

# 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 trustees 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.~~

~~(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 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.**