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Annual Survey of Virginia Law: Business and Corporate Law

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BUSINESS AND CORPORATE LAW

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I. INTRODUCTION

This article reviews recent developments in the law affecting Virginia businesses and corporations. Part II discusses recent judicial decisions in Virginia courts involving businesses and corporations. Part III discusses several acts of the 1995 session of the Virginia General Assembly that amend Virginia's corporate, partnership, limited liability company and securities act statutes.

II. RECENT JUDICIAL DECISIONS

A. *Virginia Anti-Takeover Statutes: WLR Foods, Inc. v. Tyson Foods, Inc.*

A hostile takeover attempt of a Virginia corporation spawned four decisions in 1994 by the United States District Court for the Western District of Virginia (hereinafter *Tyson I*,¹ *Tyson II*,² *Tyson III*,³ and *Tyson IV*⁴). In these cases, the dis-

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1. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492 (W.D. Va. 1994) (*Tyson I*).

2. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 496 (W.D. Va. 1994) (*Tyson II*).

3. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277 (W.D. Va. 1994) (*Tyson III*).

4. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 869 F. Supp. 419 (W.D. Va. 1994)

district court resolved several issues regarding fiduciary duties of directors for a target corporation defending against a hostile takeover attempt (*Tyson I*, *Tyson IV*), addressed certain issues arising under the Virginia Control Share Acquisitions Act (*Tyson II*) and affirmed the constitutionality of Virginia's anti-takeover statutes (*Tyson III*). Tyson Foods, Inc. ("Tyson"), a foreign corporation, had attempted a hostile takeover of WLR Foods, Inc. ("WLR"), a Virginia corporation, with a thirty dollars per share tender offer to WLR shareholders.⁵ WLR responded with a series of defensive measures, as follows, and then filed suit for a declaratory judgment affirming their validity:⁶

(1) adoption of a discriminatory shareholder rights plan ('Poison Pill') and refusal to redeem it in the face of Tyson's tender offer;

(2) adoption of lucrative severance agreements for senior officers to take effect in the event of a change in control of WLR ('Golden Parachutes');

(3) adoption of similar, less lucrative severance agreements for most WLR employees ('Other Parachutes');

(4) amendment of the bylaws setting the record date for any special meeting held pursuant to the Control Share [Acquisitions] Act⁷ as the date on which the acquiring person requests such a meeting ('Record Date Amendment');

(5) amendment of the bylaws to clarify that the Chairman and Vice Chairman of the Board are officers of the Board of Directors, rather than officers of WLR ('Officers Amendment'); and

(6) resignation as employees of four directors for the purpose of their voting in the control share referendum ('Resignations').⁸

The district court first heard and ruled on Tyson's objection to discovery orders (*Tyson I*) and on two motions (*Tyson II* and *Tyson III*) for a preliminary injunction, all of which were decid-

(*Tyson IV*).

5. Tyson ultimately withdrew its tender offer because of the "uncertainty and delay caused by [the] litigation." *Tyson IV*, 869 F. Supp. at 421.

6. *Tyson III*, 861 F. Supp. at 1279.

7. VA. CODE ANN. §§ 13.1-728.1 to -728.9 (Repl. Vol. 1993).

8. *Tyson IV*, 869 F. Supp. at 421.

ed in WLR's favor. Finally, the district court issued the declaratory judgment, ruling in WLR's favor on all questions (*Tyson IV*).

1. Fiduciary Duties of Directors

a. Standard of Conduct for Directors of Target Corporation in Hostile Takeover Attempt

In *Tyson I*, Tyson objected to nondispositive discovery orders of a magistrate judge which prevented Tyson from inquiring into the substance of professional advice given to WLR in connection with Tyson's attempted takeover of WLR.⁹ The United States District Court for the Western District of Virginia overruled the objection, holding that Virginia's standard of director conduct is process-oriented rather than substantive. Accordingly, the advice which a target corporation receives in a hostile takeover attempt is irrelevant in determining whether directors acted in good faith.¹⁰ The only issue for the court concerns whether the directors followed the appropriate decisionmaking process.

Virginia law requires directors of a Virginia corporation to "discharge [their] duties as . . . director[s] . . . in accordance with [their] good faith business judgment of the best interests of the corporation" (Business Judgment Statute).¹¹ Basing its decision on two of the Virginia anti-takeover statutes specifically invoking the Business Judgment Statute, the district court determined that the Business Judgment Statute is the only standard provided by the legislature to measure director conduct in the case presented.¹²

The district court first addressed how to evaluate the directors' "good faith" when defending against a hostile takeover

9. *Tyson I*, 857 F. Supp. at 493.

10. *Id.* at 493-95.

11. VA. CODE ANN. § 13.1-690(A) (Repl. Vol. 1993).

12. *Tyson I*, 857 F. Supp. at 495 (citing provisions of VA. CODE ANN. §§ 13.1-646 and -728.9). Section 13.1-728.9 of the Virginia Code provides, in part, that "with respect to any potential changes in control of any issuing public corporation [the Business Judgment Statute applies]." VA. CODE ANN. § 13.1-728.9 (Repl. Vol. 1993).

attempt. The district court observed that the standards for director conduct found in the Business Judgment Statute and the Model Business Corporation Act (Model Act) are generally similar, except that the reasonableness standard imposed by the Model Act is absent from the Business Judgment Statute.¹³ The district court interpreted this difference as a "legislative rejection of a substantive evaluation of director conduct."¹⁴ In determining the legislative intent of how to measure a director's good faith, the district court found its answer in the language of the Business Judgment Statute itself. The district court reasoned that because the Business Judgment Statute provides a "safe harbor" for directors who rely on competent advice, the legislature intended for "good faith" to be measured by the directors' "resort to an informed decisionmaking process."¹⁵ In so holding, the district court departed from a line of Delaware case law requiring an evaluation of the reasonableness of the directors' conduct.¹⁶

However, the court found that directors' "resort to the process" must be undertaken in good faith, that is, "the directors must believe in good faith that their advisors are competent to render the advice sought, and they must be aware of no facts which would make reliance on that advice unwarranted."¹⁷ The court clarified that a director's obligation to use good faith in resorting to the process could not be measured by the substantive soundness of the director's actions, because this would undermine the legislature's rejection of the Model Act's reasonableness standard.¹⁸ The court then set forth the appropriate scope of discovery into the "procedural indicia" of whether a director acted in good faith under the Business Judgment Statute.¹⁹ Specifically, such procedural indicia include:

13. *Tyson I*, 857 F. Supp. at 494. Compare MODEL BUSINESS CORP. ACT § 8.30(a) (1994) with VA. CODE ANN. § 13.1-690 (Repl. Vol. 1993). See Daniel T. Murphy, *The New Virginia Stock Corporation Act: A Primer*, 20 U. RICH. L. REV. 67, 104-09 (1985).

14. *Tyson I*, 857 F. Supp. at 494.

15. *Id.* (citing VA. CODE ANN. § 13.1-690(B) (Repl. Vol. 1993)). This provision of the Business Judgment Statute entitles directors to rely on information that they believe in good faith to be competent. VA. CODE ANN. § 13.1-690(B).

16. *Tyson I*, 857 F. Supp. at 495 (1994).

17. *Id.* (citing VA. CODE ANN. § 13.1-690(B)).

18. *Id.*

19. *Id.*

the identity and qualifications of any sources of information or advice sought which bear on the decision reached, the circumstances surrounding selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether advice was actually given, whether it was followed, and if not, what sources of information and advice were consulted to reach the decision in issue.²⁰

Applying the above reasoning, the district court concluded that the substance of the advice received by the directors was irrelevant to the determination of "good faith" under Virginia's Business Judgment Statute. Because the substance of the advice would therefore not be "reasonably calculated to lead to the discovery of admissible evidence," the District Court affirmed the Magistrate Judge's ruling over Tyson's objection.²¹

b. Application of the *Tyson* Standard of Director Conduct

The district court applied its previously announced standard of conduct for directors of a target corporation in defending against a hostile takeover attempt when it addressed whether to grant WLR its request for a declaratory judgment.²² The district court granted the declaratory judgment, concluding that the WLR "directors' decisionmaking process provided a clear indication that their decisions were undertaken pursuant to their good faith business judgment of the best interests of the corporation."²³ Furthermore, regardless of the high level of protection afforded by the Business Judgment Statute and of the effect of the anti-takeover statutes to impede hostile tender offers, the legislature, not the courts, is responsible for changing these results.²⁴

In reaching its conclusion that the WLR directors acted in good faith, the district court set forth the steps taken by the directors which proved to the district court that the directors

20. *Id.*

21. *Id.* at 495-96.

22. *Tyson IV*, 869 F. Supp. at 419.

23. *Id.* at 423.

24. *Id.* at 424.

“sought out and relied in good faith upon competent legal and financial advisors.”²⁵ The court observed that before adopting such defensive measures, the board of directors received legal and financial advice from independent advisors²⁶ at two meetings that each lasted over four hours.²⁷ At the first meeting (January 28 Meeting), the advisors provided detailed materials to the board to help it prepare for the second meeting (February 4 Meeting), at which the directors adopted the Poison Pill, the Golden Parachutes, the Other Parachutes, the Record Date Amendment, the Officers Amendment, and post-retirement health insurance coverage for the four employee directors who resigned as employees pursuant to the Resignations (collectively referred to as Defensive Measures).²⁸

At the January 28 Meeting (at which the directors took no action), the advisors offered information on the “legal and financial implications” of the Tyson tender offer and on “whether to adopt a Poison Pill and what its terms should be, and whether to adopt Golden Parachutes.”²⁹ At the February 4 Meeting, the directors received a “comprehensive review of the financial details of Tyson’s offer and [the advisors] concluded that the offer was inadequate.”³⁰ The court provided a laundry list of certain of the items addressed in the advisors’ presentation at the February 4 Meeting:

WLR’s recent past financial performance; important considerations taken into account in valuing WLR; the performance, ownership, and trading activity of WLR’s common stock; a summary of comments by research analysts regarding WLR; a comparison of WLR to other, similarly situated publicly traded companies; analysis of other recent acquisitions by Tyson; a detailed valuation of WLR and financial

25. *Id.* at 422.

26. The legal advisors were Wharton, Aldhizer & Weaver and Sullivan & Cromwell, and the financial advisors were Goldman, Sachs, & Co. and Wheat First Butcher & Singer. *Id.*

27. *Id.*

28. *Id.* at 422-23; *Tyson II*, 857 F. Supp. at 497. With respect to the Resignations of the employee directors in their capacities as employees, the Business Judgment Statute is not implicated for the reason that the resigning individuals were not “discharging their duties as directors.” *Tyson IV*, 869 F. Supp. at 423.

29. *Tyson IV*, 869 F. Supp. at 422.

30. *Id.*

analysis at different offer prices; a summary of factors warranting Tyson's interest in acquiring WLR; analysis of several different merger scenarios incorporating numerous financial variables; and an examination of several alternatives to Tyson's offer.³¹

At both meetings, the directors asked questions of the advisors, and at the February 4 Meeting, the directors engaged in independent discussion.³² The directors at the February 4 Meeting voted unanimously to reject Tyson's tender offer, and they voted "in reliance upon advice given by the advisors" to adopt the Defensive Measures.³³ At a third meeting on March 11, the advisors made "detailed, updated presentations" on "most of the same general topics" as had been addressed at the February 4 Meeting.³⁴ The directors "decided unanimously that the offer was inadequate" and recommended to WLR shareholders that they not tender their shares to Tyson.³⁵

The district court found that based on the record, the directors did not merely "rubberstamp" the advisors' recommendations, nor did the directors have any information or knowledge that would make their reliance on the advisors unwarranted.³⁶ The directors accordingly took their actions in "compliance with their good faith business judgment of the best interests of the corporation."³⁷ The court was not persuaded by the apparent leniency of this standard: "That the Business Judgment Statute . . . may appear to offer more protection for directors than do most or all analogous statutes in other states does not alter its plain language."³⁸

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* Interestingly, the court observed that Tyson failed to present any evidence that any action taken by the directors was not in the best interests of the corporation. *Id.* However, the court had already deemed such evidence irrelevant in *Tyson I*. See *Tyson I*, 857 F. Supp. at 494.

37. *Tyson IV*, 869 F. Supp. at 422-23.

38. *Id.* at 424.

2. The Control Share Acquisitions Statute

One of Virginia's anti-takeover statutes is the Control Share Acquisitions statute (Control Share Act),³⁹ which imposes restrictions on the voting rights of a shareholder who acquires shares within certain ranges of the corporation's total outstanding voting stock. The Control Share Act provides that shares acquired within the ranges of twenty percent to less than thirty-three and one-third percent, thirty-three and one-third percent to fifty percent and over fifty percent of the corporation's outstanding voting shares (Control Shares) have no voting rights unless the disinterested shareholders vote to grant such voting rights.⁴⁰ Shares held by officers and by employees who also serve as directors of the corporation are considered "interested" and are not eligible to vote on whether to grant voting rights to the Control Shares.⁴¹

In anticipation of the shareholder vote on whether to grant voting rights to Tyson's Control Shares (Referendum), the WLR board amended the bylaws to set the record date as the date that Tyson delivered its information statement pursuant to the Control Share Act (Record Date Amendment).⁴² The WLR board also amended the bylaws to clarify that the Chairman and Vice Chairman of the Board of Directors were officers of the Board, but were not officers of the corporation, and accordingly were eligible to vote in the Referendum.⁴³ In addition, four employees who were also directors of WLR resigned as employees in order to render themselves eligible to vote in the Referendum.⁴⁴ Tyson moved for a preliminary injunction challenging these three actions.

39. VA. CODE ANN. §§ 13.1-728.1 to -728.9 (Repl. Vol. 1993).

40. *Id.* §§ 13.1-728.1, -728.3(A).

41. *Id.* § 13.1-728.3(B), -728.1.

42. *Tyson II*, 857 F. Supp. at 497. In order for the acquiring corporation to command a shareholder vote on whether to grant voting rights to the Control Shares, it must deliver to the corporation (and to the shareholders along with notice of the meeting) an information statement setting forth certain details about the status and terms of the acquisition. VA. CODE ANN. §§ 13.1-728.4, -728.5(A), -728.6(B)(1) (Repl. Vol. 1993).

43. *Tyson II*, 857 F. Supp. at 497.

44. *Id.*

The factors for determining whether to issue a preliminary injunction are:

(1) the likelihood of irreparable harm to Tyson without the injunction; (2) the likelihood of irreparable harm to WLR with the injunction; (3) Tyson's likelihood of success on the merits; and (4) the public interest.⁴⁵

The Referendum was held, and Tyson received 3,152,830 votes out of 10,896,672 shares eligible to vote, far short of the majority needed to grant voting rights to its Control Shares.⁴⁶ In analyzing the validity of the actions taken in preparation for the Referendum, the district court first examined the amount of harm that Tyson would suffer if the injunction were not granted, and found that if none of the disputed shares were counted, Tyson still would not have received a majority.⁴⁷ The district court decided that whether an injunction should issue depended heavily on Tyson's likelihood of success on the merits.⁴⁸ Tyson alleged that WLR set the record date (April 14) for the Referendum (Record Date) significantly in advance of the May 21 Control Share Referendum in order to decrease the number of shares that would actually vote, and thereby decrease Tyson's chances for winning a majority of the eligible shares.⁴⁹ The court concluded that because (1) Virginia law permits the by-laws to fix a record date "in order to make a determination of shareholders for any purpose,"⁵⁰ (2) the Record Date was not set more than seventy days in advance of the Referendum in accordance with Virginia statute,⁵¹ and (3) no dispute existed as to whether the directors "undertook an informed decisionmaking process with regard to the selection of a record date" (the standard of director conduct previously announced by

45. *Id.* (citing *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir. 1977)).

46. *Id.* at 498.

47. *Id.* The court did describe one possible scenario in which Tyson could have prevailed, but dismissed it as "unrealistic". *Id.* at 498 n.4.

48. *Id.* at 498.

49. *Id.* at 497, 499. Tyson reasoned that the further in advance the record date was set, more shares would change hands, and shares eligible to vote that were not held by current shareholders would be less likely to be voted. *Id.* at 498.

50. *Id.* at 499 (citing VA. CODE ANN. § 13.1-660(A) (Repl. Vol. 1993)).

51. *Id.* (citing VA. CODE ANN. § 13.1-660(B)).

the court in *Tyson I*,⁵² the Record Date Amendment was valid.⁵³

With respect to the resignations of the four employee directors (including the Chairman and Vice Chairman) in their capacities as employees (Resignations), Tyson argued that because the four continued to perform the same functions after the resignations as before, they were employees as well as directors at the time of the Record Date. Therefore, their shares were ineligible to be voted in the decision of whether to grant voting rights to the Tyson Control Shares.⁵⁴ The district court did not disagree that the four performed the same duties and functions before and after the Resignations, but nevertheless found that as of the Record Date, the four were not employees of the corporation.⁵⁵ The court found it irrelevant that the intent behind the Resignations was to render the shares as being not "interested" and therefore eligible to vote in the Referendum.⁵⁶ In supporting its finding that none of the individuals was an employee of WCR after the Resignations, the court relied on the following factors: (1) upon the Resignation, none received a salary; (2) they had neither the power to hire nor fire; (3) none had either an office or a secretary; and (4) none had the authority for giving orders or responsibility for taking orders.⁵⁷ The district court concluded that because the four who resigned in the Resignations were not "employees," their shares were not interested and therefore were eligible to be voted in the Referendum.⁵⁸

3. Constitutionality of Virginia Anti-Takeover Statutes

Tyson moved for a preliminary injunction against WLR, alleging that the four statutes pursuant to which WLR acted to defend against Tyson's hostile takeover attempt were invalid

52. *Id.* (citing *Tyson I*, 857 F. Supp. at 494).

53. *Id.*

54. *Id.* at 500.

55. *Id.* at 501.

56. *Id.* at 499.

57. *Id.* at 500.

58. *Id.* at 501.

because they violated the Supremacy Clause and the Commerce Clause of the United States Constitution.⁵⁹ The court found that the likelihood of harm to Tyson and WLR, without and with the injunction, respectively, turned on the likelihood of Tyson's success on the merits.⁶⁰ Accordingly, the court undertook a constitutional analysis of the four statutes and concluded that they did not violate the Constitution.

The four statutes alleged by Tyson to violate the Constitution were: the Affiliated Transactions Act,⁶¹ the Control Share Acquisitions Act,⁶² the Poison Pill Statute,⁶³ and the Business Judgment Statute.⁶⁴ The Affiliated Transactions Act imposes restrictions on certain transactions between a public Virginia corporation and a ten-percent beneficial shareholder of the corporation (Interested Shareholder). Under this Act, the corporation and an Interested Shareholder may not engage in certain significant transactions, including mergers, without the approval of both the majority of disinterested directors and the holders of two-thirds of the corporation's voting shares (not including the Interested Shareholder's shares).⁶⁵ The Control Share Act is summarized above in section II.A.2. The Poison Pill Statute authorizes a corporation to "create or issue rights, options or warrants for the purchase of shares of the corporation upon such terms and conditions and for such consideration, if any, and such purposes as may be approved by the board of directors."⁶⁶ Under the Poison Pill adopted by the WLR board, once a shareholder acquired fifteen percent or more of WLR's stock, all other shareholders would have the right to purchase

59. *Tyson III*, 861 F. Supp. at 1281 (citing the Supremacy Clause, U.S. CONST. art. VI, cl. 2 and the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

60. *Id.*

61. VA. CODE ANN. §§ 13.1-725 to -727.1 (Repl. Vol. 1993).

62. *Id.* §§ 13.1-728.1 to -728.9.

63. *Id.* § 13.1-646.

64. *Id.* § 13.1-690.

65. *Id.* § 13.1-725.1. After an Interested Shareholder has held the stock for three years, the transaction may proceed upon (1) the approval of the disinterested directors or the holders of two-thirds of the voting shares (not including an interested Shareholder's Shares) or (2) each holder of a class or series of voting shares receiving consideration calculated as provided in the statute. VA. CODE ANN. §§ 725.1, 727(A) (Repl. Vol. 1993).

66. VA. CODE ANN. § 13.1-646(A) (Repl. Vol. 1993).

\$136 worth of WLR stock for sixty-eight dollars.⁶⁷ Once triggered, the Poison Pill would reduce the percentage ownership and the value of the shares held by the fifteen-percent shareholder.⁶⁸ The Business Judgment Statute sets forth the standard of conduct of directors of Virginia corporations.⁶⁹ (Collectively, these four statutes are referred to as the Anti-Takeover Statutes.)

In its motion for a preliminary injunction, Tyson raised two constitutional challenges to the Anti-Takeover Statutes: first, the statutes are preempted by the federal regulation of tender offers,⁷⁰ and second, the statutes violate the commerce clause. The district court denied Tyson's motion, rejecting both constitutional challenges to the statutes.⁷¹

a. Preemption by Federal Regulation

The Williams Act "regulates disclosure to shareholders and procedures required in tender offers."⁷² Tyson argued that a purpose of the Williams Act is to create a balance between management and the tender offeror,⁷³ and that because the Anti-Takeover Statutes upset this balance by depriving a tender offeror of a "meaningful opportunity for success,"⁷⁴ they unconstitutionally "stand as an obstacle to the purposes and objectives of the Williams Act."⁷⁵

67. *Tyson III*, 861 F. Supp. at 1280.

68. *Id.*

69. VA. CODE ANN. § 13.1-690(A) (Repl. Vol. 1993). Directors are required to "discharge [their] duties as . . . director[s] . . . in accordance with [their] good faith business judgment of the best interests of the corporation". *Id.*

70. Securities Exchange Act of 1934, §§ 13(d,e), 14(d,f), 15 U.S.C. §§ 78m(d,e), 78n(d,f) (1988).

71. *Tyson III*, 861 F. Supp. at 1289.

72. *Id.* at 1283. "The purpose of the Williams Act was to assure that shareholders in connection with an acquisition through a tender offer would have the benefit of appropriate information on which to base a decision as [to] whether to hold, sell, or tender their shares." HAROLD S. BLOOMENTHAL, *GOING PUBLIC AND THE PUBLIC CORPORATION*, § 12.22 (1992).

73. *Tyson III*, 861 F. Supp. at 1283.

74. *Id.* at 1284 (citing other district court cases which applied the "meaningful opportunity for success test" to determine whether the Williams Act preempts state statutes).

75. *Id.* at 1283.

The district court rejected the “meaningful opportunity for success test” in favor of a test that would find preemption if the Anti-Takeover Statutes favor either management or the tender offeror over the investors.⁷⁶ Applying this test, the court found that none of the Anti-Takeover Statutes is preempted by the Williams Act.⁷⁷ Both the Control Share Acquisitions Act and the Affiliated Transactions Act prevent abusive behavior by an acquiror.⁷⁸ The Control Share Acquisitions Act facilitates informed choices by investors by requiring an acquiror to furnish to the target corporation an information statement⁷⁹ and the Affiliated Transactions Act does not interfere with “the ability of shareholders to make an informed choice about a tender offer.”⁸⁰ Poison Pills may, to the benefit of shareholders, increase the bid in tender offers, and they are not detrimental to shareholders because the directors must act in their “good faith business judgment of the best interests of the corporation.”⁸¹ The court also found that the Business Judgment Statute, alone or together with the other Anti-Takeover Statutes, does not “interfere with investors’ free exercise of an informed choice in responding to a tender offer.”⁸²

The court acknowledged that although the effect of the Anti-Takeover Statutes is to “give power to management with the same hand that it takes away from offerors, [the Anti-Takeover Statutes] do not do so to the detriment of investors.”⁸³ According to the court, the Anti-Takeover Statutes, separately or together, do not interfere with the Williams Act’s objective to “ensure that investors are permitted to make an informed choice” and accordingly are not preempted.

76. *Id.* at 1277.

77. *Id.* at 1284, 1286.

78. *Id.* at 1285.

79. *Id.*

80. *Id.*

81. *Id.* at 1286.

82. *Id.*

83. *Id.*

b. Violation of the Commerce Clause

Tyson argued that the Anti-Takeover Statutes violate the Commerce Clause of the United States Constitution for two reasons: first, they "[eliminate] the flow of interstate commerce in an article of commerce,"⁸⁴ and, second, they "impose a burden on interstate commerce that clearly exceeds their putative local benefits."⁸⁵ The court rejected both arguments, holding that the Anti-Takeover Statutes do not violate the Commerce Clause.⁸⁶

With respect to Tyson's first argument, the district court decided that because the Anti-Takeover Statutes merely make takeovers more expensive (by requiring an acquiror to make an adequate offer), and because they affect in-state and out-of-state offerors equally, the Anti-Takeover Statutes do not violate the Commerce Clause.⁸⁷ The court then turned to Tyson's second argument, which required a balancing of the burdens and local benefits.

The court acknowledged that the state "has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs."⁸⁸ By contrast, the Anti-Takeover Statutes burden interstate commerce by making it "more difficult and more expensive to gain control of a Virginia corporation" and by limiting the number of successful tender offers; however, the ultimate effect of the Anti-Takeover Statutes is to "ensure that tender offers succeed only if they are consistent with the long-term interests of the corporation."⁸⁹ Furthermore, in-state and out-of-state offerors have equal access to Virginia corporations. The district

84. *Id.* at 1288.

85. *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

86. *Id.* at 1289.

87. *Id.* at 1288.

88. *Id.* at 1289 (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 91 (1987)).

89. *Id.*

court therefore found that the Anti-Takeover Statutes do not violate the Commerce Clause of the federal Constitution.⁹⁰

The district court declined to issue a preliminary injunction for the reason that Tyson was not likely to succeed on the merits of its arguments that the Virginia anti-takeover statutes violate the Constitution under theories of preemption and violation of the Commerce Clause.⁹¹

B. *Liability of Partners for Debts of a Partnership*

In *Citizens Bank of Massachusetts v. Parham-Woodman Medical Associates*,⁹² the United States District Court for the Eastern District of Virginia found that partners in a Virginia general partnership were not personally liable for debt attributable to advances to the partnership under a loan agreement that predated their joining the partnership.⁹³

On April 30, 1985, the predecessor of Citizens Bank of Massachusetts (the Bank) and Parham-Woodman Medical Associates, a Virginia general partnership ("Partnership"), entered into a construction loan agreement and term note, pursuant to which the Bank agreed to loan the Partnership two million dollars solely for the purpose of constructing a medical office building.⁹⁴ Nilda R. Ante ("Ante") and Larry E. King ("King") were the sole general partners of the Partnership when the loan documents were executed.⁹⁵

In accordance with the terms of the loan agreement, the Bank advanced funds from time to time during the construction of the office building. As of June 3, 1986, the advances totaled approximately \$1.5 million.⁹⁶ In June 1986, three additional partners were admitted into the Partnership.⁹⁷ From July 1986

90. *Id.*

91. *Id.*

92. 874 F. Supp. 705 (E.D. Va. 1995).

93. *Id.* at 710.

94. *Id.* at 706.

95. *Id.* Ante and King also executed a personal guaranty of the loan in favor of the Bank. *Id.*

96. *Id.*

97. *Id.* Two of the new partners contended that they did not become partners

through November 1986, the Bank made eight additional advances totaling approximately \$500,000.⁹⁸

The office building was built and the Partnership made numerous payments, but ultimately defaulted.⁹⁹ A foreclosure sale resulted in net proceeds to the Bank of approximately \$900,000 and judgment was entered against the Partnership in the amount of approximately \$1.2 million.¹⁰⁰ Ante and King were released from liability by their respective bankruptcy discharges, and the Bank sought to hold the three additional partners liable for the eight advances in the amount of approximately \$500,000.¹⁰¹ The court held that the liability for the loans could be satisfied only by the Partnership's assets because the debt arose prior to the admission of the three partners into the Partnership.¹⁰² The relevant section in the Virginia Uniform Partnership Act¹⁰³ provides in part that "[a] person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property."¹⁰⁴

Although approximately \$500,000 of advances were made to the Partnership after the admission of the three partners, the court found that under the terms of the loan documents and under applicable law, the obligation of the Bank to make the advances and the obligation of the Partnership to repay the debt arose on April 30, 1985 when the loan documents were executed.¹⁰⁵ First, the court held that the loan documents

created in the [P]artnership an entitlement to \$2 million payable from time to time on satisfaction of certain condi-

until 1987 and that prior to such time they were lenders of the Partnership. The court disagreed, based upon evidence in the record including that the 1986 K-1 schedules for the Partnership reflected that the two partners held partnership interests. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 710.

103. VA. CODE ANN. §§ 50-1 to -43.10 (Repl. Vol. 1994).

104. *Id.* § 50-17.

105. *Citizens Bank*, 874 F. Supp. at 707-08.

tions precedent, and they imposed on the [P]artnership the obligation to repay, with interest, all funds advanced up to \$2 million.

. . . Thus, notwithstanding the somewhat contingent arrangement respecting disbursement of the loan, the obligations to disburse the total sum of \$2 million and to repay all amounts disbursed up to \$2 million (with interest) were fixed on April 30, 1985.¹⁰⁶

Second, the court noted that the intent of the drafters of section 17 of the Uniform Partnership Act and the interpretation of such provision by other jurisdictions,¹⁰⁷ supported the long-standing principle that a partnership obligation arises within the meaning of section 17, when the creditor extends the credit to the partnership.¹⁰⁸ “[W]here a partnership undertakes a debt before a new partner is made ‘[t]he credit of [the] new member . . . does not enter into the consideration of the creditors of the old firm, and it would be manifestly unjust to hold the new partner liable.’”¹⁰⁹

The court concluded the opinion by noting that creditors can protect themselves by constructing and administering loans to partnerships so as to reach the personal assets of partners admitted during the disbursement of term advances.¹¹⁰ Absent such provisions, “the personal assets of an incoming partner are not available to satisfy post-admission advances under the terms of a pre-admission contract.”¹¹¹

C. Liability under the Federal Securities Laws for Predictions of Future Financial Results

In *Hillson Partners Limited Partnership v. Adage, Inc.*,¹¹² the Fourth Circuit Court of Appeals ruled that a public company’s positive predictions in quarterly reports and press releases

106. *Id.* at 708.

107. The court examined cases in other jurisdictions because the case was one of first impression under Virginia law. *Id.* at 706.

108. *Id.* at 710.

109. *Id.* (quoting *Stephens v. Neely*, 255 S.W. 562 (Ark. 1923)).

110. *Id.*

111. *Id.*

112. 42 F.3d 204 (4th Cir. 1994).

that subsequently proved inaccurate, did not constitute false statements or omissions of material fact actionable under the federal securities laws.¹¹³

Adage, Inc. (Adage), a public corporation organized under the laws of Pennsylvania, was involved in the business of manufacturing specialty products as well as the real estate development and management business.¹¹⁴ Adage conducted these businesses through its subsidiaries, Allister Controls, Inc. ("Allister") and Fort Orange Paper Company ("Fort Orange").¹¹⁵ Robert H. Cahill ("Cahill") was the president and chief executive officer of Adage at all times during which the alleged violations occurred.¹¹⁶ At issue in *Hillson Partners* were various public statements made by Cahill and Adage during the period from April 1992, through December 1992, concerning Adage, Allister and Fort Orange.

In an April 30, 1992 press report, Cahill was quoted as telling a group of security analysts that Adage expected "to report revenue increases" for its first quarter ending March 31, 1992, due in part to "improved performance in the Allister electronic access controls division."¹¹⁷ On May 5, Adage reported a forty-five percent increase in its net income for the first quarter of 1992 over its net income for the first quarter of 1991.¹¹⁸ Adage attributed the increase to, among other reasons, decreased expenses because of a restructuring and the acquisition of a new subsidiary, RELM Communications, that increased Adage's working capital.¹¹⁹ The May 5 report also stated that Allister had reduced costs, improved its gross margins, and that further progress was expected.¹²⁰ The report stated that Fort Orange continued to have excellent performance and that Adage expected these results to improve with the savings from a cogeneration plant expected to begin operation during the sum-

113. *Id.* at 220.

114. *Id.* at 206.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

mer of 1992 and from additional capital improvements.¹²¹ In a press release also issued on May 5, Cahill was quoted as saying that he expected that "1992 will produce excellent results for Adage," and in a May 19 press release, Cahill was quoted as stating that Adage was "on target toward achieving the most profitable year in its history and expects to exceed, by a comfortable margin, its previous net income record of \$1.7 million set in 1990."¹²²

On August 11, 1992, Adage released its second quarter report noting that the company was "in the midst of an excellent year," though stating that Allister's garage door opener business was suffering from economic conditions in the housing industry.¹²³ The August 11 report also showed a substantial increase in net income over the company's net income for the first and second quarters of 1991.¹²⁴

On November 4, 1992, Adage announced in a press release that during the previous week it had dismissed the president and six other high ranking executives of Allister. Cahill explained in the press release that Allister had lost over \$1 million in the first half of 1992.¹²⁵ On November 13, Adage released its third quarter report and announced a net loss of \$153,000, despite an increase in revenues of thirty-one percent over the revenues reported for the third quarter of 1991.¹²⁶ Adage explained in the report that the loss was due in part to a "decision to postpone short term gains in favor of long term benefits" at Fort Orange and to disappointing results from Allister.¹²⁷ The management change at Allister was projected to result in substantial annual cost savings, and Adage predicted an "excellent fourth quarter" with "significant improvements during 1993."¹²⁸

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 207.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

Two weeks before the end of the fourth quarter, on December 15, 1992, the Wall Street Journal, relying on statements from Cahill, reported that Adage expected a better fourth quarter and a better year in both sales and overall net income than the preceding year.¹²⁹ On March 5, 1993, Adage issued its fourth quarter and year-end results. For the fourth quarter, Adage reported net income of \$231,000, a decrease of \$97,000 from net income reported for the fourth quarter of 1991.¹³⁰ For the year, Adage reported net income of \$1,089,000, a seventy-five percent increase over the \$622,000 of net income for 1991, but \$700,000 less than net income for 1990.¹³¹ After Adage disclosed these results, the per share price of Adage stock dropped to \$4.25 from a high of \$6.37 earlier in the year.¹³²

On August 9, 1993, Hillson Partners Limited Partnership filed a shareholder class action suit against Adage, Cahill and other officers of Adage, on behalf of those who purchased Adage common stock between April 30, 1992 and March 9, 1993. The complaint alleged that the statements described above concerning Adage and its subsidiaries were materially false and misleading in violation of section 10(b) of the Securities and Exchange Act of 1934, as amended ("Exchange Act"), and Rule 10b-5 promulgated thereunder.¹³³ The district court granted Adage's motion to dismiss, finding that Cahill's statements as to Adage's expected overall performance in 1992 and as to Allister's performance were not sufficiently material to support claims for securities fraud and that Hillson had failed to allege any damages resulting from Cahill's statements as to Fort Or-

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 208.

133. *Id.* (citing 15 U.S.C. §§ 78j(b), 78(a); 17 C.F.R. § 240.10b-5). The complaint also alleged violations of the Maryland Securities Act and claims of torts of fraud and negligent misrepresentation, which the district court dismissed for lack of jurisdiction after dismissing the federal claims. The complaint also noted that Cahill and other officers and directors of Adage were parties to a Contingent Share Agreement that entitled them to receive, in the aggregate, approximately 2.4 million shares of Adage common stock if the stock price was maintained at certain levels over a ninety-day period prior to August 27, 1993. *Id.* In a footnote, the court noted that although the Contingent Share Agreement was not relevant to its decision, the per share price of Adage's common stock never approached the \$9 per share contemplated in the Contingent Share Agreement. *Id.* at 208 n.3.

ange.¹³⁴ The court of appeals affirmed the district court's decision based on a holding that the statements at issue neither misstated nor omitted material facts.¹³⁵

To establish liability under section 10(b) of the Exchange Act and Rule 10b-5, a plaintiff must prove (1) the defendant made a false statement or omission of material fact (2) with scienter (3) upon which the plaintiff justifiably relied (4) that proximately caused the plaintiff's damages.¹³⁶ The court ruled that the case at hand turned on the first part of the test, which consists of two elements: (1) a false statement or omission of fact (2) that is material.¹³⁷ In order to fulfill the materiality requirement in a 10b-5 claim, "[t]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."¹³⁸

With respect to contingent or speculative information or events, the court provided that materiality will depend upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.¹³⁹ Statements of belief or opinions can constitute statements with respect to material facts for purposes of the securities laws if they are opinions or beliefs as to current facts.¹⁴⁰ However, the court noted, "soft, puffing statements" lack materiality because the market is not influenced by vague statements predicting growth.¹⁴¹ Predictions of future growth not worded as guarantees are generally

134. *Id.* at 208.

135. *Id.* at 205-06.

136. *Id.* at 208 (citing *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1260-61 (4th Cir. 1993)); *accord* *Malone v. Microdyne Corp.*, 26 F.3d 471, 476 (4th Cir. 1994); *Myers v. Finkle*, 950 F.2d 165, 167 (4th Cir. 1991); *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991), *cert. denied sub nom. Schatz v. Weinberg & Green*, 503 U.S. 936 (1992).

137. *Adage, Inc.*, 42 F.3d at 209.

138. *Id.* (quoting *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988)).

139. *Id.* (quoting *Levinson*, 485 U.S. at 238).

140. *Id.* (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092-93 (1991)).

141. *Id.* at 211 (quoting *Raab v. General Physics Corp.*, 4 F.3d 286, 289-90 (4th Cir. 1993)).

not actionable under the federal securities laws.¹⁴² Therefore, as the court noted:

[m]istatements or omissions regarding actual past or present facts are far more likely to be actionable than statements regarding predictions of future performance. Generally the latter will be deemed actionable under [section] 10(b) and Rule 10b-5 only if they are supported by specific statements of fact or are worded as guarantees.¹⁴³

The court then applied the foregoing doctrine to the statements made by Adage and Cahill. With respect to the April and May press releases and first quarter report issued on May 5, 1992, the court found that the statements that Allister's performance should improve, that "1992 will produce excellent results for Adage" and that Adage is "on target toward achieving the most profitable year in its history," were all predictions as to future events, not statements as to present facts or guarantees.¹⁴⁴ Thus, the court determined that all of the April and May statements constituted the type of vague predictions of growth that are not material as a matter of law under *Raab* and *Malone*.¹⁴⁵

Similarly, the court found that the August statements that Allister's operations "should significantly improve" were even more indefinite than the April and May statements and were "expressly contingent on other market conditions."¹⁴⁶ Furthermore, the court did not find that the failure to disclose Allister's problems in more detail to be an omission of material facts because details were available in Adage's 1992 Annual Report on Form 10-K filed by the company in March, 1992.¹⁴⁷

Hillson also alleged that the statements in the August report that "Adage is in the midst of an excellent year" and that "[Ad-

142. *Id.* (quoting *Raab*, 4 F.3d at 290).

143. *Id.* at 212 (quoting *Malone v. Microdyne*, 26 F.3d 471, 479 (4th Cir. 1994)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* ("securities laws require disclosure of information that is not otherwise in the public domain, not information that has already been publicly—indeed, officially—disclosed by the company").

age is] on track to exceed 1990, our record year for net income," were expressions of belief or opinion as to current facts under *Sandberg*, made without any reasonable basis. The court held that to the extent that these were expressions of belief as to current facts, the statements were reasonably based on the company's performance during the first half of 1992.¹⁴⁸ To the extent that the statements were addressed to the second half of 1992, they were expressions of belief as to uncertain future performance which, the court held, are not actionable under *Sandberg*.¹⁴⁹

With respect to the November and December statements, the court noted that such statements were accurate except to the extent that they predicted that the company's 1992 fourth quarter net income would exceed net income reported for the fourth quarter of 1991.¹⁵⁰ The court held that Hillson, however, did not allege facts to indicate that these statements were not believed when made.¹⁵¹ The court also observed that these statements contained cautionary language by discussing Allister's problems and speaking in terms of "improvement."¹⁵² Finally, the court pointed out that the difference between the company's predicted income for the fourth quarter (approximately 1.4% of revenues or \$330,000) and its delivered income (only 0.9% of revenues, or \$231,000) was only 0.5% of total revenues, a difference that was "hardly material."¹⁵³

148. *Id.* at 214.

149. *Id.* The court recognized that the timing of a prediction could contribute to its materiality, but that

an inference from timing alone is not sufficient, without additional supporting facts and circumstances . . . timing has only been considered significant in cases in which there were circumstances other than timing that may have justified investor reliance, such as where a company has made specific dollar predictions or a number of very positive predictions, and in which there were allegations of specific evidence, other than timing, demonstrating that those predictions had no factual basis.

Id. at 215-16.

150. *Id.* at 217.

151. *Id.*

152. *Id.* at 218.

153. *Id.* at 219.

III. RECENT LEGISLATIVE DEVELOPMENTS

During the 1995 session of the Virginia General Assembly, fourteen bills affecting corporate, partnership, limited liability company and securities law were passed by the General Assembly and signed into law by Governor Allen.¹⁵⁴

A. *Limited Liability Companies*

The Virginia Limited Liability Company Act and certain related sections of the Virginia Code pertaining to limited liability companies ("LLC(s)") have been amended to, among other things, clarify the agency authority of members and managers of LLCs and to specify the obligations of members to the creditors of a LLC for unpaid contributions.

1. Management of LLCs

The General Assembly has created a distinction between two separate types of LLCs, manager-managed LLCs, and member-managed LLCs.¹⁵⁵ LLCs are classified into one category or the other according to the provisions for management set forth in

154. The legislation enacted in the corporate, partnership, limited liability company and securities law areas that is not discussed in this article includes changes to provisions regarding the registered name of foreign corporations which now require that a foreign corporation who has registered its name in Virginia must re-register during the 60-day period preceding expiration of the one-year period from its initial registration. VA. CODE ANN. §§ 13.1-632 and 13.1-831 (Cum. Supp. 1995). This change allows registration applicants to be charged a flat fee of twenty dollars on an annual basis from the date of registration. A foreign corporation that is authorized to do business in the Commonwealth may have such authorization revoked by the State Corporation Commission when the Commission finds that the foreign corporation "no longer exists, by virtue of dissolution, termination, merger or consolidation under the laws of the state or country of its incorporation." *Id.* §§ 13.1-769, -931. Other enacted legislation states that a professional corporation may agree to eliminate its board of directors. *Id.* § 13.1-553. Also, the filing fee of \$10.00 applicable to a statement of change of address of registered office or registered agent for stock corporations, non-stock corporations, limited liability companies and limited partnerships has been eliminated. VA. CODE ANN. §§ 13.1-616, 13.1-816, 13.1-1005, and 50-73.17 (Cum. Supp. 1995).

155. VA. CODE ANN. § 13.1-1002 (Cum. Supp. 1995).

the articles of organization or the operating agreement of the LLC.¹⁵⁶

In a member-managed LLC, each member is an agent of the LLC "for the purpose of its business."¹⁵⁷ For acts taken in the ordinary course of business of the LLC, a member has the power to contractually bind the LLC to third parties unless the member does not have actual authority and the third party to the transaction is aware of this fact.¹⁵⁸ For actions taken outside of the ordinary course of business, a member has a reduced level of apparent authority and therefore can only contractually bind the LLC to third parties if such member is actually authorized by the LLC to act on its behalf.¹⁵⁹ The rule with respect to actions not in the ordinary course focuses solely on the presence or absence of authority in the contracting member and applies regardless of the mental state of the member or the other contracting party.¹⁶⁰

In a manager-managed LLC, a member of the LLC has no authority to act on behalf of, or contractually bind, the LLC merely by reason of his status as a member.¹⁶¹ In this respect, a member of a manager-managed LLC is similar to a shareholder of a corporation in that the mere fact of ownership does not convey any authority to act on behalf of the company. By contrast, each manager is only an agent of the LLC for the purpose of conducting its business.¹⁶² For actions taken by a manager, amendments to the limited liability act indicate that managers are constrained by the same rules as those that apply to a member of a member-managed LLC as described above.

The General Assembly has further provided that unless limited by the articles of organization of an LLC, both a member of a member-managed LLC and a manager of a manager-managed

156. *Id.*

157. *Id.* § 13.1-1021.1(A)(1).

158. *Id.* § 13.1-1021.1(A)(2).

159. *Id.* § 13.1-1021.1(A)(3).

160. For a discussion of the theoretical underpinnings of the apparent authority doctrine with respect to LLCs, see 1 LARRY E. RIBSTEIN AND ROBERT R. KEATINGS, LIMITED LIABILITY COMPANIES, § 8.05 (1994).

161. VA. CODE ANN. § 13.1-1021.1(B)(1) (Cum. Supp. 1995).

162. *Id.* § 13.1-1021.1(B)(2).

LLC have the ability (and thus, the apparent authority) to transfer real property, and thereby contractually bind the LLC to such transfer, to a bona fide purchaser for value who has no knowledge of the lack of actual authority of the member or manager.¹⁶³ A member or manager has the power to transfer real property under the above-described circumstances regardless of whether or not such transfer would be considered in the ordinary course of business.

2. Contribution to LLCs

With respect to contributions made by members to a LLC, the General Assembly has made it more difficult for a creditor of the LLC who has unsatisfied debts owed to it by the LLC to enforce the obligation of a member to make a contribution when that obligation has been compromised by the other members of the LLC (i.e., the other members of the LLC have suspended or released a member's obligation to contribute to the LLC). Prior law permitted a creditor of an LLC to force a member to make a contribution which was compromised by the other members of the LLC.¹⁶⁴ As the law has been amended, a creditor seeking to enforce a compromised obligation to make a contribution to the LLC must prove that, in extending credit, he reasonably relied on the obligation of the member to make such compromised contribution.¹⁶⁵

The General Assembly has also clarified the law regarding contributions to LLCs by giving LLCs much greater enumerated powers of enforcement with regard to delinquent contributions from members. In fact, permissible penalties for failure to make a required contribution now include, among other measures, reducing the defaulting member's proportionate interest in the LLC, subordinating his interest, forcing a sale of his interest, and the complete forfeiture of his interest.¹⁶⁶ The potential for abuse of such draconian powers is limited by the fact that such

163. *Id.* § 13.1-1021.1(C).

164. VA. CODE ANN. § 13.1-1027 (Repl. Vol. 1993) (codified as amended at VA. CODE ANN. § 13.1-1027 (Cum. Supp. 1995)).

165. VA. CODE ANN. § 13.1-1027(C) (Cum. Supp. 1995).

166. *Id.* § 13.1-1027(D).

penalties must be agreed to by the members of the LLC and specified in the articles of organization or the operating agreement of the LLC.¹⁶⁷

3. Registration Fees

Lastly, in the area of LLCs, the General Assembly has acted to resolve a problem that had previously existed with regard to LLCs and limited partnerships. Under prior law, it was possible for a LLC or a limited partnership to be required to pay both an initial registration fee (if it was formed prior to July 1 of such calendar year) and an annual registration fee (which was assessed against all LLCs and limited partnerships in existence as of July 1 of such calendar year). Sections 13.1-1062 and 50-73.67 of the Virginia Code have been amended to provide that LLCs and limited partnerships, respectively, are only obligated to pay the annual registration fee of \$50 for each year after the calendar year in which they pay their initial registration fee, thus averting the double payment problem that had arisen under previous law.¹⁶⁸

B. *Crimes by Corporate Entities*

The General Assembly has clarified that corporate entities may be fined as a result of certain types of felony convictions.¹⁶⁹ Prior to this clarification, corporate entities could not have been punished for these felonies because the law did not permit the imposition of a fine without also requiring imprisonment, a punishment that cannot be imposed on an entity which is not a natural person.¹⁷⁰

167. *Id.*

168. VA. CODE ANN. §§ 13.1-1062, 50-73.67 (Cum. Supp. 1995).

169. VA. CODE ANN. § 18.2-10(g) (Cum. Supp. 1995).

170. David G. Shuford, *VBA Fares Well in 1995 General Assembly*, VA. B. ASS'N J., Spring 1995, at 14.

C. *Registered Limited Liability Partnerships*

1. Limited Partnerships as Registered Limited Liability Partnerships.

The 1995 session of the General Assembly produced changes in the area of partnership law, specifically with respect to registered limited liability partnerships. Article 7 of the Uniform Partnership Act, which addresses formation and maintenance of registered limited liability partnerships, has been amended to reflect that a limited partnership may become a registered limited liability partnership simply by complying with the newly amended provisions of the Virginia Revised Uniform Limited Partnership Act (VRULPA).¹⁷¹ As indicated in the next paragraph, in this way limited partnerships can protect their general partners from the full range of liability which typically adheres to such general partners.

The General Assembly revised the VRULPA to indicate that a limited partnership can qualify and function as a registered limited liability partnership as well as a limited partnership if three events concur.¹⁷² First, the limited partnership must register as a limited liability partnership pursuant to Section 50-43.1 of the Virginia Code (Article 7 of the Uniform Partnership Act).¹⁷³ Second, the limited partnership must meet the insurance or financial responsibility requirements for registered limited liability partnerships specified in section 50-43.3 of the Virginia Code.¹⁷⁴ Third, the limited partnership's name must include both the phrase "limited partnership" or an abbreviation thereof and the phrase "registered limited liability partnership" or the abbreviation LLP.¹⁷⁵ In applying the registered limited liability partnership statute to a limited partnership, all references therein to partners are to be interpreted as referring to general partners.¹⁷⁶

171. VA. CODE ANN. § 50-43.12 (Cum. Supp. 1995).

172. *Id.* § 50-73.78(A).

173. *Id.* § 50-73.78(A)(1).

174. *Id.* § 50-73.78(A)(2).

175. *Id.* § 50-73.78(A)(3).

176. *Id.* § 50-73.78(B).

2. Dissolution of Registered Limited Liability Partnerships

With respect to the dissolution of a registered limited liability partnership, the General Assembly has indicated that if a domestic or foreign registered limited liability partnership is dissolved, but its business continues without liquidation, the registration of such partnership then continues in force, and no further filing is required of such partnership until such time as the registration is to be renewed or withdrawn.¹⁷⁷ This amendment will afford registered limited liability partnerships which have experienced a technical event of dissolution the opportunity not to file immediately a new registration for the partnership.

3. Law Firms as Registered Limited Liability Partnerships

The General Assembly has enacted a special rule with regard to registered limited liability partnerships engaging in the practice of law. In addition to the requirements of the Uniform Partnership Act and the VRULPA, a registered limited liability partnership engaging in the practice of law also must obtain a registration certificate from the Virginia State Bar pursuant to the registration provisions that were previously only applicable to professional corporations and professional limited liability companies engaged in the practice of law.¹⁷⁸

D. *Virginia Securities Act*

During the 1995 Session, the Virginia General Assembly authorized the State Corporation Commission (the Commission) to create by rule three new exemptions to the registration requirements of the Virginia securities laws normally applicable to the offer or sale of securities by issuers, broker dealers and agents.

177. *Id.* §§ 50-43.1(H), -43.7(I).

178. VA. CODE ANN. § 54.1-3902 (Cum. Supp. 1995).

1. Limited Offering Exemption

The limited offering exception found at section 13.1-514(B)(7) of the Virginia Code has been significantly expanded. Prior to amendment, a sale of its securities by an issuer or a registered broker dealer acting on behalf of the issuer was a transaction exempt from registration if, after the sale, the issuer had fewer than thirty-five securities holders, and the issuer or its broker dealer or agent engaged in no advertisement to, or solicitation of, the general public.¹⁷⁹ With the amendments to section 13.1-514(B)(7), the Commission has been given authority to create by rule an exemption from the registration requirements for any offer or sale of securities by the issuer (but not a registered broker dealer or agent) to no more than thirty-five persons in the Commonwealth during any twelve month period.¹⁸⁰

By the terms of the enabling statute, the Commission's rule must be limited in two ways. First, the issuer must reasonably believe that all purchasers in the Commonwealth are purchasing the security for investment.¹⁸¹ From a practitioner's standpoint, this translates into a requirement that the issuer receive a letter from each investor, prior to the sale of securities to such investor, which states that the investor is acquiring such securities for investment and not with a view to resale. Second, as with the previous limited offering exception now codified as section 13.1-514(B)(7), securities exempted by section 13.1-514(B)(7) cannot be offered generally to the public by advertisement or general solicitation.¹⁸²

The State Corporation Commission has acted on the authority granted to it by the General Assembly and enacted a rule to define the parameters of this new limited offering exemption.¹⁸³ The rule contains many provisions regarding the non-

179. VA. CODE ANN. § 13.1-514(B)(7) (Repl. Vol. 1993) (codified as amended at VA. CODE ANN. 13.1-514(B)(7)(b) (Cum. Supp. 1995)).

180. VA. CODE ANN. § 13.1-514(B)(7)(b) (Cum. Supp. 1995).

181. *Id.*

182. *Id.*

183. 3 Blue Sky L. Rep. (CCH) ¶ 60,440F, at 53,527-29. (Rules of State Corporation Commission, Article V, § 11).

availability of the exemption which the issuer must carefully scrutinize prior to reliance on this exemption. Among other things, the rule indicates that an issuer may raise no more than \$100,000 in any twelve-month period, nor more than \$500,000 total pursuant to this rule.¹⁸⁴ The Commission has required that the issuer deliver to the Commission certain documentation (including a form VA-1 and form U2) fifteen days prior to the first sale of securities pursuant to the rule.¹⁸⁵ The Commission has also required a \$250 non-refundable filing fee to be paid to the Commission along with the aforementioned documentation.¹⁸⁶ Finally, the rule requires that the issuer may only sell to sophisticated buyers who, after reasonable inquiry by the issuer, appear capable of evaluating and bearing the economic risks inherent in securities purchases.¹⁸⁷

2. Securities of Professional Business Entities

The General Assembly has exempted from the registration requirements of the securities laws transactions which involve "any offer or sale of securities issued by a professional business entity . . . to a person licensed or otherwise legally authorized to render within this Commonwealth the same professional services."¹⁸⁸ "Professional business entity" is defined in subsection A of section 13.1-1102 to mean a professional limited liability company, a professional corporation, or a partnership in which each partner is licensed to provide the professional service for which the partnership was formed.¹⁸⁹ The General Assembly further indicated that the existence of this exemption should have no effect on the definition of "security" with regard to professional business entities.¹⁹⁰ From a practical standpoint, this exemption will allow law firms, accounting firms and similar business entities which have grown much larger in recent years

184. *Id.* at 53,528.

185. *Id.*

186. *Id.*

187. *Id.* at 53,529.

188. VA. CODE ANN. § 13.1-514(B)(17) (Cum. Supp. 1995).

189. *Id.* § 13.1-1102(A).

190. *Id.* § 13.1-514(B)(17).

to continue offering interests to their members without registering such interests pursuant to the Virginia securities laws.

3. Alignment with Federal Exemptions

Lastly in the securities area, the General Assembly, in order to align Virginia's rules with federal securities exemptions made minor revisions to the State Corporation Commission's authority to exempt by rule certain transactions prior to amendment, section 13.1-514(B)(13) of the Virginia Code indicated that any rule promulgated by the Commission to effect alignment with the federal exemptions should not exempt broker dealers or agents from registration requirements.¹⁹¹ With the revision the Commission may, by rule, exempt "an agent of the issuer who receives no sales commission directly or indirectly for offering or selling the securities."¹⁹²

E. *Filing Requirements and Payment Obligations*

Pertinent sections of the Virginia Stock Corporation Act, the Virginia Non-Stock Corporation Act, the Virginia Limited Liability Company Act, and the VRULPA have been amended to take into account the extensive use of photocopy and facsimile machines in the modern office. Documents filed with the Commission no longer need to contain original signatures; a photocopied signature will suffice if the document is legible and able to be reformatted and reproduced in archival quality.¹⁹³ Additionally, the Commission will now accept a facsimile of a signature, making possible filings by officers of the corporation who are away on business or vacation. Perhaps most revolutionary is the fact that the Commission is now authorized to accept electronic filings of any information which is required to be filed with the Commission.¹⁹⁴ The Commission will promulgate

191. VA. CODE ANN. § 13.1-514(B)(13) (Repl. Vol. 1993) (codified as amended at VA. CODE ANN. § 13.1-514(B)(17) (Cum. Supp. 1995)).

192. VA. CODE ANN. § 13.1-514(B)(13) (Cum. Supp. 1995). For the rule as enacted by the State Corporation Commission, see 3 Blue Sky L. Rep. (CCH) ¶ 60,439, at 53,520 (Rules of State Corporation Commission, Article V, § 4).

193. VA. CODE ANN. §§ 13.1-604(D), 13.1-804(D), 13.1-1003(D), and 50-73.17(A) (Cum. Supp. 1995).

194. VA. CODE ANN. §§ 13.1-604(K), 13.1-804(K), 13.1-1003(J), and 50-73.17(A)

rules for the "methods of execution, recording, reproduction and certification of electronically filed information."¹⁹⁵

Documents to be executed in the name of the corporation have previously been required to be executed by only a certain select group of officers of a corporation. With the passage of new legislation, however, the General Assembly has required the Commission to accept, as the binding signature on behalf of a corporation, the signature of any officer authorized by the corporation to act on its behalf.¹⁹⁶ This removes the requirement of finding the correct titular officer when a filing must be signed.

In another attempt to recognize the variety of modern methods of doing business, the General Assembly has authorized the Commission to accept payment of any amount due to it by means of: (1) check, (2) credit card, (3) electronic funds transfer, or (4) any other means approved by the Commission.¹⁹⁷ The Commission is also allowed to charge a service fee to cover its costs associated with the new payment methods.¹⁹⁸ Already a model of efficiency, the Commission will benefit greatly, as will the practitioners with whom it works, from electronic filing and electronic payment methods.

(Cum. Supp. 1995).

195. *Id.*

196. VA. CODE ANN. §§ 13.1-604(F), 13.1-804(F) (Cum. Supp. 1995).

197. VA. CODE ANN. § 12.1-17 (Cum. Supp. 1995).

198. *Id.* § 12.17(A).

