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SENATE BILL NO. 351

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Commerce and Labor
on January 27, 2014)

(Patron Prior to Substitute—Senator Edwards)

A *BILL to amend and reenact § 13.1-514 of the Code of Virginia, relating to the Securities Act; exemption.*

Be it enacted by the General Assembly of Virginia:

1. That § 13.1-514 of the Code of Virginia is amended and reenacted as follows:

§ 13.1-514. Exemptions.

A. The following securities are exempted from the securities registration requirements of this chapter:

1. Any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state or any agency or corporate or other instrumentality of one or more of the foregoing; or any certificate of deposit for any of the foregoing;

2. Any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by such issuer or guarantor;

3. Any security issued by and representing an interest in or a debt of, or guaranteed by, the International Bank for Reconstruction and Development, or any national bank, or any bank or trust company organized under the laws of any state or trust subsidiary organized under the provisions of Article 3 (§ 6.2-1047 et seq.) of Chapter 10 of Title 6.2;

4. Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association or savings bank, or by any savings and loan association or savings bank which is organized under the laws of this Commonwealth;

5. Any security issued or guaranteed by an insurance company licensed to transact insurance business in this Commonwealth;

6. Any security issued by any credit union, industrial loan association or consumer finance company which is organized under the laws of this Commonwealth and is supervised and examined by the Commission;

7. Any security issued or guaranteed by any railroad, other common carrier or public service company supervised as to its rates and the issuance of its securities by a governmental authority of the United States, any state, Canada or any Canadian province;

8. Any security which is listed or approved for listing upon notice of issuance on the New York Stock Exchange or the American Stock Exchange or any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants admitted to trading in any of said exchanges; or any warrant or right to subscribe to any of the foregoing securities;

9. Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months after the date of issuance, exclusive of days of grace, or any renewal thereof which is likewise limited, or any guaranty of such paper or of any such renewal;

10. Any security issued in connection with an employee's stock purchase, savings, pension, profit-sharing or similar benefit plan. The Commission may by rule or order, as to any security issued pursuant to such plan, specify or designate persons eligible to participate in such plan;

11. Any security issued by a cooperative association organized as a corporation under the laws of this Commonwealth;

12. Any security listed on an exchange registered with the United States Securities and Exchange Commission or quoted on an automated quotation system operated by a national securities association registered with the United States Securities and Exchange Commission and approved by regulations of the State Corporation Commission;

13. Any security issued by any issuer organized under the laws of any foreign country and approved by rule or regulation of the Commission.

B. The following transactions are exempted from the securities, broker-dealer and agent registration requirements of this chapter except as expressly provided in this subsection:

1. Any isolated transaction by the owner or pledgee of a security, whether effected through a broker-dealer or not, which is not directly or indirectly for the benefit of the issuer;

2. Any nonissuer distribution by a registered broker-dealer and its registered agent of a security that has been outstanding in the hands of the public for the past five years, if the issuer in each of the past three fiscal years has lawfully paid dividends on its common stock aggregating at least four percent of

60 its current market price;

61 3. Any transaction by a registered broker-dealer and its registered agent pursuant to an unsolicited
62 order or offer to buy;

63 4. Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage
64 or deed of trust or by an agreement for the sale of real estate or chattels, if the entire indebtedness
65 secured thereby is offered and sold as a unit;

66 5. Any transaction in his official capacity by a receiver, trustee in bankruptcy or other judicially
67 appointed officer selling securities pursuant to court order;

68 6. Any offer or sale to a corporation, investment company or pension or profit-sharing trust or to a
69 broker-dealer;

70 7. a. Any sale of its securities by an issuer or any sale of securities by a registered broker-dealer and
71 its registered agent acting on behalf of an issuer if, after the sale, such issuer has not more than 35
72 security holders, and if its securities have not been offered to the general public by advertisement or
73 solicitation; or

74 b. To the extent the Commission by rule or order permits, any sale of its securities by an issuer or
75 any sale of securities by a registered broker-dealer and its registered agent acting on behalf of an issuer
76 to not more than 35 persons in the Commonwealth during any period of 12 consecutive months, whether
77 or not the issuer or any purchaser is then present in the Commonwealth, if the issuer or broker-dealer
78 reasonably believes that all the purchasers in the Commonwealth are purchasing for investment, and if
79 the securities have not been offered to the general public by advertisement or general solicitation. The
80 Commission may, by rule or order, as to any security or transaction or any type of security or
81 transaction, withdraw or further condition this exemption, increase or decrease the number of purchasers
82 permitted, or waive the condition relating to their investment intent. The Commission may assess and
83 collect in connection with any filing pursuant to this exemption a nonrefundable fee not to exceed \$250.

84 With respect to this subdivision 7, and except to the extent the Commission by rule or order may
85 otherwise permit, the number of security holders of an issuer or the number of purchasers from an
86 issuer, as the case may be, shall not be deemed to include the security holders of any other corporation,
87 partnership, limited liability company, unincorporated association or trust unless it was organized to raise
88 capital for the issuer. Notwithstanding the provisions of subdivision 15, the merger or consolidation of
89 corporations, partnerships, limited liability companies, unincorporated associations or other entities shall
90 be a violation of this chapter if the surviving or new entity has more than 35 security holders or
91 purchasers and all the securities of the parties thereto were issued under this exemption, unless all of the
92 parties thereto have been engaged in transacting business for more than two years prior to the merger or
93 consolidation;

94 8. Any transaction pursuant to an offer to existing security holders of the issuer including holders of
95 transferable warrants issued to existing security holders and exercisable within 90 days of their issuance,
96 if either (i) no commission or other remuneration (other than a standby commission) is paid or given
97 directly or indirectly for soliciting any security holder in this Commonwealth or (ii) the issuer first
98 notifies the Commission in writing of the terms of the offer and the Commission does not by order
99 disallow the exemption within five full business days after the date of the receipt of the notice;

100 9. Any offer (but not a sale) of a security for which registration statements have been filed, but are
101 not effective, under both this chapter and the Securities Act of 1933; but this exemption shall not apply
102 while a stop order is in effect or, after notice to the issuer, while a proceeding or examination looking
103 toward such an order is pending under either act;

104 10. The issuance of not more than three shares of common stock to one or more of the incorporators
105 of a corporation and the initial transfer thereof;

106 11. Sales of an issue of bonds, aggregating \$150,000 or less, secured by a first lien deed of trust on
107 realty situated in Virginia, to 30 persons or less who are residents of Virginia;

108 12. Any offer or sale of any interest in any partnership, corporation, association or other entity
109 created solely to provide residential housing located in the Commonwealth, provided that such offer or
110 sale is by the issuer or by a real estate broker or real estate agent duly licensed in Virginia;

111 13. The Commission is authorized to create by rule a limited offering exemption, the purpose of
112 which shall be to further the objectives of compatibility with similar exemptions from federal securities
113 regulation and uniformity among the states; providing that such rule shall not exempt broker-dealers or
114 agents from the registration requirements of this chapter, except in the case of an agent of the issuer
115 who either (i) receives no sales commission directly or indirectly for offering or selling the securities or
116 (ii) effects transactions in a security exempt from registration under the Securities Act of 1933 pursuant
117 to rules and regulations promulgated under § 4(2) thereof. Any filing made with the Commission
118 pursuant to any exemption created under this subdivision shall be accompanied by a \$250 fee;

119 14. The issuance of any security dividend, whether the corporation distributing the dividend is the
120 issuer of the security or not, if nothing of value is given by stockholders for the distribution other than
121 the surrender of a right to a cash dividend where the stockholder can elect to take a dividend in cash or

in a security;

15. Any transaction incident to a right of conversion or a statutory or judicially approved reclassification, recapitalization, reorganization, quasi-reorganization, stock split, reverse stock split, merger, consolidation, sale of assets, or exchange of securities;

16. Any offer or sale of a security issued by a Virginia church if the offer and sale are only to its members and the security is offered and sold only by its members who are Virginia residents and who do not receive remuneration or compensation directly or indirectly for offering or selling the security;

17. Any offer or sale of securities issued by a professional business entity (as defined in subsection A of § 13.1-1102) to a person licensed or otherwise legally authorized to render within this Commonwealth the same professional services (as defined in subsection A of § 13.1-1102) rendered by the professional business entity. Notwithstanding the foregoing, nothing in this subdivision shall be deemed to provide that shares of stock, partnership or membership interests or other representations of ownership in a professional business entity are securities except to the extent otherwise provided by subsection A of this section;

18. Any offer that is communicated on the Internet, World Wide Web or similar proprietary or common carrier electronic system and that is in compliance with requirements prescribed by rule or order of the Commission;

19. To the extent the Commission by rule or order permits, any offer or sale to an accredited investor, as defined by the Commission, if the issuer reasonably believes before the sale that the accredited investor, either alone or with the accredited investor's representative, has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of the prospective investment. The Commission may assess and collect in connection with any filing pursuant to this exemption a nonrefundable fee not to exceed \$250;

20. Any transaction by a bank pursuant to an unsolicited offer or order to buy or sell any security, provided such transaction is not effected by an employee of the bank who is also an employee of a broker-dealer; and

21. Any offer or sale of a security by an issuer if the offer or sale is conducted in accordance with each of the following requirements:

a. The issuer of the security is a business entity formed under the laws of the Commonwealth;

b. The transaction meets the requirements of the federal exemption for intrastate offerings in § 3(a)(11) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(11), and SEC Rule 147, 17 C.F.R. § 230.147;

c. The sum of all cash and other consideration to be received for all sales of the security in reliance upon this exemption does not exceed \$2 million, less the aggregate amount received for all sales of securities by the issuer within 12 months before the first offer or sale made in reliance upon this exemption, and if the offering is:

(1) \$100,000 or less, if the issuer has financial statements prepared the previous year that have been certified by the principal executive officer of the issuer to be true and complete in all material respects;

(2) More than \$100,000 but less than \$500,000, if the issuer has financial statements prepared the previous year that have been reviewed by an independent certified public accountant in accordance with generally accepted accounting principles; or

(3) \$500,000 or more, if the issuer has financial statements prepared the previous year that have been audited by an independent certified public accountant in accordance with generally accepted accounting principles;

d. The aggregate amount sold to any investor during the 12-month period preceding the date of such transaction does not exceed:

(1) The greater of \$2,000 or five percent of the annual income or net worth of such investor, as applicable, if either the annual income or net worth of the investor is less than \$100,000;

(2) Ten percent of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount of \$10,000 if either the annual income or net worth of the investor is \$100,000 or more; or

(3) Unlimited, if the investor is an accredited investor as defined by Rule 501 of Securities and Exchange Commission regulation D, 17 C.F.R. § 230.501;

e. Not less than 10 days prior to the commencement of an offering of securities in reliance on this exemption or the use of any publicly available website in connection with any such offering, the issuer shall file a notice with the Commission, in writing or in electronic form as specified by the Commission, containing the following:

(1) A notice specifying that the issuer will be conducting an offering in reliance upon this exemption, accompanied by the filing fee as specified in this subdivision;

(2) A copy of the disclosure statement to be provided to prospective investors in connection with the offering, containing information material to the offering, including the following subjects:

- 183 (a) A description of the company, its history, its business plan, and the intended use of the offering
184 proceeds;
- 185 (b) The principal owners of the company;
- 186 (c) The managers of the company, their titles, and their prior experience;
- 187 (d) The terms and conditions of the securities being offered and of any outstanding securities of the
188 company;
- 189 (e) The identity of any person who will be offering and selling the securities, including any Internet
190 websites;
- 191 (f) Any litigation or legal proceedings involving the company or its management; and
- 192 (g) The risk factors and any other material information, either adverse or favorable, that will or
193 could affect the company or its business, or any material information that would tend to make any
194 representations about the company or investment misleading or incomplete; and
- 195 (3) An escrow agreement with a bank or other depository institution located within the
196 Commonwealth in which the investor funds will be deposited, providing that all offering proceeds will
197 be released to the issuer only when the aggregate capital raised from all investors is equal to or greater
198 than the minimum target offering amount specified in the business plan as necessary to implement the
199 business plan and that all investors may cancel their commitments to invest if that target offering
200 amount is not raised by the time stated in the disclosure document;
- 201 f. The issuer is not, either before or as a result of the offering, an investment company, as defined in
202 § 3 of the Investment Company Act of 1940, 15 U.S.C. § 8a-3, or subject to the reporting requirements
203 of section 13 or 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m and 78o(d);
- 204 g. The issuer shall inform all purchasers under this subdivision that the securities have not been
205 registered under federal or state securities law and that the securities are subject to limitations on
206 resale. The issuer shall display the following legend conspicuously on the cover page of the disclosure
207 document:
- 208 "IN MAKING AN INVESTMENT DECISION, INVESTORS MUST RELY ON THEIR OWN
209 EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS
210 AND RISKS INVOLVED. THESE SECURITIES HAVE NOT BEEN RECOMMENDED BY ANY
211 FEDERAL OR STATE SECURITIES COMMISSION OR REGULATORY AUTHORITY. FURTHERMORE,
212 THE FOREGOING AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR DETERMINED
213 THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A
214 CRIMINAL OFFENSE. THESE SECURITIES ARE SUBJECT TO RESTRICTIONS ON
215 TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS
216 PERMITTED BY SUBSECTION (E) OF SEC RULE 147, 17 C.F.R. § 230.147(E) AS PROMULGATED
217 UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND THE APPLICABLE STATE
218 SECURITIES LAWS, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM. INVESTORS
219 SHOULD BE AWARE THAT THEY WILL BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS
220 INVESTMENT FOR AN INDEFINITE PERIOD OF TIME."
- 221 h. If the offer and sale of securities is made through an Internet website, the following requirements
222 shall apply:
- 223 (1) Prior to the offer of an investment opportunity to residents of the Commonwealth through an
224 Internet website, the issuer shall provide to the Internet website and to the Commission evidence that the
225 issuer is organized under Virginia law and that it is authorized to do business within the
226 Commonwealth;
- 227 (2) The issuer shall obtain from each purchaser of a security under this exemption evidence that the
228 purchaser is a resident of Virginia and meets the requirements of subdivision B 21 d (1), (2) or (3);
- 229 (3) The Internet website operator shall provide to the Commission evidence that it is a business
230 entity that is organized under Virginia law and that it is authorized to do business within the
231 Commonwealth and that it is being utilized to offer and sell securities pursuant to this exemption. The
232 Internet website shall notify the Commission of its and the issuer's identity, location, and contact
233 information;
- 234 (4) The issuer and the Internet website shall keep and maintain records of the offers and sales of
235 securities effected through the Internet website and shall provide ready access to the records to the
236 Commission, upon request. The Commission may access, inspect, and review such Internet website and
237 its records; and
- 238 (5) All payments for purchase of securities shall be directed to and held by the bank or depository
239 institution subject to the provisions of subdivision B 21 e (3). The bank or depository institution shall
240 notify the Commission of the receipt of payments for securities and the identity and residence of the
241 investors. The information shall be confidential while in the possession of the Commission;
- 242 i. The Internet website described in subdivision h shall not be subject to the registration provisions
243 of § 13.1-504, provided that all of the following apply:
- 244 (1) It does not offer investment advice or recommendations;

(2) It does not solicit purchases, sales, or offers to buy the securities offered or displayed on the Internet website;

(3) It does not compensate employees, agents, or other persons for the solicitation or based on the sale of securities displayed or referenced on the Internet website;

(4) It does not hold, manage, possess, or otherwise handle investor funds or securities; and

(5) It does not engage in such other activities as the Commission, by rule, prohibits; and

j. An executive officer, director, managing member, or person occupying a similar status or performing similar functions in the name of and on behalf of the issuer shall be exempt from the registration provisions of § 13.1-504, provided that the person does not receive, directly or indirectly, any commission or remuneration for offering and selling securities of the issuer pursuant to this exemption.

An issuer of a security, the offer and sale of which is exempt under this subdivision B 21, shall provide a quarterly report to the issuer's investors until no securities issued under this exemption are outstanding. Such quarterly report shall be free of charge. An issuer may satisfy the requirement that it provide such quarterly report by making the information available on an Internet website address if the information is made available within 45 days of the end of each fiscal quarter and remains available until the succeeding quarterly report is issued. An issuer shall provide a written copy of the report to any investor upon request. The report shall contain (i) compensation received by each director and executive officer, including cash compensation earned since the previous report and on an annual basis and any bonuses, stock options, other rights to receive securities of the issuer or any affiliate of the issuer, or other compensation received, and (ii) an analysis by management of the issuer of the business operations and financial condition of the issuer. The issuer shall file each such quarterly report with the Commission.

The exemption provided in this subdivision shall not be used in conjunction with any other exemption under this chapter, except that offers and sales to controlling persons shall not count toward the limitation in subdivision B 21 c. "Controlling person" means an officer, director, partner, trustee, or individual occupying similar status or performing similar functions with respect to the issuer or to a person owning 10 percent or more of the outstanding shares of any class or classes of securities of the issuer.

The exemption allowed by this subdivision B 21 shall not apply if an issuer or person affiliated with the issuer or offering is subject to any disqualification contained in Rule 262 as promulgated under the Securities Act of 1933, 17 C.F.R. § 230.262. The provisions of this the preceding sentence shall not apply if (a) upon a showing of good cause and without prejudice to any other action by the Commission, the Commission determines that it is not necessary under the circumstances that an exemption be denied and (b) the issuer establishes that it made factual inquiry into whether any such disqualification contained in Rule 262 existed under this exemption but did not know, and in the exercise of reasonable care could not have known, that a disqualification existed. The nature and scope of the requisite inquiry will vary based on the circumstances of the issuer and the other offering participants.

The Commission may adopt rules to implement the provisions of this subdivision and to protect investors who purchase securities under this subdivision B 21.

The Commission shall charge a nonrefundable filing fee of \$250 for filing an exemption notice required by this subdivision B 21.

C. In any proceeding under this chapter, the burden of proving an exemption shall be upon the person claiming it.

2. That the provisions of this act shall expire on July 1, 2019.