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SENATE BILL NO. 988

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Commerce and Labor
on January 28, 2013)

(Patron Prior to Substitute—Senator Stuart)

A BILL to amend the Code of Virginia by adding in Chapter 8 of Title 6.2 an article numbered 16, consisting of sections numbered 6.2-947 through 6.2-950, relating to privilege for voluntary regulatory self-assessments by banks.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 8 of Title 6.2 an article numbered 16, consisting of sections numbered 6.2-947 through 6.2-950, as follows:

Article 16.

Voluntary Regulatory Self-Assessments.

§ 6.2-947. Definitions.

As used in this article, unless the context requires a different meaning:

"Bank" has the same meaning ascribed to the term in § 6.2-800 and includes any bank holding company, affiliates, and subsidiaries of a bank.

"Bank regulator" means any state, federal, or municipal governmental agency, bureau, commission, office, or other governmental entity charged with the regulation or supervision of a bank or the regulation or supervision of any activity in which a bank may be engaged. "Bank regulator" includes the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Consumer Financial Protection Bureau, the Federal Trade Commission, and the Bureau.

"Self-assessment" means (i) a bank's voluntary, self-initiated internal assessment, audit, or review of the bank and its practices, policies, and procedures or (ii) a bank's voluntary, self-initiated assessment, audit, or review of the practices, policies, and procedures of a person acting under contract, directly or indirectly, as the bank's service provider, including mortgage servicers and sub-servicers, credit and debit card processors, and providers of loan document systems.

"Self-assessment report" means any document, including any audit, report, finding, communication, or opinion or any draft of an audit, report, finding, communication, or opinion, prepared by internal personnel or by outside attorneys, accountants, or consultants as a part of or in connection with a self-assessment that is made in good faith.

§ 6.2-948. Privilege for self-assessment reports.

Except as otherwise provided in this article:

1. A self-assessment report and any portion or contents thereof are privileged and are not admissible or subject to discovery in any civil or administrative litigation, action, proceeding, or investigation;

2. The self-assessment privilege shall be applicable regardless of whether a bank regulator or any other governmental authority in possession of a self-assessment report or any portion or contents thereof subsequently discloses it or any portion or contents thereof to a third party (i) in accordance with subsection B of § 6.2-101 or (ii) as required or permitted by any other state or federal law; and

3. Notwithstanding any state or federal law, a bank regulator or any other governmental authority in possession of a self-assessment report or any portion or contents thereof shall not disclose the report or any portion or contents thereof to a person in response to a request made pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) or any similar federal or state public records law.

§ 6.2-949. Exceptions from self-evaluation privilege.

The self-assessment privilege established by § 6.2-948 shall not apply:

1. If a bank expressly waives the protections of the self-assessment privilege established by § 6.2-948;

2. If a bank discloses a self-assessment report to any third party, provided that disclosure of a self-assessment report to a third party shall not void or waive the self-assessment privilege with respect to such self-assessment report if such third party (i) is a bank regulator, (ii) is subject to an agreement or obligation to preserve the confidentiality of the self-assessment report, which agreement or obligation to preserve confidentiality need not be in writing and may be evidenced by an indication of confidentiality on the face of any such self-assessment report, a verbal agreement regarding its confidentiality, an employment relationship, a principal-agent relationship, a fiduciary relationship, or an attorney-client relationship, or (iii) receives the self-assessment report from a person described in clause (i) or (ii);

3. If a court or hearing officer, after an in camera review, determines that (i) the privilege is being asserted for a fraudulent purpose, (ii) the self-assessment report was prepared to avoid disclosure of

60 *information in an investigative, administrative, or judicial proceeding that was underway at the time of*
61 *its preparation or for which the bank had been provided written notification that an investigation into a*
62 *specific violation had been initiated, or (iii) the self-assessment report addresses a matter reasonably*
63 *expected to have an imminent and substantial harm to bank customers or consumers and the bank has*
64 *not previously taken reasonable actions to correct the matter; or*

65 *4. To any self-assessment report requested by a bank regulator, provided that disclosure of a*
66 *self-assessment report to a bank regulator shall not void or waive the self-assessment privilege with*
67 *respect to such self-assessment report, and provided further that disclosure of a self-assessment report*
68 *by a bank regulator to any third party shall not void or waive the self-assessment privilege with respect*
69 *to such self-assessment report.*

70 ***§ 6.2-950. Effect on other privileges.***

71 *Nothing in this article limits, waives, or abrogates the scope or nature of any statutory or common*
72 *law privilege.*