid. (1968, c. 119.)

§ 13.1-539. Civil liabilities. — (a) Any offeror who:

(1) Makes a take-over bid which does not comply with the provisions of § 13.1-530 or § 13.1-531, or

(2) Makes a take-over bid by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading (the offeree not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to any offeree whose shares are taken up pursuant to the take-over bid who may sue either at law or in equity (i) to recover such shares, together with all dividends received thereon, costs and reasonable attorneys' fees, upon the tender of the consideration received from the offeror, or (ii) for the substantial equivalent in damages if the offeror no longer owns such shares.

(b) Every person who materially participates or aids in a take-over bid made by an offeror liable under subsection (a), or who directly or indirectly controls any offeror so liable, shall also be liable jointly and severally with

and to the same extent as the offeror so liable, unless the person who so participates, aids or controls, sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There shall be contribution as in cases of contract among the several persons so liable.

(c) Any tender specified in this section may be made at any time before entry of judgment.

(d) No suit shall be maintained to enforce any liability created under this section unless brought within two years after the transaction upon which it is based; provided, that if any person liable by reason of subsection (a) or (b) makes a written offer, before suit is brought, to return the shares taken up pursuant to the take-over bid, together with all dividends received thereon, upon the tender of the consideration received from the offeror, or to pay damages if the offeror no longer owns such shares, no offeree shall maintain a suit under this section who shall have refused or failed to accept such offer within thirty days of its receipt.

(e) Any condition, stipulation or provision binding any offeree to waive compliance with any provision of this chapter or of any rule or order thereunder shall be void.

(f) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity. (1968, c. 119.)

Law Review. — For note on takeover bids in light of Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983), see 18 U. Rich. L. Rev. 375 (1984).

§ 13.1-540. Consent to service of process. — Every nonresident offeror who makes a take-over bid shall be deemed to have appointed the clerk of the Commission as his agent upon whom may be served, in any matter arising under this chapter, 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 such offeror at his latest address on file 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 bv registered or certified mail addressed to such offeror at his latest address on file. A foreign corporation that has complied with § 13.1-766 need not comply with this section. (1968, c. 119.)

§ 13.1-541: Not set out.

Editor's note. — Section 13.1-541 is a severability clause. See Acts 1968, c. 119.