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SENATE BILL NO. 1349

Offered January 16, 2007

A BILL to amend and reenact § 13.1-501 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 13.1-505.2, relating to the Virginia Securities Act; duties and liabilities of broker-dealers; failure to settle certain securities transactions.

Patron—Potts

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 13.1-501 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 13.1-505.2 as follows:

§ 13.1-501. Definitions.

A. When used in this chapter, unless the context otherwise requires:

"Agent" means any individual who, as a director, officer, partner, associate, employee or sales representative of a broker-dealer or issuer, effects or undertakes to effect sales of securities, otherwise than on behalf of (i) an issuer either offering a security exempted by subdivision 1, 2, 3, 4, 7, 9, or 10 of subsection A of § 13.1-514 or effecting a transaction with a "qualified purchaser" as defined by the United States Securities and Exchange Commission or (ii) a broker-dealer effecting in this Commonwealth transactions limited to those transactions described in § 15 (h) (2) of the Securities Exchange Act of 1934.

"Broker-dealer" means any person engaged in the business of selling any type of security other than an interest or unit in a condominium as defined in subdivision (c) of § 55-79.2 or cooperative housing corporation for the account of others or for his own account otherwise than with or through a broker-dealer or agent, but does not include an issuer or an agent. A bank or trust subsidiary formed under Article 3.1 (§ 6.1-32.1 et seq.) of Chapter 2 of Title 6.1 shall not be considered to be a broker-dealer because the bank or trust subsidiary formed under Article 3.1 (§ 6.1-32.1 et seq.) of Chapter 2 of Title 6.1 engages in any one or more of the activities specified in subparagraph (i), (ii), (iii), (iv), (v), (vi), (viii), (ix) or (x) of § 3 (a) (4) (B) or in § 3 (a) (5) (C) of the Securities Exchange Act of 1934 under the conditions described in connection with such laws.

"Commission" means the State Corporation Commission.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

"Cooperative housing corporation" means a corporation in which each member is entitled, solely by reason of his membership in the corporation, to occupy for dwelling purposes a house or an apartment in a building owned or leased or to be owned or leased by the corporation or to purchase a dwelling constructed or to be constructed by the corporation. The corporation shall not be or intend to be engaged in any business or activity other than the ownership, leasing, management, or construction of residential properties for its members, except to the extent that such business or activity is incidental to the ownership, leasing, management, or construction of residential properties. The securities of the corporation shall be issued only in connection with the sale or lease of dwelling units to persons who are or thereupon become members of the corporation and shall be transferable by the purchasers only in connection with the transfer of such dwelling units or leases to other persons who are or thereupon become members.

"Federal covered advisor" means any person who is registered or required to be registered under § 203 of the Investment Advisers Act of 1940 as an "investment adviser."

"Federal covered security" means any security described as a "covered security" in § 18 of the Securities Act of 1933.

"Guaranteed" means guaranteed as to payment of principal, interest or dividends.

"Investment advisor" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. Investment advisor also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. "Investment advisor" does not include (i) an investment advisor representative; (ii) a

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59 bank, a bank holding company as defined in the Bank Holding Company Act of 1956 which is not an
60 investment company, a trust subsidiary organized under Article 3.1 (§ 6.1-32.1 et seq.) of Chapter 2 of
61 Title 6.1, a savings institution, a credit union, or a trust company; (iii) a lawyer, accountant, engineer, or
62 teacher whose performance of these services is solely incidental to the practice of his profession; (iv) a
63 broker-dealer or his agent whose performance of these services is solely incidental to the conduct of his
64 business as a broker-dealer and who receives no special compensation for them; (v) a publisher of any
65 newspaper, news column, newsletter, news magazine, or business or financial publication or service,
66 whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of
67 the rendering of advice on the basis of the specific situation of each client; (vi) any person that is a
68 federal covered advisor; or (vii) such other persons not within the intent of this definition, as the
69 Commission may designate by rule or determine by order pursuant to § 13.1-525.

70 "Investment advisor representative" means any partner, officer, director of, or a person occupying a
71 similar status or performing similar functions, or other individual, except clerical or ministerial
72 personnel, who is employed by or associated with (a) an investment advisor registered or required to be
73 registered under this chapter and who does any of the following: (i) makes any recommendations or
74 otherwise renders advice regarding securities, (ii) manages accounts or portfolios of clients, (iii)
75 determines which recommendations or advice regarding securities should be given, (iv) prepares reports
76 or analyses concerning securities, (v) solicits, offers or negotiates for the sale of or sells investment
77 advisory services, or (vi) supervises employees who perform any of the foregoing; or (b) a federal
78 covered advisor, subject to the limitations of § 203 A of the Investment Advisers Act of 1940, as the
79 Commission may designate by rule or order. "Investment advisor representative" does not include such
80 other persons employed by or associated with either an investment advisor or a federal covered advisor
81 not within the intent of this definition as the Commission may designate by rule or determine by order
82 pursuant to § 13.1-525.

83 "Issuer" means any person who issues or proposes to issue a security, except that:

84 1. With respect to certificates of deposit, voting trust certificates or collateral trust certificates, and
85 with respect to certificates of interest or shares in an unincorporated investment trust not having a board
86 of directors or persons performing similar functions, or of the fixed, restricted management or unit type,
87 the term "issuer" means the person or persons performing the acts and assuming the duties of manager;

88 2. With respect to equipment trust certificates or like securities, "issuer" means the person by whom
89 the equipment is or is to be used;

90 3. With respect to oil, gas or other mineral leases, rights or royalties or interests therein, "issuer"
91 means the owner of any such lease, right, royalty or interest (whether whole or fractional) who creates
92 financial interests therein for the purpose of offering to more than five persons.

93 "Nonissuer distribution" means any transaction not directly or indirectly for the benefit of the issuer.

94 "Offer" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or
95 interest in a security for value.

96 "Person" means an individual, a partnership, a corporation, an unincorporated association, a
97 government, a subdivision of a government, or a trust in which the interests of the beneficiaries are
98 evidenced by securities.

99 "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or
100 interest in a security for value.

101 "Securities Act of 1933," "Securities Exchange Act of 1934," "Bank Holding Company Act of 1956,"
102 "Investment Advisers Act of 1940," and "Investment Company Act of 1940" mean the federal statutes of
103 those names as now or hereafter amended.

104 "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness;
105 certificate of interest or participation in any profit-sharing agreement; collateral trust certificate;
106 preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate;
107 certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest
108 therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of
109 interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to
110 subscribe to or purchase, any of the foregoing. However, this definition shall not apply to any insurance
111 policy, endowment policy, annuity contract, variable annuity contract or any contract or agreement in
112 relation to and in consequence of any such policy or contract, issued by an insurance company subject
113 to the supervision or control of the Commission's Bureau of Insurance when the form of such policy or
114 contract has been duly filed with the Bureau as now or hereafter required by law.

115 "State" means any state, territory or possession of the United States, including the District of
116 Columbia and Puerto Rico.

117 "Threshold security" means a security that is a threshold security under Rule 203(c)(6) of Regulation
118 SHO, 17 C.F.R. Part 242.200 et seq.

119 B. For the purposes of Article 4 (§ 13.1-507 et seq.) of this chapter, the terms defined in this section
120 shall not include negotiations or agreements between the issuer and any underwriter or among

underwriters; or any transaction by the pledgee of a security unless made directly or indirectly for the benefit of the issuer.

C. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing shall be deemed to constitute part of the subject of the purchase and to have been offered and sold for value.

D. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same issuer or of another person, and every sale or offer, of a security which gives the holder thereof a present or future right or privilege to convert the security into another security of the same issuer or of another person, shall be deemed to include an offer of such other security.

§ 13.1-505.2. Required notice of failure to settle trades of threshold securities.

A. A registered broker-dealer is subject to this section if:

1. The registered broker-dealer is selling or purchasing for a customer or its own account;
2. A trade fails to settle by delivery of securities of like kind and quality;
3. The trade is in a threshold security of an issuer domiciled in the Commonwealth or with its principal office located in this Commonwealth; and

4. The failure to settle described in this section occurs on or after July 1, 2007.

B. A registered broker-dealer subject to this section shall notify the Commission of any trade that fails to settle by delivery of securities of like kind and quality within 24 hours of the failure to settle. The notice shall be in writing or by a means specified by the Commission. The notice shall inform the Commission of:

1. The name of the company whose shares were the subject of the settlement failure;
2. The date of the trade that failed to settle;
3. The amount of the shares not delivered to settle the trade; and
4. In the case of a selling broker-dealer, the identity of the broker-dealer's customer account or broker-dealer account for which the sell transaction is executed; or, in the case of a broker-dealer purchasing the securities, the identity of the account that failed to deliver the security in settlement of the trade.

C. The Commission shall make the information disclosed under subsection B available to the public.

D. 1. Subject to subdivision 3, a broker-dealer who materially fails to provide the notice required by subsection B is liable to the company whose securities were the subject of the settlement failure in the amount of:

a. If the failure is for at least one business day but not more than five business days, \$1,000 for each business day the broker-dealer fails to provide the required notice between July 1, 2007, and July 1, 2008, and \$10,000 for each business day the broker-dealer fails to provide the required notice on or after July 1, 2008; or

b. If the failure is for six or more business days, the greater of:

(1) \$1,000 for each business day the broker-dealer fails to provide the required notice that occurs between July 1, 2007, and July 1, 2008, and \$10,000 for each business day the broker-dealer fails to provide the required notice that occurs on or after July 1, 2008; or

(2) The sum of the sales price for each security's share in the subject trade that has not been delivered in settlement.

2. Subject to subdivision 3, the company whose securities were the subject of the settlement failure may bring a proceeding in a court of proper jurisdiction to enforce the broker-dealer's obligation to make the payment of (i) the amount described in subdivision 1; (ii) interest thereon at the rate of 12% per year from the day on which the broker-dealer fails to provide the notice required by subsection B; and (iii) the costs of the action together with reasonable attorney fees as determined by the court.

3. The court, in an action brought under subdivision 2, may waive the broker-dealer's obligation to make the payment of amounts owed pursuant to subdivision 1, upon a showing by the registered broker-dealer who is subject to this section, or by any person listed in subsection E, of reasonable cause including for any exception provided in Regulation SHO, 17 C.F.R. Part 242.200 et seq.

E. Each of the following is liable jointly and severally with and to the same extent as a broker-dealer is liable under subsection D:

1. A principal of the broker-dealer;
2. A person who directly or indirectly controls the broker-dealer;
3. A partner, officer, or director of the broker-dealer;
4. A person occupying a similar status or performing a similar function to a partner, officer, or director of the broker-dealer; and

5. An employee of the broker-dealer who has a duty to assure the filing of the notice required by subsection B and recklessly fails to perform that duty.

F. An action shall not be maintained to enforce any liability under subsection D or E unless it is brought before the sooner of the expiration of:

182 1. Four years after the day on which the broker-dealer fails to provide the notice required by
183 subsection B; or
184 2. Two years after the day on which the company bringing the enforcement action discovers the facts
185 constituting the violation of subsection B.
186 G. The rights and remedies provided in this section are in addition to any other rights or remedies
187 that may exist at law.
188 H. With regard to any enforcement action the Commission may take to enforce this section, the
189 Commission may waive any penalty or amounts owed upon a showing by the registered broker-dealer
190 who is subject to this section or any person listed in subsection E of reasonable cause including for any
191 exception provided in Regulation SHO, 17 C.F.R. Part 242.200 et seq.