

REPORT OF THE

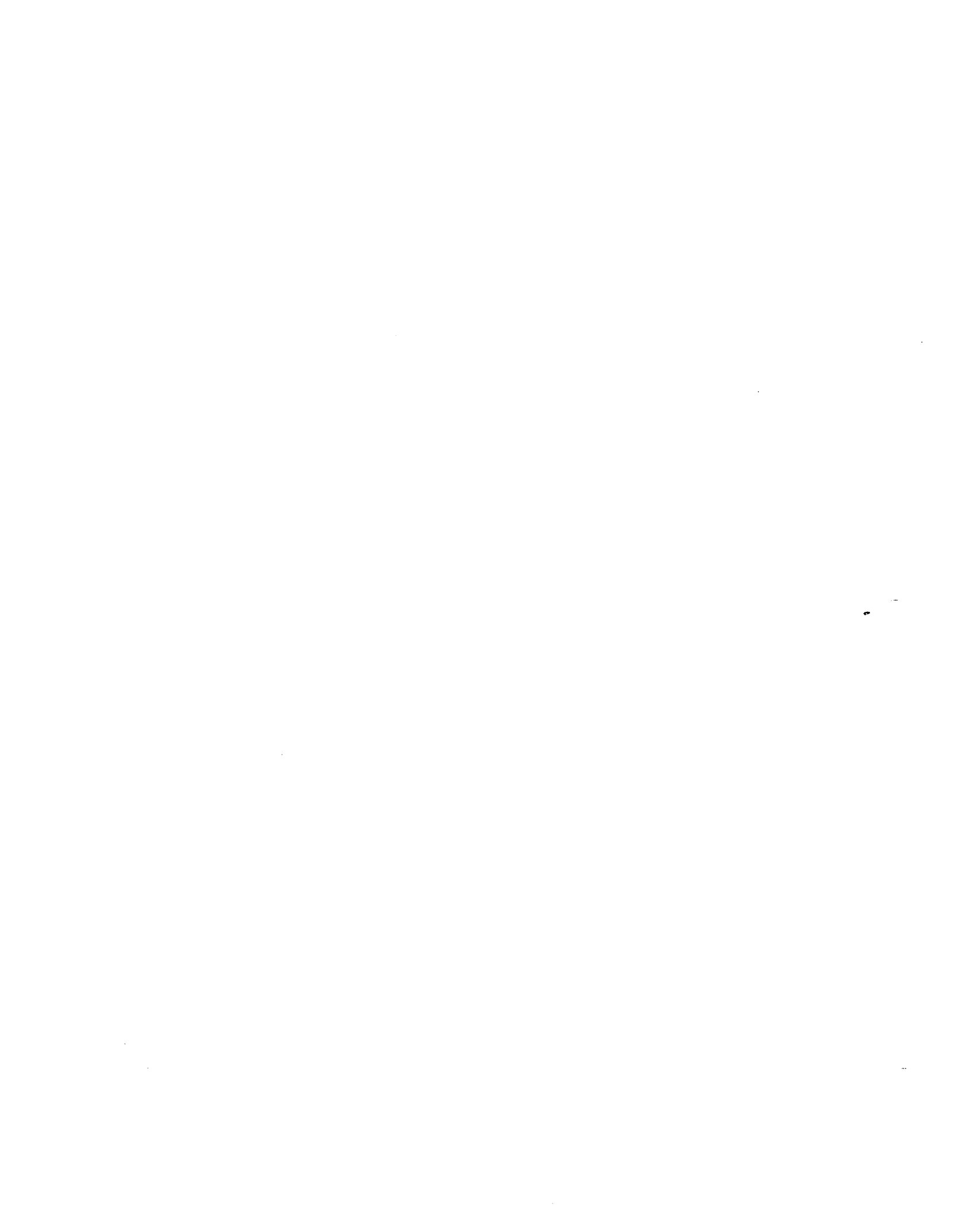
**VIRGINIA COMMISSIONERS TO
THE NATIONAL CONFERENCE
OF COMMISSIONERS ON
UNIFORM STATE LAWS**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 111

**COMMONWEALTH OF VIRGINIA
RICHMOND
2000**



Report of the
Virginia Commissioners to the
National Conference of Commissioners
on Uniform State Laws
to
The Governor and the General Assembly of Virginia
Richmond, Virginia

January 1, 1999 - December 31, 1999

HISTORY OF THE CONFERENCE

In 1889, the New York Bar Association appointed a special committee on uniformity of laws. The following year the New York legislature authorized the appointment of commissioners

... to examine certain subjects of national importance that seem to show conflict among the laws of the several commonwealths, to ascertain the best means to effect an assimilation or uniformity of the laws of the states, and especially whether it would be advisable for the State of New York to invite the other states of the Union to send representatives to a convention to draft uniform laws to be submitted for approval and adoption by the several states.

In the same year, the American Bar Association passed a resolution recommending that each state provide for commissioners to confer with the commissioners of other states regarding legislation on certain issues. In August 1892, the first National Conference of Commissioners on Uniform State Laws (ULC) convened in Saratoga, New York.

By 1912, every state was participating in the Conference. Since then, the Conference has steadily increased its contribution to state law and has attracted some of the most outstanding members of the legal profession. Prior to his more notable political prominence and service as President of the United States, Woodrow Wilson became a member in 1901. Supreme Court Justices Brandeis and Rutledge, current Chief Justice Rehnquist, and such legal scholars as Professors Wigmore, Williston, Pound and Bogart have all served as members of the Conference. This distinguished body has guaranteed that the products of the Uniform Law Conference are of the highest quality and are enormously influential upon the process of the law.

The Conference began more than 100 years ago because of the interests of state governments in improvement of the law and interstate relationships. Its purposes remain to serve state governments and improve state law.

OPERATION OF THE CONFERENCE

The ULC convenes as a body once a year. The annual meeting lasts eight to 12 days and is usually held in late July or early August. Throughout the year drafting committees, composed of commissioners, work over several weekends on drafts of legislation to be considered at the annual meeting. The work of the drafting committees is read, line by line, and thoroughly debated at the annual meeting. Each act must be considered over a number of years; most are read and debated by the Conference two or more times. Those acts deemed by the ULC to be ready for consideration in the state legislatures are put to a vote of the states. Each state caucuses and votes as a unit.

The governing body of the ULC, the Executive Committee, is composed of the officers elected by vote of the commissioners, and five members who are appointed annually by the president of the ULC. Certain activities are conducted by standing committees. For example, the Committee on Scope and Program considers all new subject areas for possible uniform acts. The Legislative Committee superintends the relationships of the Conference to the state legislatures.

The ULC maintains relations with several sister organizations. Official liaison is maintained with the American Bar Association, which annually contributes to the operation of the Conference. The Conference also seeks grants from the federal government and from foundations for specific drafting efforts. The drafting effort on the Uniform Victims of Crime Act (1992) was aided by a federal grant, for example. The Conference will not take money from any source except on the understanding that its drafting work is autonomous. No source may dictate the contents of any act because of a financial contribution. Additionally, liaison is continually maintained with the American Law Institute, the Council of State Governments, and the National Conference of State Legislatures. Other associations are frequently contacted and advised of Conference activities as interests and activities necessitate.

At the national office in Chicago, a small staff provides administrative and clerical assistance to the ULC and the individual members, as well as advice and coordinating assistance in securing the passage of uniform acts. The ULC has consciously limited its staff to prevent accrual of needless administrative costs. The full-time staff in Chicago includes the legislative director and legal counsel, chief administrative officer and communications officer. The position of executive director is part time and is traditionally occupied by a law school faculty member. In addition, the ULC contracts with "reporters" for professional services to aid in

drafting. Reporters are engaged at very modest honoraria to work with drafting committees on specific acts. The Conference also employs professional independent contractors for work on part of its public information and educational materials. The Conference has an annual budget and audit report that are available on request.

Members of the ULC contribute numerous hours each year to drafting acts for Conference consideration. Although the members volunteer their time and effort, they are reimbursed for expenses. The cumulative value of the time donated by the commissioners for the development of uniform and model acts conservatively averages \$6 million annually.

The work of the ULC strengthens the state and federal system of government. In many areas of the law, the states must solve the problem through cooperative action, or the issues are likely to be preempted by Congress. The ULC is one of the few institutions that pursues solutions to problems on a cooperative basis by the states. Without the ULC, more legislative activities would undoubtedly shift from the state capitals to Washington, D. C.

VALUE FOR VIRGINIA AND THE STATES

The process of drafting a uniform act is, therefore, lengthy and deliberate, yet immensely cost-efficient. First, a committee is appointed from the membership of the ULC. The American Bar Association is invited to appoint an advisor to each drafting committee. The by-laws of the ULC require at least two years for drafting and two readings of the draft at annual meetings of the ULC. Through this unique system - the only one like it in American political life - comprehensive legislation receives painstaking and balanced, non-partisan consideration.

The price tag for this process represents true value to the states. With 98 percent of the annual budget of the ULC coming from state government contributions, here is a look at some of the costs and benefits.

Let us assume that a drafting committee will meet twice a year and that a given act will receive about 16 hours of debate. The average committee meeting costs \$10,000. Four meetings over a two-year period will cost \$40,000. Sixteen hours of annual meeting debate translates into an additional \$66,000, figuring the amount budgeted for annual meeting expenses and hours devoted to a specific act. Based on these assumptions, the total cost to the states for a uniform act is \$106,000.

The states would have to come up with an additional \$1,014,000 to duplicate these same services on their own, estimating a \$250 hourly fee for professional services for a total cost of \$1,120,000. The main difference: Uniform Law

Commissioners donate their professional services, spending hundreds of hours on uniform state laws as a public service because of their commitment to good law.

Of course, the hypothetical committee that meets twice a year over a period of two years is just that. The average revision of an article of the Uniform Commercial Code takes four years, with three to five committee meetings per year. The original Uniform Probate Code took a full decade to develop and promulgate. The Uniform Adoption Act (1994) required five years, with extensive committee meetings. Each of these comprehensive projects cost much more from the actual budget of the ULC, and represents much larger contributions - in terms of time - from the ULC membership.

The hypothetical example does not consider still other benefits to the state. Major committees of the ULC draw extensive advisory and observer groups into the drafting process. Meetings of the Uniform Commercial Code committees regularly draw advisors and observers in a ratio of two or three to one commissioner. These advisor and observer groups represent various interests, provide outside expertise and facilitate dissemination of the act. It is impossible to place a dollar value on their input, which state funds do not pay.

It is also not possible to measure the worth of the intellectual participation by all who are involved. There is no process at either the state or federal level of the United States government today that compares to the uniform law process -- intense, non-partisan scrutiny of both policy and execution of the law.

STATE APPROPRIATIONS

The ULC is a state service organization that depends upon state appropriations for its continued operation. All states, the District of Columbia, Puerto Rico, and the U. S. Virgin Islands are asked to contribute a specific amount, based on population, for the maintenance of the ULC. In addition, each state delegation requests an amount to cover its commissioners' travel expenses for the Conference annual meeting. For Virginia, the amount requested for the 1998-99 fiscal year for Conference maintenance was \$29,200, and the amount requested for the 1999-2000 fiscal year was \$30,700.

The total requested contribution of all the states to the operation of the ULC is \$1,356,300 for fiscal year 1999-2000. The smallest state contribution is \$8,200 for the U. S. Virgin Islands, and the largest is \$118,000 for California. Even a modest use of the work product of the ULC guarantees any state a substantial return on each dollar invested. The average number of current uniform and model acts adopted in all states is 70; Virginia has adopted 78. (See Appendix B for a list of Uniform Acts adopted in Virginia.)

PROCESS FOR CREATION OF UNIFORM AND MODEL ACTS

The procedures for drafting an act are the result of long experience with the creation of legislation. The Scope and Program Committee considers subject areas of state law for potential uniform or model acts. The Scope and Program Committee, consisting solely of commissioners, studies suggestions for uniform or model acts from many sources, including organized bar groups, state governments and private persons. The recommendations of the Scope and Program Committee go to the Executive Committee and to the entire ULC for approval.

Once a subject receives approval for drafting, a drafting committee is selected, and a budget is established for the committee work. A reporter is usually engaged, although a few committees work without professional assistance.

Advisors and participating observers are solicited to assist the drafting committee. The American Bar Association appoints official advisors for every committee. Other advisors may come from state government or organizations with interest and expertise in a subject, and from the ranks of recognized experts in a subject. They must donate their time to the effort if they wish to participate. Advisors and participating observers are invited to work with drafting committees and to contribute comments. They do not make final decisions with respect to the final contents of an act. Only the commissioners who compose the drafting committee may do this.

A committee meets according to the needs of the project. Meetings ordinarily begin on Friday morning and finish by Sunday noon, so as to minimize conflict with ordinary working hours. A short act may require one or two committee meetings. Major acts may require one meeting every month for a considerable period of time -- several years, in some instances. A committee may produce a number of successive drafts as an act evolves.

At each annual meeting during its working life, the drafting committee must present its work to the whole body of the ULC. The most current draft is read and debated. This scrutiny continues from annual meeting to annual meeting until a draft satisfies the whole body of the commissioners. No act is promulgated without at least two year's consideration, meaning every act receives at least one interim reading at an annual meeting, and a final reading at a subsequent annual meeting. An act becomes official by a majority vote of the states. As mentioned earlier, each state commission caucuses to represent its state's position and each state receives one vote. The vote by states completes the drafting work, and the act is ready for consideration by the state legislatures.

ACTIVITIES OF THE VIRGINIA COMMISSIONERS

The Governor is authorized to appoint three members, each to serve a four-year term (§ 9-49, Code of Virginia). Governor Allen, in June of 1994, appointed John Goode of Richmond, J. Rodney Johnson of Richmond and Pamela Meade Sargent of Abingdon. Each was reappointed in 1996. Governor James Gilmore appointed Kenneth Lawrence Foran of Alexandria to replace John Goode, whose term expired on June 30, 1998. Governor James Gilmore appointed Kimberly A. Taylor to replace J. Rodney Johnson, who resigned in May of 1999.

In addition to the Governor's appointments, the Constitution of the Conference authorizes the appointment of life members upon recommendation of the Executive Committee. To be eligible for life membership, a commissioner must have served as president of the Conference or as a commissioner for at least 20 years. Virginia's life members are Brockenbrough Lamb, Jr., a member since 1953, and Carlyle C. Ring, Jr., a member since 1970 and president of the Conference from 1983 to 1985.

The Constitution of the Conference also grants membership as an associate member to the principal administrative officer of the state agency "charged by law with the duty of drafting legislation, or his designee." E. M. Miller, Jr., director of the Division of Legislative Services since 1989, is an associate member. Jessica D. French, senior attorney with the Division, was designated an associate member in July 1999.

The Virginia commissioners have served on the following committees during the past year:

Kenneth L. Foran - Member, Drafting Committee to Revise Uniform Health-Care Information Act.

Carlyle C. Ring, Jr. - Chairman, Committee on Uniform Commercial Code; Enactment Plan Coordinator, Drafting Committee to Revise Uniform Commercial Code Article 1; Chairman, Standby Committee on Uniform Computer Information Transactions Act; Chairman, Drafting Committee for Article 2B of the Uniform Commercial Code; Member, Permanent Editorial Board for Uniform Commercial Code; Member, Millennium Committee.

Pamela M. Sargent - Member, Standby Committee on Uniform Electronic Transactions Act.

Esson McKenzie Miller, Jr. - Member, Committee on Liaison with Legislative Drafting Agencies; Member, Legislative Committee, Committee on Parliamentary Practice.

ACTIVITIES OF THE 1999 VIRGINIA GENERAL ASSEMBLY

Based on recommendations made by the Virginia Commissioners in House Document No. 30, 1999, covering the period January 1, 1998 through December 31, 1998, the following actions were taken by the 1999 Virginia General Assembly:

Amendment to enabling legislation for the Virginia Commissioners of Uniformity of Legislation

The Virginia Commissioners suggested an amendment to its enabling legislation, Virginia Code § 9-49, which was adopted by the 1999 Session of the General Assembly and signed by the Governor. This was Senate Bill 1089, patroned by Senator William Mims and was effective as of July 1, 1999.

The bill provided that a commissioner would serve for a term of four years and would continue in office, once his term ends, until an appointment is made by the Governor. Prior to the enactment of Senate Bill 1089, a commissioner served a two-year term at which time his appointment expired. The bill, providing that a commissioner would remain in office until a successor is appointed, is in conformity with the by-laws of the Conference, which allow a commissioner in such a situation to attend the annual conference or meetings of a drafting committee to which the commissioner may be assigned. The bill permits such member to be reimbursed for attending those meetings.

The Commissioners suggested a four-year term as a way of adding continuity and, thereby, exercising greater effectiveness by Virginia's representatives to the Conference. It takes a year or more to develop the individual recognition and respect required to impact the Conference. Also, a majority of states currently provide a four-year term for their members.

The Uniform Child Custody Jurisdiction and Enforcement Act

This act was adopted by the Conference in 1997 and was introduced by Senator William C. Mims during the 1998 Session as Senate Bill 413. The bill was assigned to the Juvenile Justice and Domestic Relations Subcommittee of the Senate Courts of Justice Committee and was carried over to the 1999 Session by the full committee by a vote of 13-0. After being carried over, Senate Bill 413 was not acted upon because Senator Mims made some modifications and reintroduced the act as Senate Bill 1087 at the 1999 Session of the General Assembly. The bill was assigned to the same subcommittee but no action was taken on the bill. The act is being reviewed by the Virginia Bar Association Coalition Committee on Family Law Legislation and it is expected the bill will be revised and reintroduced by Senator Mims during the 2000 General Assembly Session.

Uniform Prudent Investor Act

The 1999 Virginia General Assembly adopted the Uniform Prudent Investor Act as House Bill 841, patroned by Delegate Whittington W. Clement. The act, which is intended to facilitate reasonable investment practices by trustees, became effective in Virginia on January 1, 2000. The bill adopts a standard of prudence that is applied to an investment as part of a total portfolio rather than to the individual investment; makes the fiduciary's central consideration an evaluation of risk versus return; allows investment in anything that meets the requirements of prudent investing; recognizes the need for diversification; and allows delegation of investment and management functions.

Uniform Principal and Income Act

The 1999 Virginia General Assembly adopted the Uniform Principal and Income Act as House Bill 842, patroned by Delegate Whittington W. Clement. The act, which replaces the prior uniform act to reflect modern trust investment practices in the allocation of principal and income, became effective January 1, 2000. The bill provides procedures for trustees administering estates in separating principal from income, and ensuring that the intention of creator of the trust is the guiding principle for trustees.

Uniform Testamentary Additions to Trusts Act (1991)

The 1999 Virginia General Assembly adopted the Uniform Testamentary Additions to Trust Act as House Bill 1996, patroned by Delegate William J. Howell. The bill became effective July 1, 1999. It limits Virginia's pour-over statute to deaths occurring prior to July 1, 1999, and replaces it with the 1991 version of the Uniform Testamentary Additions to Trust Act, which is in force in 46 other states. The surety requirement applicable to a nonresident trustee of a receptacle trust is eliminated, and the prohibition against pour-overs to trusts being administered by out-of-state banks is eliminated. The proposed bill allows a pour-over into a receptacle trust to be executed before, concurrently with or after the testator's death. The bill also recognizes posthumous trust amendments unless prohibited by the testator's will.

Briefings on Article 9 of the Uniform Commercial Code

The 1999 Virginia General Assembly adopted House Joint Resolution 558, patroned by Delegate Harvey B. Morgan, requesting the Virginia Commissioners to the National Conference of Commissioners on Uniform State Laws to conduct briefings for the House Committee on Corporations, Insurance and Banking and the Senate Committee on Commerce and Labor regarding the revisions to Article 9 (Secured Transactions) of the Uniform Commercial Code as proposed by the ULC.

See Appendix C for copies of the 1999 Virginia legislation.

REPORT OF PROCEEDINGS OF THE 1999 ANNUAL CONFERENCE

The 1999 annual meeting was held July 23 to July 30, in Denver, Colorado. Commissioners Lamb, Ring, Sargent, Foran, Miller and French attended.

The agenda for the annual conference was again very full. As always, the debates were spirited and lengthy, but fruitful. The following four uniform acts were approved at the annual meeting: The Uniform Electronic Transactions Act (UETA), the Uniform Computer Information Transactions Act (UCITA), Revisions to the Uniform Rules of Evidence, originally promulgated in 1974, and a revised Uniform Disclaimer of Property Interests Act. Revisions to the Uniform Commercial Code were debated, but not completed. UCC Article 2, Sales, and UCC Article 2A, Leases, were both scheduled for final approval, but it was decided that these acts require more consideration before they are completed. In addition to the acts discussed in this paragraph, the following uniform acts were considered by the Conference at its annual meeting:

- Uniform Consumer Leases Act
- Revision of Uniform Arbitration Act
- Uniform Trust Act
- Uniform Athlete Agents Act
- Uniform Money Services Business Act
- Revision of Uniform Parentage Act
- Uniform Mediation Act
- Uniform Interstate Enforcement of Domestic Violence Orders Act.

1999 ENACTMENTS BY ANNUAL CONFERENCE

SUMMARIES

Summaries of the four acts adopted by the Conference are as follows:

Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act provides that no contract may be denied enforcement or legal effect solely because it is memorialized with an electronic record or authenticated with an electronic signature; that any requirement in the law for a writing will be satisfied by an electronic record; and, that any requirement for a

signature in the law will be satisfied by an electronic signature. An electronic record can be any record that can be made discernable and that is stored electronically. An electronic signature can be any sign or device in electronic form that identifies the author of the message that is sent in electronic form. There are specific rules that indicate when an electronic record or signature is sent and received, how they may be retained when the law requires retention, when a signature is attributed to a person, and, what is the effect of a security procedure – all rules that facilitate electronic transactions and the use of electronic records and signatures. Electronic agents may be used to form contracts. And there is provision for what are called “transferable records,” essentially electronic promissory notes and warehouse receipts. A “transferable record” is an electronic negotiable instrument, and the rules establish the characteristics of an electronic instrument that make it transferable in the same sense (though not in the same way) as a negotiable instrument on paper is transferred. There are also optional rules for state government regarding administration of electronic transactions by governmental agencies.

Uniform Computer Information Transactions Act

The Uniform Computer Information Transactions Act (UCITA) is the first comprehensive act governing the commercial licensing of computer information and network access contracts. It governs all aspect of licensing contracts from formation to remedies in the event there is breach of contract. Computers operate with, produce and use digitized information. The software that runs the computer and the music that it plays are all the same in that sense. What is transferred from person to person is that digitized information stored electronically. A licensing contract is a contract to transfer the informational rights and copies of the information that the originator of computer information has to a transferee. Usually, the transferor of computer information reserves some of the informational rights – the right to copy being the most commonly withheld right. Computer information can be copied and disseminated instantly and infinitely, and the license contract protects the transferor’s economic interest in computer information by limiting the transferee’s subsequent transfer rights. There are special formation rules in UCITA for acquisition of licenses in the mass-market, warranty rules for transfer of information, including special compatibility rules, rules relating to the authentication of transfers of computer information, and rules for memorializing contracts using electronic records. Remedies for breach of an agreement are, generally, damages. In limited and circumscribed instances, there can be agreement to electronic repossession of computer information, or electronically disabling it, as a remedy for breach of contract.

Uniform Disclaimer of Property Interests Act (1999)

The Uniform Disclaimer of Property Interests Act (1999) (UDPIA 1999) updates and replaces the earlier Uniform Disclaimer of Property Interests Act, the

Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act and the Uniform Disclaimer of Transfers under Non-testamentary Instruments Act. UDPIA 1999 allows beneficiaries of intestate, testamentary and non-testamentary (non-probate) interests to execute a disclaimer of those interests. A disclaimer extinguishes the interest as if that interest had never been granted. Disclaimers are used to reallocate interests in estates, trusts and other kinds of property holdings in which benefits may be allocated at death. Often disclaimers are used to obtain more favorable tax consequences. UDPIA 1999 makes it clearer that trustees and other fiduciaries may use disclaimers, that powers of appointment may be disclaimed, and that unfair distributions of interests are avoided when disclaimers are used.

Amendments to Uniform Rules of Evidence; Uniform Rules of Evidence (1999)

The Uniform Rules of Evidence in their modern form originated in 1974. The Rules have been amended in 1986 and 1988. The rules not only promote uniformity of law between states, but also unity of law between state and federal courts. Insofar as it is deemed feasible, the Uniform Rules parallel the Federal Rules of Evidence. The latest amendments in 1999 are responses to the most recent amendments of the Federal Rules. Included in the amendments are new procedures to consider the admission of prior criminal acts of a criminal defendant before they are admitted in court to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident; new limited rules for admitting evidence of a plea or admission of a charge; new limited exceptions to the rule that a sexual crime victim's prior sexual behavior is inadmissible; an additional privilege for "mental health providers"; and new procedures for qualifying an expert before the offering of expert opinion evidence.

RECOMMENDATIONS FOR ENACTMENT

The following uniform acts, which have been approved by the Conference, make significant contributions to important subjects. The Virginia commissioners strongly recommend these acts for consideration and adoption by the 2000 General Assembly:

- Uniform Electronic Transactions Act
- Uniform Computer Information Transactions Act
- Uniform Child Custody Jurisdiction and Enforcement Act (1997)
- Revised Article 9 of the Uniform Commercial Code - Secured Transactions.

CURRENT DRAFTING PROJECTS

There are currently 16 ULC drafting committees working on new and revised uniform acts. In addition, eight study committees are considering subjects for possible future drafting.

An act is designated as "Uniform" if there is a substantial reason to anticipate enactment in a large number of jurisdictions and uniformity of the provisions of the proposed enactment among the various jurisdictions is a principal objective.

The Conference occasionally drafts model acts. An act is designated as "Model" if uniformity may be a desirable objective, although not a principal objective; if the act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the act in its entirety; or, if the purposes of the act can be substantially achieved, even though it is not adopted in its entirety by every state.

CURRENT DRAFTING COMMITTEES

Drafting Committee on Apportionment of Tort Liability. This committee will set out rules to allocate financial responsibility among multiple parties liable to others for negligent or willful misconduct and among themselves.

Drafting Committee to Revise Uniform Arbitration Act. This committee will update and revise the Uniform Arbitration Act, originally promulgated in 1956.

Drafting Committee on Uniform Athlete Agents Act. This committee will draft rules governing individuals who solicit athletes to represent them in negotiating contracts with professional sports teams.

Drafting Committee to Revise Uniform Commercial Code Article 1, General Provisions. This committee will revise Article 1 to complete the current cycle of revisions of the Uniform Commercial Code, begun with Article 2A in 1987. It is also reviewing all articles of the Uniform Commercial Code to harmonize terminology and common concepts.

Drafting Committee to Revise Uniform Commercial Code Article 2, Sales, and Article 2A, Leases. This committee is revising both Article 2 and 2A of the Uniform Commercial Code.

Drafting Committee on Uniform Consumer Leases Act. This committee is drafting rules governing personal property lease transactions in which the lessee is a consumer.

Drafting Committee on Foreclosure by Power of Sale Act. This committee will create a separate power of sale foreclosure act from the Uniform Land Security Interest Act.

Drafting Committee to Revise Uniform Health-Care Information Act. This committee will update and revise the Uniform Health-Care Information Act, originally promulgated in 1985.

Drafting Committee on Uniform Interstate Enforcement of Domestic Violence Orders Act. This committee is drafting rules governing domestic violence orders that originate in another state.

Drafting Committee to Revise Uniform Limited Partnership Act. This committee will revise the Uniform Limited Partnership Act in light of developments in unincorporated organization law since this Act was last amended in 1985.

Drafting Committee on Uniform Mediation Act. This committee is considering legal rules relating to mediation.

Drafting Committee on Uniform Money Services Business Act. This committee will consider legal rules governing certain entities that provide financial services but are not banks or other forms of depository institutions. Included are rules preventing the use of such entities for masking the exchange of illegal proceeds of criminal activity.

Drafting Committee to Revise Uniform Parentage Act. The Uniform Parentage Act, promulgated in 1969, will be updated to reflect new evidentiary techniques for determining paternity.

Drafting Committee to Revise Uniform Securities Act. This committee will consider revisions of earlier Uniform Securities Acts.

Drafting Committee on Uniform Trust Act. This committee is drafting a comprehensive act relating to the law of trusts.

Drafting Committee to Revise Estate Tax Apportionment Act and Section 3-916 of the Uniform Probate Code. This drafting committee will revise Section 3-916 of the Uniform Probate Code and the comparable provision in the Uniform Estate Tax Apportionment Act in light of judicial decisions interpreting the Section and subsequent federal and state legislation.

Study Committees:

Study Committee on *Certificate of Title Laws*
Study Committee on *Electronic Payment Systems*
Study Committee on *Uniform Fiduciaries Act*
Study Committee on *International Developments*
Study Committee on *Internet Private Law*
Study Committee on *Public Retirement Systems*
Study Committee on *Recognition of Foreign Judgments*
Study Committee on *Tort Reform*

**REQUEST FOR TOPICS APPROPRIATE
FOR CONSIDERATION AS UNIFORM ACTS**

The Virginia Commissioners welcome suggestions from the Governor, the General Assembly, the Attorney General, the organized bar, state governmental entities, private interest groups and private citizens on ideas for new uniform or model acts. Appropriate topics are those where (i) uniformity in the law among the states will produce significant benefits to the public and (ii) it is anticipated that a majority of the states would adopt such an act.

Respectfully submitted,

Brockenbrough Lamb, Jr.
Carlyle C. Ring, Jr.
Kenneth Lawrence Foran
Pamela Meade Sargent
Kimberly A. Taylor
E.M. Miller, Jr.
Jessica D. French

APPENDIX A

Number of Adoptions of Uniform and Model Acts for Each State Through November 1, 1999

Alabama: 68	Nebraska: 84
Alaska: 84	Nevada: 98
Arizona: 88	New Hampshire: 78
Arkansas: 94	New Jersey: 69
California: 81	New Mexico: 111
Colorado: 89	New York: 60
Connecticut: 83	North Carolina: 70
Delaware: 75	North Dakota: 130
District of Columbia: 57	Ohio: 65
Florida: 66	Oklahoma: 104
Georgia: 54	Oregon: 97
Hawaii: 105	Pennsylvania: 83
Idaho: 92	Puerto Rico: 24
Illinois: 90	Rhode Island: 78
Indiana: 72	South Carolina: 56
Iowa: 77	South Dakota: 101
Kansas: 92	Tennessee: 75
Kentucky: 68	Texas: 65
Louisiana: 69	U.S. Virgin Islands: 38
Maine: 83	Utah: 92
Maryland: 94	Vermont: 70
Massachusetts: 71	Virginia: 78
Michigan: 94	Washington: 97
Minnesota: 111	West Virginia: 77
Mississippi: 58	Wisconsin: 114
Missouri: 63	Wyoming: 74
Montana: 121	

APPENDIX B

Enactment Record for: VIRGINIA

Anatomical Gift (1968)	Year Enacted: 1970
Anatomical Gift (1987)	Year Enacted: 1990
Arbitration	Year Enacted: 1986
Attendance of Witnesses from Without a State in Criminal Proceedings, Act to Secure (1936)	Year Enacted: 1938
Audio-Visual Deposition (1978)	Year Enacted: 1983
Business Corporation (1928)	Year Enacted: 1956
Child Custody Jurisdiction (1968)	Year Enacted: 1979
Commercial Code (1951) (1957) (1962) (1966)	Year Enacted: 1964
Commercial Code, Article 2A (1987) (1990)	Year Enacted: 1991
Commercial Code, Article 4A (1989)	Year Enacted: 1990
Commercial Code, Article 5 (1995)	Year Enacted: 1997
Commercial Code, Article 6 (Revise) (1989)	Year Enacted: 1997
Commercial Code, Article 8 (1977)	Year Enacted: 1984
Commercial Code, Article 8 (1994)	Year Enacted: 1996
Commercial Code, Article 9 (1972)	Year Enacted: 1973
Commercial Code, Articles 3 and 4 (1990)	Year Enacted: 1992
Condominium (1977) (1980)	Year Enacted: 1982
Conservation Easement (1981)	Year Enacted: 1988
Controlled Substances (1970)	Year Enacted: 1971
Crime Victims Reparations (1973)	Year Enacted: 1976
Criminal Extradition (1936)	Year Enacted: 1940
Custodial Trust (1987)	Year Enacted: 1990
Declaratory Judgments (1922)	Year Enacted: 1922
Desertion and Non-Support (1910)	Year Enacted: 1922
Disposition of Community Property Rights at Death (1971)	Year Enacted: 1982
Disposition of Unclaimed Property (1954)	Year Enacted: 1960
Division of Income for Tax Purposes (1957)	Year Enacted: ?
Durable Power of Attorney (1979)	Year Enacted: ?
Enforcement of Foreign Judgments (1964)	Year Enacted: 1988
Federal Lien Registration (1978) (1982)	Year Enacted: 1988
Federal Tax Lien Registration (1966)	Year Enacted: 1970
Flag (1917)	Year Enacted: 1936
Foreign Depositions (1920)	Year Enacted: 1958
Foreign Money Claims (1989)	Year Enacted: 1991
Foreign Money Judgments Recognition (1962)	Year Enacted: 1990
Gifts to Minors (1956)	Year Enacted: 1958
International Wills (1977)	Year Enacted: 1995
Interstate Arbitration of Death Taxes (1943)	Year Enacted: 1948
Interstate Compromise of Death Taxes (1943)	Year Enacted: 1948
Interstate Family Support (1992)	Year Enacted: 1994
Interstate Family Support (1992) (1996)	Year Enacted: 1997
Land Registration (1916)	Year Enacted: 1916
Limited Partnership (1916)	Year Enacted: 1918
Limited Partnership (1976)	Year Enacted: 1985
Limited Partnership (1976) (1985)	Year Enacted: 1987
Machine Gun (1932)	Year Enacted: 1934
Management of Institutional Funds (1972)	Year Enacted: 1973
Narcotic Drug (1932)	Year Enacted: 1934
Narcotic Drug (1932) (1942)	Year Enacted: 1952
Negotiable Instruments Law (1896)	Year Enacted: 1897
Partnership (1914)	Year Enacted: 1918

Partnership (1992) (1993) (1994)	Year Enacted: 1996
Photographic Copies of Business and Public Records as Evidence (1949)	Year Enacted: 1950
Remarital Agreement (1983)	Year Enacted: 1985
Principal and Income (1931)	Year Enacted: 1936
Principal and Income (1997)	Year Enacted: 1999
Proof of Statutes (1920)	Year Enacted: 1918
Prudent Investor (1994)	Year Enacted: 1999
Real Estate Cooperative (1981)	Year Enacted: 1982
Reciprocal Enforcement of Support (1950)	Year Enacted: 1952
Reciprocal Enforcement of Support (1950) (1952)	Year Enacted: 1954
Reciprocal Enforcement of Support (1968)	Year Enacted: 1970
Recognition of Acknowledgements (1968)	Year Enacted: 1970
Residential Landlord and Tenant (1972)	Year Enacted: 1974
Securities (1956) (1958)	Year Enacted: 1958
Simplification of Fiduciary Security Transfers (1958)	Year Enacted: 1960
Simultaneous Death (1940)	Year Enacted: 1942
Simultaneous Death (1991) (1993)	Year Enacted: 1994
Stock Transfer (1909)	Year Enacted: 1924
TOD Security Registration (1989)	Year Enacted: 1994
Testamentary Additions to Trusts (1991)	Year Enacted: 1999
Trade Secrets (1979) (1985)	Year Enacted: 1986
Traffic on Highways, Act Regulating (1926)	Year Enacted: 1926
Transfer of Dependents (1935)	Year Enacted: 1940
Transfers to Minors (1983) (1986)	Year Enacted: 1988
Trust Receipts (1933)	Year Enacted: 1944
Unclaimed Property (1981)	Year Enacted: 1984
Warehouse Receipts (1906)	Year Enacted: 1908

Enactments: 78.00

VIRGINIA ACTS OF ASSEMBLY -- 1999 SESSION

CHAPTER 338

An Act to amend and reenact § 9-49 of the Code of Virginia, relating to the number and terms of the Commissioners for the Promotion of Uniformity of Legislation.

[S 1089]

Approved March 23, 1999

Be it enacted by the General Assembly of Virginia:

1. That § 9-49 of the Code of Virginia is amended and reenacted as follows:

§ 9-49. Appointment of Commissioners.

~~Every two years~~ *There shall be appointed by the Governor shall appoint* three Commissioners, who with any persons appointed life members are hereby constituted a board of Commissioners by the name and style of Commissioners for the Promotion of Uniformity of Legislation in the United States. *The three Commissioners appointed by the Governor shall serve for a term of four years, with each such term commencing on October 1. A Commissioner appointed by the Governor shall serve until his successor is appointed.*

2. That notwithstanding the provisions of this or any other act, appointment resolution, or other directive of the Governor, any Commissioner for the Promotion of Uniformity of Legislation in the United States appointed by the Governor, whose term is due to expire on June 30, 2000, shall continue that term as a Commissioner until September 30, 2000, or until his successor is appointed. After this transitional period, appointments shall commence for terms of four years as provided in § 9-49.

SB 1087 Uniform Child Custody Jurisdiction and Enforcement Act.

Patron-William C. Mims

Summary as introduced:

Uniform Child Custody Jurisdiction and Enforcement Act. Replaces the former UCCJA (1979) with an updated version addressing jurisdictional issues and expands the act to cover issues involving enforcement of custody and visitation orders issued out of state. Jurisdiction is authorized if there is a significant connection between the parties and the Commonwealth, there is no other state which fits the definition of the child's home state and the parties are all within the Commonwealth. Additionally, a court may exercise temporary emergency jurisdiction if there is a danger of abuse to the child, a sibling or a parent. Once a court exercises jurisdiction, that jurisdiction continues and is exclusive until all parties have left the state, and any orders issued may be modified only by the state having continuing, exclusive jurisdiction. The bill therefore eliminates the current problems created when competing orders are issued in more than one state.

Orders issued in other states may be registered in the juvenile courts here and enforced as Virginia orders. Commonwealth's attorneys are given authority to enforce orders and to use law enforcement to investigate and secure the presence of children.

This bill is recommended by the Virginia Commissioners to the National Conference of Commissioners on Uniform State Laws. This bill contains some modifications from the version introduced during the 1998 Session.

Full text:

01/20/99 Senate: Presented & ordered printed 991833718

Status:

01/20/99 Senate: Presented & ordered printed 991833718

01/20/99 Senate: Referred to Committee for Courts of Justice

01/29/99 Senate: Assigned to C. J. sub-com: Juvenile Justice & Dom. Rel.

02/03/99 Senate: No action taken by Courts of Justice

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VIRGINIA ACTS OF ASSEMBLY -- 1999 SESSION

CHAPTER 772

An Act to amend and reenact §§ 2.1-328, 26-39, 26-40, 26-40.01, 26-40.2, 26-44, 57-35.14:1, 57-39.22, and 64.1-57; to amend the Code of Virginia by adding in Chapter 3 of Title 26 an article numbered 2, consisting of sections numbered 26-45.3 through 26-45.14; and to repeal § 26-45.1, relating to prudent investor rule; uniform act.

[H 841]

Approved March 28, 1999

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.1-328, 26-39, 26-40, 26-40.01, 26-40.2, 26-44, 57-35.14:1, 57-39.22, and 64.1-57 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 3 of Title 26 an article numbered 2, consisting of sections numbered 26-45.3 through 26-45.14, as follows:

§ 2.1-328. Legal investments for other public funds.

A. The Commonwealth, all public officers, municipal corporations, other political subdivisions and all other public bodies of the Commonwealth may invest any and all moneys belonging to them or within their control, other than sinking funds, in the following:

1. Obligations of the Commonwealth. - Stocks, bonds, notes, and other evidences of indebtedness of the Commonwealth of Virginia, and those unconditionally guaranteed as to the payment of principal and interest by the Commonwealth of Virginia.

2. Obligations of the United States, etc. - Stocks, bonds, treasury notes and other evidences of indebtedness of the United States, including the guaranteed portion of any loan guaranteed by the Small Business Administration, an agency of the United States government, and those unconditionally guaranteed as to the payment of principal and interest by the United States; bonds of the District of Columbia; bonds and notes of the Federal National Mortgage Association and the Federal Home Loan Banks; bonds, debentures or other similar obligations of federal land banks, federal intermediate credit banks, or banks of cooperatives, issued pursuant to acts of Congress; and obligations issued by the United States Postal Service when the principal and interest thereon is guaranteed by the government of the United States. The evidences of indebtedness enumerated by this paragraph may be held directly or in the form of repurchase agreements collateralized by such debt securities or in the form of securities of any open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940, provided that the portfolio of such investment company or investment trust is limited to such evidences of indebtedness or repurchase agreements collateralized by such securities, or securities of other such investment companies or investment trusts whose portfolios are so restricted.

3. Obligations of other states. - Stocks, bonds, notes and other evidences of indebtedness of any state of the United States upon which there is no default and upon which there has been no default for more than ninety days; provided, that within the twenty fiscal years next preceding the making of such investment, such state has not been in default for more than ninety days in the payment of any part of principal or interest of any debt authorized by the legislature of such state to be contracted.

4. Obligations of Virginia counties, cities, etc. - Stocks, bonds, notes and other evidences of indebtedness of any county, city, town, district, authority or other public body in the Commonwealth of Virginia upon which there is no default; provided, that if the principal and interest be payable from revenues or tolls and the project has not been completed, or if completed, has not established an operating record of net earnings available for payment of principal and interest equal to estimated requirements for that purpose according to the terms of the issue, the standards of judgment and care required in ~~§ 26-45.1~~ Article 2 (§ 26-45.3 et seq.) of Chapter 3 of Title 26, without reference to this section, shall apply.

In any case in which an authority, having an established record of net earnings available for payment of principal and interest equal to estimated requirements for that purpose according to the terms of the issue, issues additional evidences of indebtedness for the purposes of acquiring or constructing additional facilities of the same general character that it is then operating, such additional

evidences of indebtedness shall be governed fully by the provisions of this section without limitation.

5. Obligations of cities, counties, etc., of other states. - Legally authorized stocks, bonds, notes and other evidences of indebtedness of any city, county, town or district situated in any one of the states of the United States upon which there is no default and upon which there has been no default for more than ninety days; provided, that (i) within the twenty fiscal years next preceding the making of such investment, such city, county, town or district has not been in default for more than ninety days in the payment of any part of principal or interest of any stock, bond, note or other evidence of indebtedness issued by it; (ii) such city, county, town or district shall have been in continuous existence for at least twenty years; (iii) such city, county, town or district has a population, as shown by the federal census next preceding the making of such investment, of not less than 25,000 inhabitants; (iv) the stocks, bonds, notes or other evidences of indebtedness in which such investment is made are the direct legal obligations of the city, county, town or district issuing the same; (v) the city, county, town or district has power to levy taxes on the taxable real property therein for the payment of such obligations without limitation of rate or amount; and (vi) the net indebtedness of such city, county, town or district (including the issue in which such investment is made), after deducting the amount of its bonds issued for self-sustaining public utilities, does not exceed ten percent of the value of the taxable property in such city, county, town or district, to be ascertained by the valuation of such property therein for the assessment of taxes next preceding the making of such investment.

6. Obligations of International Bank, Asian Development Bank and African Development Bank. - Bonds and other obligations issued, guaranteed or assumed by the International Bank for Reconstruction and Development, by the Asian Development Bank or by the African Development Bank.

This section shall not apply to retirement funds and deferred compensation plans to be invested pursuant to §§ 51.1-124.30 through 51.1-124.35 or § 51.1-601.

B. Investments made prior to July 1, 1991, pursuant to § 51.1-601 are hereby ratified and deemed valid to the extent that such investments were made in conformity with the standards set forth in Chapter 6 of Title 51.1.

§ 26-39. Time within which guardian of an estate, conservator or other fiduciary to invest funds; reasonable diligence required.

Whenever a guardian of an estate, conservator or other fiduciary charged with the investment of funds collects any principal he shall have a reasonable time not exceeding four months to invest or loan the same, and shall not be charged with interest thereon until the expiration of such time. A guardian of an estate, conservator or any other fiduciary shall only be required to invest in accordance with the provisions of §§ 26-40.01, 26-40.1, 26-40.2, 26-44, and 26-44.1 and ~~26-45.1~~ Article 2 (*§ 26-45.3 et seq.*) and if he so invests shall be accountable only for such interest and profits as are earned. If any funds are otherwise invested without the previous consent of the court having jurisdiction of such trust funds, the burden shall be on the guardian of an estate, conservator or other fiduciary before his settlement is approved by the commissioner of accounts to show to the satisfaction of the commissioner that after exercising reasonable diligence he was unable to so invest the funds and that the investment made was reasonable and proper under all of the circumstances and fair to the beneficiary of the funds.

This section shall not be construed as altering the provisions of any will, deed or other instrument giving to the fiduciary discretion as to the rate of interest, character of security, nature or investment under the trust, or time within which the trust funds are to be loaned or invested.

§ 26-40. In what securities fiduciaries may invest.

For purposes of §§ 36-55.44 and 62.1-221 only, the following investments shall be considered lawful investments and shall be conclusively presumed to have been prudent:

(1) Obligations of the Commonwealth. - Stocks, bonds, notes, and other evidences of indebtedness of the Commonwealth of Virginia, and those unconditionally guaranteed as to the payment of principal and interest by the Commonwealth of Virginia.

(2) Obligations of the United States, etc. - Stocks, bonds, treasury notes and other evidences of indebtedness of the United States, including the guaranteed portion of any loan guaranteed by the Small Business Administration, an agency of the United States government, and those unconditionally

guaranteed as to the payment of principal and interest by the United States; and bonds of the District of Columbia, and bonds and notes of the Federal National Mortgage Association and the Federal Home Loan Banks, and bonds, debentures or other similar obligations of federal land banks, federal intermediate credit banks, or banks of cooperatives, issued pursuant to acts of Congress, and obligations issued by the United States Postal Service when the principal and interest thereon guaranteed by the government of the United States. The evidences of indebtedness enumerated by this paragraph may be held directly or in the form of repurchase agreements collateralized by such debt securities or in the form of securities of any open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940, provided that the portfolio of such investment company or investment trust is limited to such evidences of indebtedness or repurchase agreements collateralized by such debt securities, or securities of other such investment companies or investment trusts whose portfolios are so restricted.

(3) Obligations of other states. - Stocks, bonds, notes and other evidences of indebtedness of any state of the United States upon which there is no default and upon which there has been no default for more than ninety days; provided, that within the twenty fiscal years next preceding the making of such investment, such state has not been in default for more than ninety days in the payment of any part of principal or interest of any debt authorized by the legislature of such state to be contracted.

(4) Obligations of Virginia counties, cities, etc. - Stocks, bonds, notes and other evidences of indebtedness of any county, city, town, district, authority or other public body in the Commonwealth of Virginia upon which there is no default; provided, that if the principal and interest be payable from revenues or tolls and the project has not been completed, or if completed, has not established an operating record of net earnings available for payment of principal and interest equal to estimated requirements for that purpose according to the terms of the issue, the standards of judgment and care required in ~~§ 26-45.1~~ Article 2 (*§ 26-45.3 et seq.*), without reference to this section, shall apply.

In any case in which an authority, having an established record of net earnings available for payment of principal and interest equal to estimated requirements for that purpose according to the terms of the issue, issues additional evidences of indebtedness for the purposes of acquiring or constructing additional facilities of the same general character that it is then operating, such additional evidences of indebtedness shall be governed fully by the provisions of this section without limitation.

(5) Obligations of cities, counties, etc., of other states. - Legally authorized stocks, bonds, notes and other evidences of indebtedness of any city, county, town or district situated in any one of the states of the United States upon which there is no default and upon which there has been no default for more than ninety days; provided, that (a) within the twenty fiscal years next preceding the making of such investment, such city, county, town or district has not been in default for more than ninety days in the payment of any part of principal or interest of any stock, bond, note or other evidence of indebtedness issued by it; (b) such city, county, town or district shall have been in continuous existence for at least twenty years; (c) such city, county, town or district has a population, as shown by the federal census next preceding the making of such investment, of not less than 25,000 inhabitants; (d) the stocks, bonds, notes or other evidences of indebtedness in which such investment is made are the direct legal obligations of the city, county, town or district issuing the same; (e) the city, county, town or district has power to levy taxes on the taxable real property therein for the payment of such obligations without limitation of rate or amount; and (f) the net indebtedness of such city, county, town or district (including the issue in which such investment is made), after deducting the amount of its bonds issued for self-sustaining public utilities, does not exceed ten percent of the value of the taxable property in such city, county, town or district, to be ascertained by the valuation of such property therein for the assessment of taxes next preceding the making of such investment.

(5a) Obligations subject to repurchase. - Investments set forth in the first five paragraphs of this statute may also be made subject to the obligation or right of the seller to repurchase these on a specific date.

(6) Bonds secured on real estate. - Bonds and negotiable notes directly secured by a first lien on improved real estate or farm property in the Commonwealth of Virginia, or in any state contiguous to the Commonwealth of Virginia within a fifty-mile area from the borders of the Commonwealth of Virginia, not to exceed eighty percent of the fair market value of such real estate, including any improvements thereon at the time of making such investment, as ascertained by an appraisal thereof

made by two reputable persons who are not interested in whether or not such investment is made.

(7) Bonds secured on city property in Fifth Federal Reserve District. - Bonds and negotiable notes directly secured by a first lien on improved real estate situated in any incorporated city in any of the states of the United States which lie wholly or in part within the Fifth Federal Reserve District of the United States as constituted on June 18, 1928, pursuant to the act of Congress of December 23, 1913, known as the Federal Reserve Act, as amended, not to exceed sixty percent of the fair market value of such real estate, with the improvements thereon, at the time of making such investment, as ascertained by an appraisal thereof made by two reputable persons who are not interested in whether or not such investment is made; provided, that such city has a population, as shown by the federal census next preceding the making of such investments, of not less than 5,000 inhabitants.

(8) Bonds of Virginia educational institutions. - Bonds of any of the educational institutions of the Commonwealth of Virginia, which have been or may be authorized to be issued by the General Assembly of the Commonwealth of Virginia.

(9) Securities of the R. F. & P. - Stocks, bonds and other securities of the Richmond, Fredericksburg and Potomac Railroad Company, including bonds or other securities guaranteed by the Richmond, Fredericksburg and Potomac Railroad Company.

(10) Obligations of railroads. - Bonds, notes and other evidences of indebtedness, including equipment trust obligations, which are direct legal obligations of or which have been unconditionally assumed or guaranteed as to the payment of principal and interest by, any railroad corporation operating within the United States which meets the following conditions and requirements:

(a) The gross operating revenue of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have not been less than ten million dollars;

(b) The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of the investment, shall have been earned an average of at least two times annually during the seven fiscal years preceding the making of the investment and at least 1 1/2 times during the fiscal year immediately preceding the making of the investment (the term "total fixed charges" as used in this paragraph shall be deemed to refer to the term used in the accounting reports of common carriers as prescribed by the regulations of the Interstate Commerce Commission); and

(c) The aggregate of the average market prices of the total amounts of each of the individual securities of such corporation junior to its bonded debt and outstanding at the time of the making of such investment shall be equal to at least two-thirds of the total fixed charges, as defined in paragraph (b) of clause (10) of this section, for such railroad corporation for the fiscal year next preceding the making of such investment capitalized at an interest rate of five percent per annum. Such average market price of any one of such individual securities shall be determined by the average of the highest quotation and the lowest quotation of the individual security for a period immediately preceding the making of such investment, which period shall be the full preceding calendar year plus the then expired portion of the calendar year in which such investment is made; provided, that if more than six months of the calendar year in which such investment is made shall have expired, then such period shall be only the then expired portion of the calendar year in which such investment is made; and provided further, that if such individual security shall not have been outstanding during the full extent of such period, such period shall be deemed to be the length of time such individual security shall have been outstanding.

(11) Obligations of leased railroads. - Stocks, bonds, notes, other evidences of indebtedness and any other securities of any railroad corporation operating within the United States the railroad lines of which have been leased by a railroad corporation, either alone or jointly with other railroad corporations, whose bonds, notes and other evidences of indebtedness shall, at the time of the making of such investment, qualify as lawful investments for fiduciaries under the terms of clause (10) of this section; provided, that the terms of such lease shall provide for the payment by such lessee railroad corporation individually, irrespective of the liability of other joint lessee railroad corporations, if any, in this respect, of an annual rental of an amount sufficient to defray the total operating expenses and maintenance charges of the lessor railroad corporation plus its total fixed charges, plus, in the event of the purchase of such a stock as aforesaid, a fixed dividend upon any issue of such stock in which

such investment is made; and provided, that, if such investment so purchased shall consist of an obligation of definite maturity, such lease shall be one which shall, according to its terms, provide for the payment of the obligation at maturity or extend for a period of not less than twenty years beyond the maturity of such obligations so purchased, or if such investment so purchased shall be a stock or other form of investment having no definite date of maturity, such lease shall be one which shall, according to its terms, extend for a period of at least fifty years beyond the date of the making of such investment.

(12) Equipment trust obligations. - Equipment trust obligations issued under the "Philadelphia Plan" in connection with the purchase for use on railroads of new standard gauge rolling stock; provided that the owner, purchaser, or lessee of such equipment or one or more of such owners, purchasers, or lessees shall be a railroad corporation whose bonds, notes and other evidences of indebtedness shall, at the time of the making of such investment, qualify as lawful investments for fiduciaries under the terms of clause (10) of this section; and provided that all of such owners, purchasers, or lessees shall be both jointly and severally liable under the terms of such contract of purchase or lease, or both, for the fulfillment thereof.

(13) Preferred stock of railroads. - Any preference stock of any railroad corporation operating within the United States; provided such stock and such railroad corporation meet the following conditions and requirements:

(a) Such stock shall be preferred as to dividends, such dividends shall be cumulative and such stock shall be preferred as to assets in the event of liquidation or dissolution;

(b) The gross operating revenue of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ten million dollars;

(c) The total fixed charges, as defined in paragraph (b) of clause (10) of this section, of such corporation, as reported for the fiscal year next preceding the making of such investment, plus the amount, at the time of making such investment, of the annual dividend requirements on such preference stock and any preference stock having the same or senior rank, such fixed charges and dividend requirements being considered the same for every year, shall have been earned an average of at least 2 1/2 times annually for the seven fiscal years preceding the making of such investment and at least two times for the fiscal year immediately preceding the making of such investment; and

(d) The aggregate of the average market prices of the total amount of each of the individual securities of such corporation, junior to such preference stock and outstanding at the time of the making of such investment, shall be at least equal to the par value of the total issue of the preference stock in question plus the total par value of all other issues of its preference stock having either the same rank as, or a senior rank to, the issue of such preference stock plus total fixed charges, as defined in paragraph (b) of clause (10) of this section, for such railroad corporation for the fiscal year next preceding the making of such investment capitalized at an interest rate of five percent annually. Such average market price of any one of such individual securities shall be determined in the same manner as prescribed in paragraph (c) of clause (10) of this section.

(14) Obligations of public utilities. - Bonds, notes and other evidences of indebtedness of any public utility operating company operating within the United States; provided such company meets the following conditions and requirements:

(a) The gross operating revenue of such public utility operating company for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than five million dollars;

(b) The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of the investment, shall have been earned, after deducting operating expenses, depreciation and taxes, other than income taxes, an average of at least 1 3/4 times annually during the seven fiscal years preceding the making of the investment and at least 1 1/2 times during the fiscal year immediately preceding the making of the investment;

(c) In the fiscal year next preceding the making of such investment the ratio of the total par value of the bonded debt of such public utility operating company including the total bonded indebtedness

of all its subsidiary companies, whether assumed by the public utility operating company in question or not, to its gross operating revenue shall not be greater than four to one; and

(d) Such public utility operating company shall be subject to permanent regulation by a state commission or other duly authorized and recognized regulatory body.

The term "public utility operating company" as used in this clause (14) shall mean a public utility or public service corporation (i) of whose total income available for fixed charges for the fiscal year next preceding the making of such investment at least fifty-five percent thereof shall have been derived from direct payments by customers for service rendered them, (ii) of whose total operating revenue for the fiscal year next preceding the making of such investment at least sixty percent thereof shall have been derived from the sale of electric power, gas, water, or telephone service and not more than ten percent thereof shall have been derived from traction operations, and (iii) whose gas properties are all within the limits of one state, if more than twenty percent of its total operating revenues are derived from gas.

(15) Preferred stock of public utilities. - Any preference stock of any public utility operating company operating within the United States; provided such stock and such company meet the following conditions and requirements:

(a) Such stock shall be preferred as to dividends, such dividends shall be cumulative, and such stock shall be preferred as to assets in the event of liquidation or dissolution;

(b) The gross operating revenue of such public utility operating company for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than five million dollars;

(c) The total fixed charges of such public utility operating company, as reported for the fiscal year next preceding the making of such investment, plus the amount, at the time of making such investment, of the annual dividend requirements on such preference stock and any preference stock having the same or senior rank, such fixed charges and dividend requirements being considered the same for every year, shall have been earned, after deducting operating expenses, depreciation and taxes, including income taxes, an average of at least two times annually for the seven fiscal years preceding the making of such investment and at least two times for the fiscal year immediately preceding the making of such investment;

(d) In the fiscal year next preceding the making of such investment, the ratio of the sum of the total par value of the bonded debt of such public utility operating company, the total par value of the issue of such preference stock, and the total par value of all other issues of its preference stock having the same or senior rank to its gross operating revenue shall not be greater than four to one; and

(e) Such public utility operating company shall be subject to permanent regulation by a state commission or other duly authorized and recognized regulatory body.

For the purposes of this clause (15) of this section, the term "public utility operating company" shall be construed in the same manner as defined in clause (14) of this section.

(16) Obligations of the following telephone companies. - Bonds, notes and other evidences of indebtedness of American Telephone and Telegraph, Bell Atlantic, Bell South, Southwestern Bell, Pacific Telesis, Nynex, American Information Technologies, or U.S. West; and bonds, notes and other evidences of indebtedness unconditionally assumed or guaranteed as to the payment of principal and interest by any such company; provided, that the total fixed charges, as reported for the fiscal year next preceding the making of the investment, of such company and all of its subsidiary corporations on a consolidated basis shall have been earned, after deducting operating expenses, depreciation and taxes, other than income taxes, an average of at least 1 3/4 times annually during the seven fiscal years preceding the making of the investment and at least 1 1/2 times during the fiscal year immediately preceding the making of the investment.

(17) Obligations of municipally owned utilities. - The stocks, bonds, notes and other evidences of indebtedness of any electric, gas or water department of any state, county, city, town or district whose obligations would qualify as legal for purchase under clause (3), (4) or (5) of this section, the interest and principal of which are payable solely out of the revenues from the operations of the facility for which the obligations were issued; provided, that the department issuing such obligations meet the

requirements applying to public utility operating companies as set out in paragraphs (a), (b) and (c) of clause (14) of this section.

(18) Obligations of industrial corporations. - Bonds, notes and other evidences of indebtedness of any industrial corporation incorporated under the laws of the United States or of any state thereof; provided such corporation meets the following conditions and requirements:

(a) The gross operating revenue of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ten million dollars;

(b) The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of the investment, shall have been earned, after deducting operating expenses, depreciation and taxes, other than income taxes, and depletion in the case of companies commonly considered as depleting their natural resources in the course of business, an average of at least three times annually during the seven fiscal years preceding the making of the investment and at least 2 1/2 times during the fiscal year immediately preceding the making of the investment;

(c) The net working capital of such industrial corporation, as shown by its last published fiscal year-end statement prior to the making of such investment, or in the case of a new issue, as shown by the financial statement of such corporation giving effect to the issuance of any new security, shall be at least equal to the total par value of its bonded debt as shown by such statement; and

(d) The aggregate of the average market prices of the total amounts of each of the individual securities of such industrial corporation, junior to its bonded debt and outstanding at the time of the making of such investment, shall be at least equal to the total par value of the bonded debt of such industrial corporation at the time of the making of such investment, such average market price of any one of such individual securities being determined in the same manner as prescribed in paragraph (c) of clause (10) of this section.

(19) Preferred stock of industrial corporations. - Any preference stock of any industrial corporation incorporated under the laws of the United States or of any state thereof; provided such stock and such industrial corporation meet the following conditions and requirements:

(a) Such stock shall be preferred as to dividends, such dividends shall be cumulative and such stock shall be preferred as to assets in the event of liquidation or dissolution;

(b) The gross operating revenue of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ten million dollars;

(c) The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of such investment, plus the amount, at the time of making such investment, of the annual dividend requirements on such preference stock and any preference stock having the same or senior rank, such fixed charges and dividend requirements being considered the same for every year, shall have been earned, after deducting operating expenses, depreciation and taxes, including income taxes, and depletion in the case of companies commonly considered as depleting their natural resources in the course of business, an average of at least four times annually for the seven fiscal years preceding the making of such investment and at least three times for the fiscal year immediately preceding the making of such investment;

(d) The net working capital of such industrial corporation, as shown by its last published fiscal year-end statement prior to the making of such investment, or, in the case of a new issue, as shown by the financial statement of such corporation giving effect to the issuance of any new security, shall be at least equal to the total par value of its bonded debt plus the total par value of the issue of such preference stock plus the total par value of all other issues of its preference stock having the same or senior rank; and

(e) The aggregate of the lowest market prices of the total amounts of each of the individual securities of such industrial corporation junior to such preference stock and outstanding at the time of the making of such investment shall be at least 2 1/2 times the par value of the total issue of such preference stock plus the total par value of all other issues of its preference stock having the same or senior rank plus the par value of the total bonded debt of such industrial corporation. Such lowest

market price of any one of such individual securities shall be determined by the lowest single quotation of the individual security for a period immediately preceding the making of such investment, which period shall be the full preceding calendar year plus the then expired portion of the calendar year in which such investment is made; and provided, that if such individual security shall not have been outstanding during the full extent of such period, such period shall be deemed to be the length of time such individual security shall have been outstanding.

(20) Obligations of finance corporations. - Bonds, notes and other evidences of indebtedness of any finance corporation incorporated under the laws of the United States or of any state thereof; provided such corporation meets the following conditions and requirements:

(a) The gross operating income of such corporation for the fiscal year preceding the making of such investment or the average of the gross operating income for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than five million dollars;

(b) The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of the investment, shall have been earned, after deducting operating expenses, depreciation and taxes, other than income taxes, an average of at least 2 1/2 times annually during the seven fiscal years preceding the making of the investment and at least two times during the fiscal year immediately preceding the making of the investment;

(c) The aggregate indebtedness of such finance corporation as shown by its last fiscal year-end statement, or, in the case of a new issue, as shown by the financial statement giving effect to the issuance of any new securities, shall be no greater than three times the aggregate net worth, as represented by preferred and common stocks and surplus of such corporation; and

(d) The aggregate of the average market prices of the total amounts of each of the individual securities of such finance corporation, junior to its bonded debt and outstanding at the time of the making of such investment, shall be at least equal to one-third of the sum of the par value of the bonded debt plus all other indebtedness of such finance corporation as shown by the last published fiscal year-end statement, such average market price of any one of such individual securities being determined in the same manner as prescribed in paragraph (c) of clause (10) of this section.

(21) Preferred stock of finance corporations. - Any preference stock of any finance corporation, incorporated under the laws of the United States or of any state thereof; provided, such stock and such corporation meet the following conditions and requirements:

(a) Such stock shall be preferred as to dividends, such dividends shall be cumulative, and such stock shall be preferred as to assets in the event of liquidation or dissolution;

(b) The gross operating income of such corporation for the fiscal year preceding the making of such investment or the average of the gross operating income for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than five million dollars;

(c) The total fixed charges of such finance corporation, as reported for the fiscal year next preceding the making of such investment, plus the amount, at the time of making such investment, of the annual dividend requirements on such preference stock and any preference stock having the same or senior rank, such fixed charges and dividend requirements being considered the same for every year, shall have been earned, after deducting operating expenses, depreciation and taxes, including income taxes, an average of at least 3 1/2 times annually for the seven fiscal years preceding the making of such investment and at least three times for the fiscal year immediately preceding the making of such investment;

(d) The aggregate indebtedness and par value of the purchased stock, both the issue in question and any issues equal or senior thereto, of such finance corporation as shown by its last published fiscal year-end statement, or in the case of a new issue as shown by the financial statement giving effect to the issuance of any new securities, shall be no greater than three times the aggregate par value of the junior securities and surplus of such corporation; and

(e) The aggregate of the lowest market prices of the total amounts of each of the individual securities of such finance corporation junior to such preference stock and outstanding at the time of the making of such investment shall be at least equal to one-third of the sum of the par value of such preference stock plus the total par value of all other issues of preference stock having the same or

senior rank plus the par value of the total bonded debt plus all other indebtedness of such finance corporation as shown by the last published fiscal year-end statement, such lowest market price of any one of such individual securities being determined in the same manner as prescribed in paragraph (e) of clause (19) of this section.

(22) Federal housing loans. - First mortgage real estate loans insured by the Federal Housing Administrator, under Title II of the National Housing Act.

(23) Certificates of deposit and savings accounts. - Certificates of deposit of, and savings accounts in, any bank, banking institution or trust company, whose deposits are insured by the Federal Deposit Insurance Corporation at the prevailing rate of interest on such certificates or savings accounts; provided, however, no such fiduciary shall invest in such certificates of, or deposits in, any one bank, banking institution or trust company an amount from any one fund in his or its care which shall be in excess of such amount as shall be fully insured as a deposit in such bank, banking institution or trust company by the Federal Deposit Insurance Corporation. A corporate fiduciary shall not, however, be prohibited by the terms of this clause (23) of this section from depositing in its own banking department, in the form of demand deposits, savings accounts, time deposits or certificates of deposit, funds in any amount awaiting investments or distribution, provided that it shall have complied with the provisions of §§ 6.1-23 and 6.1-21, with reference to the securing of such deposits.

(24) Obligations of International Bank, Asian Development Bank and African Development Bank. - Bonds and other obligations issued, guaranteed or assumed by the International Bank for Reconstruction and Development, by the Asian Development Bank or by the African Development Bank.

(25) Deposits in savings institutions. - Certificates of deposit of, and savings accounts in, any state or federal savings institution or savings bank lawfully authorized to do business in this Commonwealth whose accounts are insured by the Federal Deposit Insurance Corporation or other federal insurance agency; however, no such fiduciary shall invest in such shares of any one such association an amount from any one fund in his or its care which shall be in excess of such amount as shall be fully insured as an account in such association by the Federal Deposit Insurance Corporation or other federal insurance agency.

(26) Certificates evidencing ownership of undivided interests in pools of mortgages. - Certificates evidencing ownership of undivided interests in pools of bonds or negotiable notes directly secured by first lien deeds of trust or mortgages on real property located in the Commonwealth of Virginia improved by single-family residential housing units or multi-family dwelling units; provided that (i) such certificates are rated AA or better by a nationally recognized independent rating agency; (ii) the loans evidenced by such bonds or negotiable notes do not exceed eighty percent of the fair market value, as determined by an independent appraisal thereof, of the real property and the improvements thereon securing such loans; and (iii) such bonds or negotiable notes are assigned to a corporate trustee for the benefit of the holders of such certificates.

(27) Shares and share certificates in any credit union lawfully authorized to do business in this Commonwealth whose accounts are insured by the National Credit Union Share Insurance Fund or the Virginia Credit Union Share Insurance Corporation; provided no such fiduciary shall invest in such shares an amount from any one fund in his or its care which shall be in excess of such amount as shall be fully insured as an account in such credit union by the National Credit Union Share Insurance Fund or the Virginia Credit Union Share Insurance Corporation.

§ 26-40.01. In what securities fiduciaries may invest; definitions.

A. As used in this section:

"Fiduciary" shall be defined as in § 8.01-2 and shall also include any attorney in fact or agent acting for a principal under a written power of attorney.

"National rating service" shall mean Standard & Poor's Corporation, Moody's Investors Service, Inc., Duff and Phelps, Inc., Fitch Investors Corporation and any successor to the rating business of any of them.

B. Notwithstanding any other provision of law designating as legal investments for fiduciaries the bonds, notes, obligations or other evidences of indebtedness issued by a governmental entity or political subdivision of the Commonwealth, including but not limited to agencies, authorities, commissions, districts, boards, or local governments, and except as specifically provided in § 26-40,

fiduciaries, whether individual or corporate, shall be conclusively presumed to have been prudent in investing the funds held by them in a fiduciary capacity in only the following securities:

1. Obligations of the Commonwealth, its agencies and political subdivisions. - The following obligations:

a. Bonds, notes and other evidences of indebtedness of the Commonwealth, and securities unconditionally guaranteed as to the payment of principal and interest by the Commonwealth;

b. Revenue bonds, revenue notes or other evidences of revenue indebtedness issued by agencies or authorities of the Commonwealth upon which there is no default; and

c. Bonds, notes and other evidences of indebtedness of any county, city, town, district, authority or other public body in the Commonwealth upon which there is no default provided that such bonds, notes and other evidences of indebtedness are (i) direct legal obligations of the public body, for the payment of which the public body has pledged its full faith and credit and unlimited taxing power, or (ii) unconditionally guaranteed as to the payment of principal and interest by the public body.

In every case referred to in subsection B 1, such bonds, notes or other evidences of indebtedness shall be rated in one of the two highest rating categories of at least one national rating service and not rated in a category lower than the two highest rating categories of any national rating service. Determination of an obligation's rating in one of the two highest rating categories shall be made without regard to any refinement or gradation of such rating category by numerical or other modifier. In addition, the remaining maturity of such bonds, notes or other evidences of indebtedness shall not be greater than five years.

2. Obligations of the United States. - Bonds, notes and other obligations of the United States, and securities unconditionally guaranteed as to the payment of principal and interest by the United States with a remaining maturity not greater than five years, except in the case of savings bonds, which may have a longer maturity. The obligations enumerated in this subdivision may be held directly or in the form of repurchase agreements collateralized by such obligations or in the form of securities of any open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940, provided that the portfolio of such investment company or investment trust is limited to such obligations or repurchase agreements collateralized by such obligations, or securities of other such investment companies or investment trusts whose portfolios are so restricted.

3. Savings accounts, time deposits or certificates of deposit. - Savings accounts, time deposits or certificates of deposit in any bank, savings bank, trust company, savings and loan association or credit union authorized to do business as such in this Commonwealth, but only to the extent that such accounts, deposits or certificates are fully insured by the Federal Deposit Insurance Corporation or any successor federal agency or by the National Credit Union Share Insurance Fund or any successor to it.

C. Notwithstanding the provisions of this section, investments listed in § 26-40 as in effect prior to July 1, 1992, which continue to be held on July 1, 1992, shall be subject to § ~~26-45.1~~ 26-45.3, and any reference to the Virginia "legal list" or to § 26-40 or any predecessor statute contained in a will, trust, or other instrument that was irrevocable on June 30, 1992, shall be construed to refer to such section as in effect on June 30, 1992, or at such earlier time as may be specified in the controlling document, absent an expression of intent to the contrary contained in such document.

D. The permissible investments specified in subsection B are not exclusive and shall not be construed to limit a fiduciary's investments as permitted pursuant to § ~~26-45.1~~ Article 2 (§ 26-45.3 et seq.).

§ 26-40.2. Investments in municipal bonds by banks or trust companies.

Subject to § ~~26-45.1~~ Article 2 (§ 26-45.3 et seq.) and the common law duties of a fiduciary, unless the governing instrument or a court order specifically directs otherwise, a bank or trust company serving as personal representative, trustee, guardian, agent or in any other fiduciary capacity, may purchase during the existence of any underwriting or selling syndicate any state or municipal security otherwise authorized by this title in spite of the fact that such fiduciary, or an affiliate thereof under common ownership, participates or has participated as a member of a syndicate underwriting such security, if the fiduciary purchases the security from another syndicate member or from an affiliate thereof, and not from itself or any of its affiliates.

§ 26-44. Investments that cease to be eligible may be retained.

Investments made under the provisions of § 26-40 or § 26-40.01, if in conformity with the requirements of such section at the time such investments were made, may be retained even though they cease to be eligible for purchase under the provisions of such section, but shall be subject to the provisions of ~~§ 26-45.1~~ Article 2 (§ 26-45.3 et seq.).

Article 2.

Uniform Prudent Investor Act.

§ 26-45.3. Prudent investor rule.

A. Except as otherwise provided in subsection B and §§ 26-40 and 26-40.01, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this Act.

B. The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A general authorization in a controlling document authorizing a trustee to invest in such assets as the trustee, in his sole discretion, may deem best, or other language purporting to expand the trustee's investment powers, shall not be construed to waive the rule of subsection A unless the controlling document expressly manifests an intention that it be waived (i) by reference to "prudent man" or "prudent investor" rule, (ii) by reference to power of the trustee to make "speculative" investments, (iii) by an express authorization to acquire or retain a specific asset or type of asset such as a closely held business, or (iv) by other language synonymous with (i), (ii) or (iii). A trustee shall not be liable to a beneficiary for the trustee's good faith reliance on a waiver of the rule of subsection A.

§ 26-45.4. Standard of care; portfolio strategy; risk and return objectives.

A. A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

B. A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

C. Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

1. General economic conditions;
2. The possible effect of inflation or deflation;
3. The expected tax consequences of investment decisions or strategies;
4. The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
5. The expected total return from income and the appreciation of capital;
6. Other resources of the beneficiaries;
7. Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
8. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

D. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

E. A trustee may invest in any kind of property or type of investment consistent with the standards of this Act.

F. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

G. A trustee may hold any policies of life insurance acquired by gift or pursuant to an express permission or direction in the governing instrument including an authority granted by subdivision (1) (r) of § 64.1-57 with no duty or need to (i) determine whether any such policy is or remains a proper investment, (ii) dispose of such policy in order to diversify the investments of the trust, or (iii) exercise policy options under any such contract not essential to the continuation of the life insurance provided by such contract. However, apart from these specific authorities, this subsection is not intended and shall not be construed to affect the application of the standard of judgment and care as

set forth in this section. This subsection shall apply to all trusts, regardless of when established.

§ 26-45.5. *Diversification by trustee.*

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

§ 26-45.6. *Duties at inception of trusteeship.*

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this Act.

§ 26-45.7. *Loyalty and impartiality.*

A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

§ 26-45.8. *Investment costs.*

In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

§ 26-45.9. *Reviewing compliance.*

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

§ 26-45.10. *Delegation of investment and management functions.*

A. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

1. Selecting an agent;
2. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
3. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

C. A trustee who complies with the requirements of subsection A is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

D. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this Commonwealth, an agent submits to the jurisdiction of the courts of this Commonwealth.

§ 26-45.11. *Language invoking standard of Act.*

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified by language articulating the investment standard to which the trustee is to be held, authorizes any investment or strategy permitted under this Act: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

§ 26-45.12. *Application to existing trusts.*

This Act applies to trusts existing on and created after January 1, 2000. As applied to trusts existing on its effective date, this Act governs only decisions or actions occurring after that date.

§ 26-45.13. *Definition of terms.*

As used in this Article, the term "trustee" includes any fiduciary as defined in § 8.01-2 and any attorney in fact or agent acting for a principal under a written power of attorney. The term "trust" includes the assets under the control or management of the trustee as defined herein. "Controlling document" means the will, agreement, power of attorney, court order or other instrument creating the fiduciary powers.

§ 26-45.14. *Uniformity of application and construction.*

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among the states enacting it.

§ 57-35.14:1. Application of Title 26.

Trustees appointed pursuant to this article shall be governed in their investment of trust funds by §§ 26-40 through ~~26-45.1~~ 26-44.1 and Article 2 (§ 26-44.3 et seq.) of Chapter 3 of Title 26, except as provided otherwise herein.

§ 57-39.22. Certain representations unlawful; perpetual care trust fund required.

A. Effective July 1, 1996, it shall be unlawful to sell or offer for sale in the Commonwealth any burial right in a pet cemetery, and in connection therewith to represent to the public, in any manner, express or implied, that the entire pet cemetery or any burial or interment right therein will be perpetually cared for, unless adequate provision has been made for the perpetual care of the cemetery and all burials and interment rights therein as to which such representation has been made.

B. Each pet cemetery operator shall establish in a bank, savings and loan or other federally insured investment banking institution doing business in the Commonwealth an irrevocable trust fund in the amount of at least \$12,000 before the first lot, parcel of land, burial or interment right is sold. This fund shall be designated the perpetual care fund.

C. The moneys of a perpetual care fund shall be invested as provided by §§ 26-40 through ~~26-45.1~~ 26-44.1 and Article 2 (§ 26-44.3 et seq.) of Chapter 3 of Title 26, except as provided otherwise herein.

D. The income from the perpetual care fund shall be used only for the maintenance, supervision, improvement, and preservation of the grounds, lots, markers, memorials, buildings, equipment, statuary, and other real and personal property of the pet cemetery and for the payment of real property taxes. Annual reports of all the assets and investments of the perpetual care fund shall be prepared and maintained by the operator, and shall be available for inspection at reasonable times to any owner of a burial right in the pet cemetery. Such records shall be subject to examination by the commissioner of revenue.

§ 64.1-57. Incorporation by reference of certain powers of fiduciaries into will or trust instrument.

(1) The following powers, in addition to all other powers granted by law, may be incorporated in whole or in part in any will or trust instrument by reference to this section:

(a) To keep and retain any or all investments and property, real, personal or mixed, including stock in the fiduciary institution, if the same be a corporation, as they may be at the time they come into the custody of said fiduciary, regardless of the character of same or whether they are such as then would be authorized by law for investment by fiduciaries or whether a disproportionately large part of the trust or estate remains invested in one or more types of property, for such time as the fiduciary shall deem best, and to dispose of such property by sale, exchange, or otherwise as and when such fiduciary shall deem advisable.

(a1) At the discretion of the fiduciary, to receive additions to the estate from any source, in cash or in kind, and to hold, administer and distribute such additions as a part of and under the same terms and conditions as the estate then currently held.

(b) To sell, assign, exchange, transfer and convey or otherwise dispose of, any or all of the investments and property, either real, personal or mixed, which may be included in, or may at any time become part of the trust or estate upon such terms and conditions as the fiduciary, in his absolute discretion, may deem advisable, at either public or private sale, either for cash or deferred payments or other consideration, as such fiduciary may determine; and for the purpose of selling, assigning, exchanging, transferring or conveying the same, to make, execute, acknowledge and deliver any and all instruments of conveyance, deeds of trust, or assignments in such form and with warranties and covenants as such fiduciary may deem expedient and proper; and in the event of any sale, conveyance, exchange, or other disposition of any of the trust or estate, the purchaser shall not be obligated in any way to see to the application of the purchase money or other consideration passing in connection therewith.

(b1) To grant, sell, transfer, exchange, purchase or acquire options of any kind on property held by such trust or estate or acquired or to be acquired by such trust or estate or held or owned by any other person.

(c) ~~To invest and reinvest all of the funds of the estate as said fiduciary, in his sole discretion,~~

may deem best, including investment in stocks, common and preferred, and common trust funds, without being restricted to those investments expressly approved by statute for investment by fiduciaries; and to change investments from realty to personalty, and vice versa.

(c-1) To invest and reinvest all of the funds of the estate as said fiduciary, in his sole discretion, may deem best, including investment in interests in investment trusts and mutual funds, without being restricted to those investments expressly approved by statute for investment by fiduciaries; and to change investments from realty to personalty, and vice versa.

(d) To lease any or all of the real estate, which may be included in or at any time become a part of the trust or estate, upon such terms and conditions as said fiduciary, in his sole judgment and discretion, may deem advisable, and any lease or leases made by such fiduciary may extend beyond the term of the trust or administration of the estate and for the purpose of leasing said real estate, to make, execute, acknowledge and deliver any and all instruments, in such form and with such covenants and warranties as such fiduciary may deem expedient and proper.

(e) To vote any stocks, bonds, or other securities held by such fiduciary at any meeting of stockholders, bondholders, or other security holders, and to delegate the power to so vote to attorneys-in-fact or proxies under power of attorney, restricted or unrestricted.

(f) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and security as to such fiduciary shall seem advisable, including the power to borrow from the fiduciary, if the fiduciary be a bank, for the purpose of paying debts, taxes or other charges against the trust or estate or any part thereof, and with prior approval of the court for any proper purpose of the trust or estate, and to mortgage or pledge such portion of the trust or estate as may be required to secure such loan or loans; and as maker or endorser to renew existing loans.

(f1) To make loans or advancements to the executor or other representative of the grantor's estate in case such executor or other representative is in need of cash with which to pay taxes, claims or other indebtedness of the grantor's estate; but no assets acquired from a qualified retirement benefit plan under § 2039 (c) of the Internal Revenue Code shall be so used, and such assets shall be segregated and held separately until all claims against the estate for debts of the decedent or claims of administration have been satisfied. Such loans or advancements may be secured or unsecured, and the trustee shall not be liable in any way for any loss resulting to the trust or estate by reason of the exercise of this authority.

(g) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims, in favor of or against the trust or estate as the fiduciary shall deem best, and his decision shall be conclusive.

(h) To make distributions in cash or in kind or partly in each at valuations to be determined by the fiduciary, whose decision as to values shall be conclusive.

(i) [Repealed.]

~~(i) To determine whether any part of the trust or estate or any addition or increment thereto be income or principal, or whether any cost, charge, expense, tax or assessment shall be charged against income or principal, or partially against income and partially against principal, provided that this determination be made so as to balance fairly the interests of the income beneficiary and the remainderman.~~

(j) To repair, alter, improve, renovate, reconstruct and demolish any of the buildings on the real estate held by such fiduciary and to construct such buildings and improvements thereon as such fiduciary may, in his discretion, deem advisable.

(k) To employ and compensate, out of the principal or the income or both as to the fiduciary shall seem proper, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, licensed real estate brokers, licensed salesmen and other assistants and advisors deemed by the fiduciary needful for the proper administration of the trust or estate, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided he was selected and retained with reasonable care.

(l) To rely upon any affidavit, certificate, letter, notice, telegram, or other paper or upon any telephone conversation believed by such fiduciary to be genuine and upon any other evidence believed by such fiduciary to be sufficient, and to be protected and saved harmless in all payments or distributions required to be made hereunder if made in good faith and without actual notice or

knowledge of the changed condition or status of any person receiving payments or other distributions upon a condition.

(m) To retain any interest held by such fiduciary in any business, whether as a stockholder or security holder of a corporation, a partner, a sole proprietor, or otherwise, for any length of time, without limitations, solely at the risk of the trust or estate and without liability on the part of the fiduciary for any losses resulting therefrom; to participate in the conduct of such business and take or delegate to others discretionary power to take any action with respect to its management and affairs which an individual could take as the owner of such business, including the voting of stock, and the determination of any or all questions of policy; to participate in any incorporation, reorganization, merger, consolidation, recapitalization or liquidation thereof; to invest additional capital in, subscribe to additional stock or securities of, and loan money or credit with or without security to, such business out of the trust or estate property; to elect or employ as directors, officers, employees or agents of such business, and compensate, any persons, including the fiduciary or a director, officer, or agent of the fiduciary; to accept as correct financial or other statements rendered by the business from time to time as to his conditions and operations except when having actual notice to the contrary; to regard the business as an entity separate from the trust or estate with no duty to account to any court as to his operations; to deal with and act for the business in any capacity, including any banking or trust capacity and the loaning of money out of the fiduciary's own funds, and to be compensated therefor; and to sell or liquidate such interest or any part thereof at any time. If any business shall be unincorporated, contractual and tort liabilities arising out of such business shall be satisfied, first, out of the business, and second, out of the trust or estate; but it is intended that in no event shall there be a liability of the fiduciary, and if the fiduciary shall be held liable, such fiduciary shall be entitled to indemnification from the business and the trust or estate in the order named. Such fiduciary shall be entitled to such additional compensation as is commensurate with the time, effort, and responsibility involved in his performance of services with respect to such business. Such compensation for services rendered to the business may be paid by such fiduciary from the business or from other assets or from both as the fiduciary, in his discretion, may determine to be advisable; the amount of such additional compensation, however, shall be subject to the final approval of the court.

(n) To do all other acts and things not inconsistent with the provisions of the will or trust in which these powers are incorporated which such fiduciary may deem necessary or desirable for the proper management of the trusts herein created, in the same manner and to the same extent as an individual might or could do with respect to his own property.

(o) To hold property in his name or in the name of nominees.

(p) During the minority, incapacity or the disability of any beneficiary, the fiduciary may, in his sole discretion, distribute income and principal to such beneficiary in any one of the following ways: (1) directly to said beneficiary; (2) to a relative, friend, guardian, conservator or committee, to be expended by such person for the education, maintenance, support or benefit of said beneficiary; (3) by himself expending the same for the education, maintenance, support or benefit of said beneficiary; (4) to an adult person or bank authorized to exercise trust powers as custodian for a minor beneficiary under the Uniform Transfers to Minors Act (§ 31-37 et seq.) to be held by such custodian under the terms of such act; or (5) to an adult person or bank authorized to exercise trust powers as custodial trustee for ~~an incapacitated~~ *a beneficiary who is incapacitated as defined in § 55-34.1*, under the Uniform Custodial Trust Act (§ 55-34.1 et seq.) to be held as custodial trustee under the terms of such act.

(q) To continue and carry on any farming operation transferred to him and to operate such farms and any other farm which may be acquired and, in so doing, by way of illustration and not in limitation of his powers, to operate the farm with hired labor, tenants or sharecroppers; to hire a farm manager or a professional farm management service to supervise the farming operations; to lease or rent the farm for cash or for a share of the crops; to purchase or otherwise acquire farm machinery and equipment and livestock; to construct, repair and improve farm buildings of all sorts needed, in its judgment, for the operation of the farm; to make loans or advances or to obtain such from any source, including the fiduciary at the prevailing rate or rates of interest for farm purposes such as for production, harvesting, or marketing, or for the construction, repair, or improvement of farm buildings or for the purchase of farm machinery or equipment or livestock; to employ approved soil

conservation practices in order to conserve, improve and maintain the fertility and productivity of the soil; to protect, manage and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate or trust; to ditch and drain damp or wet fields and areas of the farm when and where needed; to engage in livestock production, if it is deemed advisable, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on such a livestock program; to execute contracts, notes and chattel mortgages relating to agriculture with the Commodity Credit Corporation, the United States Secretary of Agriculture or any other officer or agency of the federal or state governments, to enter into acreage reduction agreements, to make soil conservation commitments, and to do all acts necessary to cooperate with any governmental agricultural program; and in general, to employ the methods of carrying on the farming operation that are in common use by the community in which the farm is located, inasmuch as the duties the fiduciary is requested to assume with respect to farming operations may considerably enlarge and increase his usual responsibility and work as fiduciary, it is agreed that the fiduciary shall be entitled to such additional reasonable compensation as is commensurate with the time, effort and responsibility involved in his performance of such services.

(r) To purchase and hold policies of life insurance on the life of any beneficiary, or any person in whom the beneficiary has an insurable interest, and pay the premiums thereon out of income or principal as he deems appropriate; provided, however, that the decision of the beneficiary of any trust otherwise meeting the requirements of § 2056 (b) (5) of the Internal Revenue Code of 1954, as amended, shall control in respect to the purchase or holding of a policy of life insurance by the trustee of such trust.

(s) To make any election authorized under any law requiring, or relating to the requirement for, payment of any taxes or assessments on assets or income of the estate or in connection with any fiduciary capacity, regardless of whether any property or income is received by or is under the control of the fiduciary, including, but not limited to, elections concerning the timing of payment of any such tax or assessment, the valuation of any property subject to any such tax or assessment, the alternative use of items of deduction in computing any tax or assessment and including specifically elections permitted by statutes enacted after the date of execution of the will or trust instrument.

(t) To comply with environmental law:

1. To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to a change in, or any actual or threatened violation of, any environmental law affecting property held by the fiduciary;

2. To take, on behalf of the estate or trust, any action necessary to respond to a change in, or prevent, abate, or otherwise remedy any actual or threatened violation of, any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

3. To refuse to accept property in trust if the fiduciary determines that any property to be transferred to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving any hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;

4. To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

5. To charge the cost of any inspection, review, abatement, response, cleanup or remedial action authorized herein against the income or principal of the trust or estate;

6. For purposes of this subdivision, "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health and "hazardous substances" means any substances defined as hazardous or toxic or otherwise regulated by any environmental law.

(u) To resign as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between it in its fiduciary capacity and in its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust or estate because of the

type or condition of assets held therein.

(2) As used in the section, the term "fiduciary" shall mean and include one or more individuals or corporations having trust powers and the use of the male gender shall include the female; and any substitute, added or successor fiduciary shall have all of the powers hereby provided for the fiduciary named in the will or trust instrument. The provisions of this section may by reference hereto be made applicable to a fiduciary of the estate of a decedent as well as to the trustee of an inter vivos or testamentary trust.

(3) Any fiduciary upon whom a document confers any or all of the powers set forth in subsection (1) may irrevocably disclaim the right to exercise any or all of the powers conferred by filing a suitable written disclaimer with the clerk of court where the document is recorded or probated or, if the document is not recorded, by sending a written disclaimer by registered or certified mail to the last known address of all persons then living entitled to receive the principal or income. Such disclaimer shall relate back to the time when the disclaiming fiduciary originally assumed such fiduciary capacity and shall be binding upon any successor fiduciary. For the purpose of this subsection, a fiduciary shall not be deemed to have assumed a fiduciary capacity under a revocable document until the same becomes irrevocable.

(4) For the purposes of this section, unless the will or trust instrument expresses a contrary intention, the incorporation by reference of powers enumerated by this statute shall refer to those powers existing at the time of death and reference to powers under the Uniform Gifts to Minors Act in an instrument executed prior to July 1, 1989, shall be construed to refer to the Uniform Transfers to Minors Act (§ 31-37 et seq.).

(5) This section is not intended and shall not be construed to affect the application of the standard of judgment and care as set forth in ~~subdivision (a) of § 26-45.1~~ *Article 2 (§ 26-45.3 et seq.) of Chapter 3 of Title 26.*

(6) In the event that the will or trust instrument shall contain a provision in favor of a surviving spouse of the testator or grantor, the powers above enumerated shall in no way be construed or interpreted in any fashion which might cause the bequest to fail to qualify for the marital deduction permitted under the federal estate tax law, unless the will or trust instrument shall specifically provide to the contrary. A fiduciary acting under a construction or interpretation of a power, which action is otherwise reasonable under the circumstances, shall incur no responsibility for acts taken in good faith which are otherwise thereafter contended to be in a fashion which might cause disqualification for the marital deduction. The provision of this subsection shall apply without regard to the time the will or trust was executed or probated or the testator died in relation to the effective date of this section or amendments thereto.

2. That § 26-45.1 of the Code of Virginia is repealed.

3. That the provisions of this act shall become effective January 1, 2000.

VIRGINIA ACTS OF ASSEMBLY – 1999 RECONVENED SESSION

REENROLLED

CHAPTER 975

An Act to amend and reenact §§ 64.1-57 and 64.1-68 of the Code of Virginia, to amend the Code of Virginia by adding in Title 55 a chapter numbered 15.1, containing articles numbered 1 through 6, consisting of sections numbered 55-277.1 through 55-277.33, and to repeal Article 1 (§§ 55-253 through 55-268) of Chapter 15 of Title 55 of the Code of Virginia, relating to the Uniform Principal and Income Act.

[H 842]

Approved April 7, 1999

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.1-57 and 64.1-68 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 55 a chapter numbered 15.1, containing articles numbered 1 through 6, consisting of sections numbered 55-277.1 through 55-277.33, as follows:

CHAPTER 15.1.

UNIFORM PRINCIPAL AND INCOME ACT.

Article I.

Definitions and Fiduciary Duties.

§ 55-277.1. Short title.

This chapter may be cited as the Uniform Principal and Income Act.

§ 55-277.2. Definitions.

In this chapter:

"Accounting period" means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends.

"Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

"Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

"Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4 (§ 55-277.10 et seq.).

"Income beneficiary" means a person to whom net income of a trust is or may be payable.

"Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

"Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

"Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; government or governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

"Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

"Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

"Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

"Trustee" includes an original, additional, or successor trustee, whether or not appointed or

confirmed by a court.

§ 55-277.3. *Fiduciary duties; general principles.*

A. In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 (§ 55-277.5 et seq.) and 3 (§ 55-277.7 et seq.), a fiduciary:

1. Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

2. May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

3. Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

4. Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

B. In exercising the power to adjust under subsection A of § 55-277.4 or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

C. The power of a fiduciary to allocate receipts and expenses between income and principal, whether incorporated by reference, expressly conferred by the terms of a will or trust, or granted by a court pursuant to § 64.1-57.1, does not alone constitute a discretionary power of administration for purposes of this section.

§ 55-277.4. *Fiduciary's power to adjust.*

A. A fiduciary may adjust between principal and income to the extent the fiduciary considers necessary if the fiduciary invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the fiduciary determines, after applying the rules in subsection A of § 55-277.3, that the fiduciary is unable to comply with subsection B of § 55-277.3.

B. In deciding whether and to what extent to exercise the power conferred by subsection A, a fiduciary shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

1. The nature, purpose, and expected duration of the trust;

2. The intent of the settlor;

3. The identity and circumstances of the beneficiaries;

4. The needs for liquidity, regularity of income, and preservation and appreciation of capital;

5. The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the fiduciary or received from the settlor;

6. The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the fiduciary may estimate as to assets for which market values are not readily available;

7. Whether and to what extent the terms of the trust give the fiduciary the power to invade principal or accumulate income or prohibit the fiduciary from invading principal or accumulating income, and the extent to which the fiduciary has exercised a power from time to time to invade principal or accumulate income;

8. The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

9. The anticipated tax consequences of an adjustment.

C. A fiduciary may not make an adjustment:

1. That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the fiduciary did not have the power to make the adjustment;
2. That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
3. That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
4. From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;
5. If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the fiduciary did not possess the power to make an adjustment;
6. If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a fiduciary or appoint a fiduciary, or both, and the assets would not be included in the estate of the individual if the fiduciary did not possess the power to make an adjustment;
7. If the fiduciary is a beneficiary of the trust; or
8. If the fiduciary is not a beneficiary, but the adjustment would benefit the fiduciary directly or indirectly.

D. If subdivision C 5, 6, 7, or 8 applies to a fiduciary and there is more than one fiduciary, a cofiduciary to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining fiduciary or fiduciaries is not permitted by the terms of the trust. Any beneficiary or fiduciary may petition the circuit court pursuant to § 26-54 for appointment of a cofiduciary who would be permitted to make an adjustment not permitted by the other fiduciary or fiduciaries.

E. A fiduciary may release the entire power conferred by subsection A or may release only the power to adjust from income to principal or the power to adjust from principal to income if the fiduciary is uncertain about whether possessing or exercising the power will cause a result described in subdivisions C 1 through 6 or C 8 or if the fiduciary determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection C. The release may be permanent or for a specified period, including a period measured by the life of an individual.

F. Terms of a trust that limit the power of a fiduciary to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the fiduciary the power of adjustment conferred by subsection A.

G. As used in this section and the application of this section elsewhere in this chapter, the term "trust" includes the assets under the control or management of a personal representative.

Article 2.

Decedent's Estate or Terminating Income Interest.

§ 55-277.5. Determination and distribution of net income.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

1. A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 through 5 (§ 55-277 et seq.) which apply to trustees and the rules in subdivision 5. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

2. A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 which apply to trustees and by:

- a. Including in net income all income from property used to discharge liabilities;*
- b. Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary*

claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

c. Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

3. A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under subdivision 2 or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

4. A fiduciary shall distribute the net income remaining after distributions required by subdivision 3 in the manner described in § 55-277.6 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

5. A fiduciary may not reduce principal or income receipts from property described in subdivision 1 because of a payment described in § 55-277.25 or § 55-277.26 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

§ 55-277.6. Distribution to residuary and remainder beneficiaries.

A. Each beneficiary described in subdivision 4 of § 55-277.5 is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

B. In determining a beneficiary's share of net income, the following rules apply:

1. The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

2. The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

3. The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

4. The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

C. If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

D. A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from

the asset.

Article 3.

Apportionment at Beginning and End of Income Interest.

§ 55-277.7. When right to income begins and ends.

A. An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

B. An asset becomes subject to a trust:

1. On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

2. On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

3. On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

C. An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection D, even if there is an intervening period of administration to wind up the preceding income interest.

D. An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

§ 55-277.8. Apportionment of receipts and disbursements when decedent dies or income interest begins.

A. A trustee shall allocate an income receipt or disbursement other than one to which subdivision 1 of § 55-277.5 applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

B. A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

C. An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which § 55-277.10 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

§ 55-277.9. Apportionment when income interest ends.

A. In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

B. When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

C. When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

Article 4.

Allocation of Receipts During Administration of Trust.

PART 1.

RECEIPTS FROM ENTITIES.

§ 55-277.10. Character of receipts.

A. In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which § 55-277.11 applies, a business or activity to which § 55-277.12 applies, or an asset-backed security to which § 55-277.24 applies.

B. Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

C. A trustee shall allocate the following receipts from an entity to principal:

- 1. Property other than money;*
- 2. Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;*
- 3. Money received in total or partial liquidation of the entity; and*
- 4. Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.*

D. Money is received in partial liquidation:

- 1. To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or*
- 2. If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.*

E. Money is not received in partial liquidation, nor may it be taken into account under subdivision D 2, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

F. A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

§ 55-277.11. Distribution from trust or estate.

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, § 55-277.10 or § 55-277.24 applies to a receipt from the trust.

§ 55-277.12. Business and other activities conducted by trustee.

A. If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

B. A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

C. Activities for which a trustee may maintain separate accounting records include:

- 1. Retail, manufacturing, service, and other traditional business activities;*
- 2. Farming;*
- 3. Raising and selling livestock and other animals;*
- 4. Management of rental properties;*

5. Extraction of minerals and other natural resources;
6. Timber operations; and
7. Activities to which § 55-277.23 applies.

PART 2.

RECEIPTS NOT NORMALLY APPORTIONED.

§ 55-277.13. Principal receipts.

A trustee shall allocate to principal:

1. To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;
2. Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this article;
3. Amounts recovered from third parties to reimburse the trust because of disbursements described in subdivision A 7 of § 55-277.26 or for other reasons to the extent not based on the loss of income;
4. Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;
5. Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and
6. Other receipts as provided in §§ 55-277.17 through 55-277.24.

§ 55-277.14. Rental property.

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

§ 55-277.15. Obligation to pay money.

A. An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

B. A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

C. This section does not apply to an obligation to which §§ 55-277.18, 55-277.19, 55-277.20, 55-277.21, 55-277.23, or § 55-277.24 applies.

§ 55-277.16. Insurance policies and similar.

A. Except as otherwise provided in subsection B, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

B. A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to § 55-277.12, loss of profits from a business.

C. This section does not apply to a contract to which § 55-277.18 applies.

PART 3.

RECEIPTS NORMALLY APPORTIONED.

§ 55-277.17. Insubstantial allocations not required.

If a trustee determines that an allocation between principal and income required by §§ 55-277.18,

55-277.19, 55-277.20, 55-277.21, or § 55-277.24 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in subsection C of § 55-277.4 applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in subsection D of § 55-277.4 and may be released for the reasons and in the manner described in subsection E of § 55-277.4. An allocation is presumed to be insubstantial if:

1. The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent; or
2. The value of the asset producing the receipt for which the allocation would be made is less than ten percent of the total value of the trust's assets at the beginning of the accounting period.

§ 55-277.18. *Deferred compensation, annuities, and similar payments.*

A. In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

B. To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

C. If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

D. If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

E. This section does not apply to payments to which § 55-277.19 applies.

§ 55-277.19. *Liquidating asset.*

A. In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, or royalty right, and a right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to § 55-277.18, resources subject to § 55-277.20, timber subject to § 55-277.21, an activity subject to § 55-277.23, an asset subject to § 55-277.24, or any asset for which the trustee establishes a reserve for depreciation under § 55-277.27.

B. A trustee shall allocate to income ten percent of the receipts from a liquidating asset and the balance to principal.

§ 55-277.20. *Minerals, water, and other natural resources.*

A. To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

1. If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

2. If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

3. If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety percent must be allocated to principal and the balance to income.

4. If an amount is received from a working interest or any other interest not provided for in subdivision 1, 2, or 3, ninety percent of the net amount received must be allocated to principal and

the balance to income.

B. An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent of the amount must be allocated to principal and the balance to income.

C. This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

D. If a trust owns an interest in minerals, water, or other natural resources on January 1, 2000, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before January 1, 2000. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2000, the trustee shall allocate receipts from the interest as provided in this chapter.

§ 55-277.21. Timber.

A. To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

1. To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

2. To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

3. To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in subdivision 1 or 2; or

4. To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to subdivision 1, 2 or 3.

B. In determining net receipts to be allocated pursuant to subsection A, a trustee shall deduct and transfer to principal a reasonable amount for depletion.

C. This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

D. If a trust owns an interest in timberland on January 1, 2000, the trustee may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the trustee before January 1, 2000. If the trust acquires an interest in timberland after January 1, 2000, the trustee shall allocate net receipts from the sale of timber and related products as provided in this chapter.

§ 55-277.22. Property not productive of income.

A. If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under § 55-277.4 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by subsection A of § 55-277.4. The trustee may decide which action or combination of actions to take.

B. In cases not governed by subsection A, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

§ 55-277.23. Derivatives and options.

A. In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

B. To the extent that a trustee does not account under § 55-277.12 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

C. If a trustee grants an option to buy property from the trust, whether or not the trust owns the

property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

§ 55-277.24. Asset-backed securities.

A. In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which § 55-277.10 or § 55-277.18 applies.

B. If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

C. If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent of the payment to income and the balance to principal.

Article 5.

Allocation of Disbursements During Administration of Trust.

§ 55-277.25. Disbursements from income.

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which subdivision 2 b or 2 c of § 55-277.5 applies:

1. One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;
2. One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;
3. All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and
4. Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

§ 55-277.26. Disbursements from principal.

A. A trustee shall make the following disbursements from principal:

1. The remaining one-half of the disbursements described in subdivisions 1 and 2 of § 55-277.25;
2. All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;
3. Payments on the principal of a trust debt;
4. Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;
5. Premiums paid on a policy of insurance not described in subdivision 4 of § 55-277.25 of which the trust is the owner and beneficiary;
6. Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and
7. Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or

common law claims by third parties, and defending claims based on environmental matters.

B. If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

§ 55-277.27. Transfers from income to principal for depreciation.

A. In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

B. A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

1. Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

2. During the administration of a decedent's estate; or

3. Under this section if the trustee is accounting under § 55-277.12 for the business or activity in which the asset is used.

C. An amount transferred to principal need not be held as a separate fund.

§ 55-277.28. Transfers from income to reimburse principal.

A. If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

B. Principal disbursements to which subsection A applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

1. An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

2. A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

3. Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

4. Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

5. Disbursements described in subdivision A 7 of § 55-277.26.

C. If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection A.

§ 55-277.29. Income taxes.

A. A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

B. A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

C. A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid proportionately:

1. From income to the extent that receipts from the entity are allocated to income; and

2. From principal to the extent that:

a. Receipts from the entity are allocated to principal; and

b. The trust's share of the entity's taxable income exceeds the total receipts described in subdivisions 1 and 2 a of this section.

D. For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

§ 55-277.30. Adjustments between principal and income because of taxes.

A. A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

1. Elections and decisions, other than those described in subsection B, that the fiduciary makes from time to time regarding tax matters;

2. An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

3. The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

B. If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

Article 6.

Miscellaneous Provisions.

§ 55-277.31 Expenses and receipts; nontrust estates.

A. The provisions of this chapter concerning the allocation and apportionment of receipts and expenses to principal and income shall govern the allocation and apportionment of receipts and expenses between a tenant and a remainderman where no trust has been created, except as otherwise provided in subsection B or C, and except for any provision that requires the exercise of a discretionary power by a trustee.

B. The cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant, when such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total which is found by dividing the present value of the tenant's estate by the present value of an estate corresponding to the reasonably expected duration of the improvement. The computation of present values of the estate shall be made on the expectancy basis set forth in § 55-269.1 and no other evidence of duration or expectancy shall be considered. When either tenant or remainderman has incurred an expense for the benefit of his own estate and without the consent or agreement of the other, he shall pay such expense in full.

C. The rules of this section are subject to any agreement of the parties.

§ 55-277.32. Uniformity of application and construction.

In applying and construing this Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

§ 55-277.33. Application of chapter to existing trusts decedent's estates and nontrust estates.

This chapter applies to every trust, decedent's estate or nontrust estate existing on January 1, 2000, except as otherwise expressly provided in the will or the terms of the trust, any other governing document, or in this chapter.

§ 64.1-57. Incorporation by reference of certain powers of fiduciaries into will or trust instrument.

(1) The following powers, in addition to all other powers granted by law, may be incorporated in whole or in part in any will or trust instrument by reference to this section:

(a) To keep and retain any or all investments and property, real, personal or mixed, including stock in the fiduciary institution, if the same be a corporation, as they may be at the time they come into the custody of said fiduciary, regardless of the character of same or whether they are such as then would be authorized by law for investment by fiduciaries or whether a disproportionately large part of the trust or estate remains invested in one or more types of property, for such time as the fiduciary shall deem best, and to dispose of such property by sale, exchange, or otherwise as and when such fiduciary shall deem advisable.

(a1) At the discretion of the fiduciary, to receive additions to the estate from any source, in cash or in kind, and to hold, administer and distribute such additions as a part of and under the same terms and conditions as the estate then currently held.

(b) To sell, assign, exchange, transfer and convey or otherwise dispose of, any or all of the investments and property, either real, personal or mixed, which may be included in, or may at any time become part of the trust or estate upon such terms and conditions as the fiduciary, in his absolute discretion, may deem advisable, at either public or private sale, either for cash or deferred payments or other consideration, as such fiduciary may determine; and for the purpose of selling, assigning, exchanging, transferring or conveying the same, to make, execute, acknowledge and deliver any and all instruments of conveyance, deeds of trust, or assignments in such form and with warranties and covenants as such fiduciary may deem expedient and proper; and in the event of any sale, conveyance, exchange, or other disposition of any of the trust or estate, the purchaser shall not be obligated in any way to see to the application of the purchase money or other consideration passing in connection therewith.

(b1) To grant, sell, transfer, exchange, purchase or acquire options of any kind on property held by such trust or estate or acquired or to be acquired by such trust or estate or held or owned by any other person.

(c) To invest and reinvest all of the funds of the estate as said fiduciary, in his sole discretion, may deem best, including investment in stocks, common and preferred, and common trust funds, without being restricted to those investments expressly approved by statute for investment by fiduciaries; and to change investments from realty to personalty, and vice versa.

(c1) To invest and reinvest all of the funds of the estate as said fiduciary, in his sole discretion, may deem best, including investment in interests in investment trusts and mutual funds, without being restricted to those investments expressly approved by statute for investment by fiduciaries; and to change investments from realty to personalty, and vice versa.

(d) To lease any or all of the real estate, which may be included in or at any time become a part of the trust or estate, upon such terms and conditions as said fiduciary, in his sole judgment and discretion, may deem advisable, and any lease or leases made by such fiduciary may extend beyond the term of the trust or administration of the estate and for the purpose of leasing said real estate, to make, execute, acknowledge and deliver any and all instruments, in such form and with such covenants and warranties as such fiduciary may deem expedient and proper.

(e) To vote any stocks, bonds, or other securities held by such fiduciary at any meeting of stockholders, bondholders, or other security holders, and to delegate the power to so vote to attorneys-in-fact or proxies under power of attorney, restricted or unrestricted.

(f) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and security as to such fiduciary shall seem advisable, including the power to borrow from the fiduciary, if the fiduciary be a bank, for the purpose of paying debts, taxes or other charges against the trust or estate or any part thereof, and with prior approval of the court for any proper purpose of the trust or estate, and to mortgage or pledge such portion of the trust or estate as may be required to secure such loan or loans; and as maker or endorser to renew existing loans.

(f1) To make loans or advancements to the executor or other representative of the grantor's estate in case such executor or other representative is in need of cash with which to pay taxes, claims or other indebtedness of the grantor's estate; but no assets acquired from a qualified retirement benefit plan under § 2039 (c) of the Internal Revenue Code shall be so used, and such assets shall be segregated and held separately until all claims against the estate for debts of the decedent or claims of administration have been satisfied. Such loans or advancements may be secured or unsecured, and the trustee shall not be liable in any way for any loss resulting to the trust or estate by reason of the exercise of this authority.

(g) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims, in favor of or against the trust or estate as the fiduciary shall deem best, and his decision shall be conclusive.

(h) To make distributions in cash or in kind or partly in each at valuations to be determined by the fiduciary, whose decision as to values shall be conclusive.

(i) [Repealed.]

(i1) ~~To determine whether any part of the trust or estate or any addition or increment thereto be income or principal, or whether any cost, charge, expense, tax or assessment shall be charged against income or principal, or partially against income and partially against principal, provided that this~~

determination be made so as to balance fairly the interests of the income beneficiary and the remainderman.

(j) To repair, alter, improve, renovate, reconstruct and demolish any of the buildings on the real estate held by such fiduciary and to construct such buildings and improvements thereon as such fiduciary may, in his discretion, deem advisable.

(k) To employ and compensate, out of the principal or the income or both as to the fiduciary shall seem proper, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, licensed real estate brokers, licensed salesmen and other assistants and advisors deemed by the fiduciary needful for the proper administration of the trust or estate, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided he was selected and retained with reasonable care.

(l) To rely upon any affidavit, certificate, letter, notice, telegram, or other paper or upon any telephone conversation believed by such fiduciary to be genuine and upon any other evidence believed by such fiduciary to be sufficient, and to be protected and saved harmless in all payments or distributions required to be made hereunder if made in good faith and without actual notice or knowledge of the changed condition or status of any person receiving payments or other distributions upon a condition.

(m) To retain any interest held by such fiduciary in any business, whether as a stockholder or security holder of a corporation, a partner, a sole proprietor, or otherwise, for any length of time, without limitations, solely at the risk of the trust or estate and without liability on the part of the fiduciary for any losses resulting therefrom; to participate in the conduct of such business and take or delegate to others discretionary power to take any action with respect to its management and affairs which an individual could take as the owner of such business, including the voting of stock, and the determination of any or all questions of policy; to participate in any incorporation, reorganization, merger, consolidation, recapitalization or liquidation thereof; to invest additional capital in, subscribe to additional stock or securities of, and loan money or credit with or without security to, such business out of the trust or estate property; to elect or employ as directors, officers, employees or agents of such business, and compensate, any persons, including the fiduciary or a director, officer, or agent of the fiduciary; to accept as correct financial or other statements rendered by the business from time to time as to his conditions and operations except when having actual notice to the contrary; to regard the business as an entity separate from the trust or estate with no duty to account to any court as to his operations; to deal with and act for the business in any capacity, including any banking or trust capacity and the loaning of money out of the fiduciary's own funds, and to be compensated therefor; and to sell or liquidate such interest or any part thereof at any time. If any business shall be unincorporated, contractual and tort liabilities arising out of such business shall be satisfied, first, out of the business, and second, out of the trust or estate; but it is intended that in no event shall there be a liability of the fiduciary, and if the fiduciary shall be held liable, such fiduciary shall be entitled to indemnification from the business and the trust or estate in the order named. Such fiduciary shall be entitled to such additional compensation as is commensurate with the time, effort, and responsibility involved in his performance of services with respect to such business. Such compensation for services rendered to the business may be paid by such fiduciary from the business or from other assets or from both as the fiduciary, in his discretion, may determine to be advisable; the amount of such additional compensation, however, shall be subject to the final approval of the court.

(n) To do all other acts and things not inconsistent with the provisions of the will or trust in which these powers are incorporated which such fiduciary may deem necessary or desirable for the proper management of the trusts herein created, in the same manner and to the same extent as an individual might or could do with respect to his own property.

(o) To hold property in his name or in the name of nominees.

(p) During the minority, incapacity or the disability of any beneficiary, the fiduciary may, in his sole discretion, distribute income and principal to such beneficiary in any one of the following ways: (1) directly to said beneficiary; (2) to a relative, friend, guardian, conservator or committee, to be expended by such person for the education, maintenance, support or benefit of said beneficiary; (3) by himself expending the same for the education, maintenance, support or benefit of said beneficiary; (4) to an adult person or bank authorized to exercise trust powers as custodian for a minor beneficiary

under the Uniform Transfers to Minors Act (§ 31-37 et seq.) to be held by such custodian under the terms of such act; or (5) to an adult person or bank authorized to exercise trust powers as custodial trustee for an incapacitated beneficiary under the Uniform Custodial Trust Act (§ 55-34.1 et seq.) to be held as custodial trustee under the terms of such act.

(q) To continue and carry on any farming operation transferred to him and to operate such farms and any other farm which may be acquired and, in so doing, by way of illustration and not in limitation of his powers, to operate the farm with hired labor, tenants or sharecroppers; to hire a farm manager or a professional farm management service to supervise the farming operations; to lease or rent the farm for cash or for a share of the crops; to purchase or otherwise acquire farm machinery and equipment and livestock; to construct, repair and improve farm buildings of all sorts needed, in its judgment, for the operation of the farm; to make loans or advances or to obtain such from any source, including the fiduciary at the prevailing rate or rates of interest for farm purposes such as for production, harvesting, or marketing, or for the construction, repair, or improvement of farm buildings or for the purchase of farm machinery or equipment or livestock; to employ approved soil conservation practices in order to conserve, improve and maintain the fertility and productivity of the soil; to protect, manage and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate or trust; to ditch and drain damp or wet fields and areas of the farm when and where needed; to engage in livestock production, if it is deemed advisable, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on such a livestock program; to execute contracts, notes and chattel mortgages relating to agriculture with the Commodity Credit Corporation, the United States Secretary of Agriculture or any other officer or agency of the federal or state governments, to enter into acreage reduction agreements, to make soil conservation commitments, and to do all acts necessary to cooperate with any governmental agricultural program; and in general, to employ the methods of carrying on the farming operation that are in common use by the community in which the farm is located, inasmuch as the duties the fiduciary is requested to assume with respect to farming operations may considerably enlarge and increase his usual responsibility and work as fiduciary, it is agreed that the fiduciary shall be entitled to such additional reasonable compensation as is commensurate with the time, effort and responsibility involved in his performance of such services.

(r) To purchase and hold policies of life insurance on the life of any beneficiary, or any person in whom the beneficiary has an insurable interest, and pay the premiums thereon out of income or principal as he deems appropriate; provided, however, that the decision of the beneficiary of any trust otherwise meeting the requirements of § 2056 (b) (5) of the Internal Revenue Code of 1954, as amended, shall control in respect to the purchase or holding of a policy of life insurance by the trustee of such trust.

(s) To make any election authorized under any law requiring, or relating to the requirement for, payment of any taxes or assessments on assets or income of the estate or in connection with any fiduciary capacity, regardless of whether any property or income is received by or is under the control of the fiduciary, including, but not limited to, elections concerning the timing of payment of any such tax or assessment, the valuation of any property subject to any such tax or assessment, the alternative use of items of deduction in computing any tax or assessment and including specifically elections permitted by statutes enacted after the date of execution of the will or trust instrument.

(t) To comply with environmental law:

1. To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to a change in, or any actual or threatened violation of, any environmental law affecting property held by the fiduciary;

2. To take, on behalf of the estate or trust, any action necessary to respond to a change in, or prevent, abate, or otherwise remedy any actual or threatened violation of, any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

3. To refuse to accept property in trust if the fiduciary determines that any property to be transferred to the trust either is contaminated by any hazardous substance or is being used or has been

used for any activity directly or indirectly involving any hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;

4. To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

5. To charge the cost of any inspection, review, abatement, response, cleanup or remedial action authorized herein against the income or principal of the trust or estate;

6. For purposes of this subdivision, "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health and "hazardous substances" means any substances defined as hazardous or toxic or otherwise regulated by any environmental law.

(u) To resign as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between it in its fiduciary capacity and in its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust or estate because of the type or condition of assets held therein.

(2) As used in the section, the term "fiduciary" shall mean and include one or more individuals or corporations having trust powers and the use of the male gender shall include the female; and any substitute, added or successor fiduciary shall have all of the powers hereby provided for the fiduciary named in the will or trust instrument. The provisions of this section may by reference hereto be made applicable to a fiduciary of the estate of a decedent as well as to the trustee of an inter vivos or testamentary trust.

(3) Any fiduciary upon whom a document confers any or all of the powers set forth in subsection (1) may irrevocably disclaim the right to exercise any or all of the powers conferred by filing a suitable written disclaimer with the clerk of court where the document is recorded or probated or, if the document is not recorded, by sending a written disclaimer by registered or certified mail to the last known address of all persons then living entitled to receive the principal or income. Such disclaimer shall relate back to the time when the disclaiming fiduciary originally assumed such fiduciary capacity and shall be binding upon any successor fiduciary. For the purpose of this subsection, a fiduciary shall not be deemed to have assumed a fiduciary capacity under a revocable document until the same becomes irrevocable.

(4) For the purposes of this section, unless the will or trust instrument expresses a contrary intention, the incorporation by reference of powers enumerated by this statute shall refer to those powers existing at the time of death and reference to powers under the Uniform Gifts to Minors Act in an instrument executed prior to July 1, 1989, shall be construed to refer to the Uniform Transfers to Minors Act (§ 31-37 et seq.).

(5) This section is not intended and shall not be construed to affect the application of the standard of judgment and care as set forth in subdivision (a) of § 26-45.1.

(6) In the event that the will or trust instrument shall contain a provision in favor of a surviving spouse of the testator or grantor, the powers above enumerated shall in no way be construed or interpreted in any fashion which might cause the bequest to fail to qualify for the marital deduction permitted under the federal estate tax law, unless the will or trust instrument shall specifically provide to the contrary. A fiduciary acting under a construction or interpretation of a power, which action is otherwise reasonable under the circumstances, shall incur no responsibility for acts taken in good faith which are otherwise thereafter contended to be in a fashion which might cause disqualification for the marital deduction. The provision of this subsection shall apply without regard to the time the will or trust was executed or probated or the testator died in relation to the effective date of this section or amendments thereto.

§ 64.1-68. Interest on pecuniary legacies.

Unless a contrary intent is expressed in or to be implied from a will, interest on pecuniary legacies shall begin to run at the expiration of one year after the date of the death of the testator.

For the purposes of this section, a marital formula pecuniary bequest either outright to the testator's spouse or in trust for the benefit of such spouse, designed in either case to qualify for the benefit of the marital deduction allowed by the Federal Internal Revenue Code, shall not be considered a pecuniary legacy entitled to interest at the expiration of one year after the death of the

testator but, instead, shall share ratably with the residue of the estate in the income earned by the estate during the period of administration, unless a contrary intent is expressed in the will.

The provisions of this section shall also apply to the distribution of interest to a beneficiary entitled to receive a pecuniary amount from a trust, in accordance with § 55-277.5.

2. That Article 1 (§§ 55-253 through 55-268) of Chapter 15 of Title 55 of the Code of Virginia is repealed.

3. That the provisions of this act shall become effective January 1, 2000.

VIRGINIA ACTS OF ASSEMBLY -- 1999 SESSION

CHAPTER 252

An Act to amend and reenact § 64.1-73 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.1-73.1, relating to pour-over wills.

[H 1996]

Approved March 18, 1999

Be it enacted by the General Assembly of Virginia:

1. That § 64.1-73 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.1-73.1 as follows:

§ 64.1-73. Devise or bequest to trustee of an established trust.

A. A devise or bequest (including the exercise of a power of appointment) may be made by a will duly executed pursuant to the provisions of this chapter to the trustee or trustees of an inter vivos trust or testamentary trust, whether the trust was established by the testator, by the testator and another, or by some other person if:

1. In the case of an inter vivos trust, the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will; or

2. In the case of a testamentary trust, the trust is identified in the testator's will and its terms are set forth in the valid last will of a person who has predeceased the testator and whose will was executed before or concurrently with the execution of the testator's will.

In either event, at the time the devise or bequest is to be distributed to the trustee or trustees at least one trustee of the trust shall be (i) an individual, or (ii) a corporation or association authorized to do a trust business in this Commonwealth. However, prior to distribution of the devise or bequest to the trustee, each nonresident shall file, with the clerk of the circuit court of the jurisdiction wherein the testator's will was admitted to probate, his consent in writing that service of process in any action against him as trustee or any other notice with respect to administration of the trust in his charge, may be by service upon the clerk of the court in which he is qualified or upon a resident of this Commonwealth at such address as he may appoint in the written instrument filed with the clerk. Where any nonresident qualifies pursuant to this paragraph, bond with surety shall be required in every case unless at least one other trustee is a resident or the court in which the nonresident qualifies waives surety under the provisions of § 26-4.

A corporation or association not authorized to do a trust business in this Commonwealth at the time the devise or bequest is to be distributed shall not, in any case, be a trustee of such trust.

B. The inter vivos trust may be an unfunded trust.

For the purposes of this section:

1. An inter vivos trust shall be deemed established upon execution of the instrument creating such trust; and

2. An inter vivos trust may contain provisions whereby the amount of corpus to be allocated to any particular portion of the trust will be determined, measured or affected by the "adjusted gross estate" of the settlor or testator for federal estate tax purposes, or by the amount of the "marital deduction allowable" to the settlor's or testator's estate, the amount of deductions or credits available to the estate of the settlor or testator for federal estate tax purposes, or by the value of such estate for federal estate tax purposes, or by any other method, and such unfunded trust shall not be deemed testamentary by reason thereof.

C. The devise or bequest shall not be invalid because (i) the trust is amendable or revocable or both by the settlor or any other person, either prior or subsequent to the testator's death, (ii) the trust instrument or any amendment thereto was not executed in the manner required for wills, or (iii) the trust was amended after the execution of the will or after the death of the testator.

D. Unless the testator's will provides otherwise, the property so devised or bequeathed:

1. Shall not be deemed held under a testamentary trust of the testator, but shall become a part of the corpus of the trust to which it is given or, if the will so specifies, it shall become a part of any one or more particular portions of the corpus; and

2. Shall be administered and disposed of (i) in accordance with the terms of the trust as they appear in writing at the testator's death, including any amendments thereto made before the death of the testator and regardless of whether made before or after the execution of the testator's will, or (ii) if the testator expressly so specifies in his will, and only in such event, as such terms are amended after the death of the testator.

E. In the event that the settlor or other person having the right to do so revokes or otherwise terminates the trust pursuant to a power so to do reserved in the trust instrument, and such revocation or termination is effected at a date subsequent to the death of a testator who has devised or bequeathed property to such trust, the revocation or termination shall be ineffective as to property devised or bequeathed to such trust by a testator other than the settlor, unless the testator's will expressly provides to the contrary.

F. The devise or bequest shall not be valid should the entire trust not be operative for any reason at the testator's death. If the devise or bequest is to augment only one or more portions of the trust, the devise or bequest shall not be valid should the trust not be operative for any reason as to such portion at the testator's death.

G. In any case in which the devise or bequest to the trustee of a trust such as is contemplated in the foregoing provisions fails to take effect by reason of the fact that there is no qualified trustee acting at the time the devise or bequest is to be distributed, or that one or more of the trustees then acting is a corporation or association not authorized to do a trust business in this Commonwealth, the court having jurisdiction with respect to the probate of the will or the administration of the testator's estate, upon sufficient evidence of the existence of a trust estate for administration, independent of the testator's estate, and of the validity of the trust established by virtue of such separate written instrument, may determine that the trusts declared by such separate written instrument are the trusts upon which the devise or bequest is made, so far as applicable in the nature of the case, to the same extent and with like effect as if such trust provisions had been extensively incorporated in the testamentary documents, and that such trusts will not fail for want of a qualified trustee to administer the trust estate so devised or bequeathed. The court may then grant such further and ancillary relief as the nature of the case may require, including the appointment of a qualified trustee to perform the trusts with respect to the estate so devised or bequeathed, and granting instruction and guidance to the trustee so appointed in the performance of his duties. Nothing herein shall be deemed to authorize any such trustee to be excused from any obligations of accounting or performance such as are required by law of fiduciaries, nor to prevent the transfer of the trust estate to a trustee appointed by or qualified in a court of record in a foreign state in accordance with the provisions of § 26-64.

H. This section shall apply to any devise or bequest under the will of a decedent dying on or after July 1, 1994, and before July 1, 1999.

§ 64.1-73.1. Testamentary additions to trusts.

A. A will may validly devise or bequeath property (including by the exercise of a power of appointment) to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator, by the testator and some other person, or by some other person including a funded or unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the insurance contracts or (ii) at the testator's death by the testator's devise or bequest to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust. The devise or bequest is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

B. Unless the testator's will provides otherwise, property devised or bequeathed to a trust described in subsection A is not held under a testamentary trust of the testator but it becomes a part of the trust to which it is devised or bequeathed, and shall be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

C. Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise or bequest to lapse.

D. Unless at least one trustee of the trust is an individual resident of this Commonwealth or an entity authorized to do a trust business in this Commonwealth, at the time the devise or bequest is to be distributed to the trust, the testator's personal representative shall not make any distribution to the trust until each nonresident individual or entity files with the clerk of the circuit court of the jurisdiction wherein the testator's will was admitted to probate, a consent in writing that service of process in any action against the trustee or any other notice with respect to administration of the trust in the trustee's charge, may be by service upon a resident of this Commonwealth at such address as the trustee may appoint in the written instrument filed with the clerk. No further requirement shall be imposed upon any nonresident individual or entity as a condition to receiving the devise or bequest.

E. This section applies to a will of a testator who dies after June 30, 1999, and it shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this section among states enacting it.

1999 SESSION

ENROLLED

HOUSE JOINT RESOLUTION NO. 558

Requesting the Virginia Commissioners of the National Conference of Commissioners on Uniform State Laws to conduct briefings for the House Committee on Corporations, Insurance and Banking and the Senate Committee on Commerce and Labor and other interested parties regarding the proposed revisions to Article 9 of the Uniform Commercial Code.

Agreed to by the House of Delegates, February 7, 1999

Agreed to by the Senate, February 18, 1999

WHEREAS, Article 9, Secured Transactions, one of the 11 substantive articles of the Uniform Commercial Code, was first proposed in 1951 and last updated in 1972; and

WHEREAS, the National Conference of Commissioners on Uniform State Laws completed major revisions to Article 9 in 1998 and recommends the adoption of the revised Article 9 in each state; and

WHEREAS, Article 9 governs transactions in which a creditor takes a security interest in specific property of a debtor, allowing the creditor to take the property in the event the debtor defaults on the debt; and

WHEREAS, trillions of dollars of commercial and consumer credit are granted each year in secured transactions under Article 9 of the Uniform Commercial Code; and

WHEREAS, manufacturers, retailers, and consumers all depend upon Article 9 of the Uniform Commercial Code to make it possible for them to obtain the credit they need; and

WHEREAS, Article 9 is absolutely necessary to economic function in the United States; and

WHEREAS, the revised Article 9 takes into account changes in technology, increases in the volume of commerce and credit, new kinds of property and transactions, and the proliferation of statutory nonpossessory liens which have occurred since Article 9 was last updated in 1972; and

WHEREAS, uncertainties about where to perfect a security interest and ambiguities that resulted in conflicting court interpretations have been addressed in the revised Article 9; and

WHEREAS, Article 9 is lengthy and complex and should be thoroughly studied and considered before adoption by the Commonwealth as state law; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia Commissioners of the National Conference of Commissioners on Uniform State Laws be requested to conduct briefings for the House Committee on Corporations, Insurance and Banking and the Senate Committee on Commerce and Labor and other interested parties regarding the proposed revisions to Article 9 of the Uniform Commercial Code. The Virginia Commissioners shall conduct such briefings for the committees sitting jointly to receive this information. The Chairmen of the House Committee on Corporations, Insurance and Banking and the Senate Committee on Commerce and Labor shall each invite members of the Virginia State Bar who are interested in the proposed revisions to attend the briefings.

The Division of Legislative Services shall provide staff support for the briefings.

The Commissioners shall complete the briefings prior to the 2000 Session of the General Assembly.

