

CHAPTER ~~3~~ 15.

INVESTMENTS.

Article 1.

General Provisions.

Drafting note: Existing Chapter 3 of Title 26 consists of two articles: Article 1 (General Provisions) and Article 2 (Uniform Prudent Investor Act). Proposed Chapter 15 consists primarily of existing Article 1. Article 2 has been relocated to proposed Article 9 (§ 64.2-780 et seq.) of Chapter 7 of Subtitle III, which is part of the Uniform Trust Code (UTC). The Uniform Prudent Investor Act (UPIA) was originally promulgated in 1994 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) as a stand-alone act. The UPIA was enacted in Virginia in 1999 with little variation between the language of the Act as promulgated and as enacted. The UPIA was incorporated into the UTC when the UTC was promulgated by NCCUSL in 2000. As a result of the relocation of Article 2, the provisions of existing Article 1 constitute the entirety of proposed Chapter 14.

~~§ 26-38~~ 64.2-1500. Court ~~may order orders regarding~~ money in ~~hands possession~~ of fiduciary ~~to be invested, etc.~~

~~When it appears by~~ If a report made ~~as provided in pursuant to~~ § 26-31, 64.2-1210 or a special report of the commissioner, ~~of accounts shows~~ that money is in the ~~hands possession~~ of ~~any a~~ fiduciary, the circuit court, in ~~the clerk's office of~~ which ~~such the~~ report is filed, may order ~~that~~ the ~~same to money~~ be invested or loaned out, or make such other order respecting the ~~same money~~ as ~~may seem to it the court deems~~ proper.

Drafting note: Technical changes.

~~§ 26-39~~ 64.2-1501. Time within which guardian of an estate, conservator, or other fiduciary to invest funds; reasonable diligence required.

A. Whenever a guardian of an estate, conservator, or other fiduciary charged with the investment of funds collects any principal, he shall have a reasonable time, not ~~exceeding to exceed~~ four months, to invest or loan the ~~same funds~~, and shall not be charged with interest thereon until the expiration of such time. A guardian of an estate, conservator, or any other fiduciary shall only be required to invest in accordance with the provisions of §§ ~~26-40.01~~ 64.2-1502, ~~26-40.1~~ 64.2-1503, ~~26-40.2~~ 64.2-1504, ~~26-44~~ 64.2-1505, and ~~26-44.1~~ 64.2-1506 and Article 2 the Uniform Prudent Investor Act (~~§ 26-45.3~~ 64.2-780 et seq.) and, if he ~~so~~ invests in accordance with these provisions, he shall be accountable only for such interest and profits as are earned. If any funds are otherwise invested without the previous consent of the court having jurisdiction of such trust funds, the burden shall be on the guardian of an estate, conservator, or other fiduciary before his settlement is approved by the commissioner of accounts to show to the satisfaction of the commissioner of accounts that, after exercising reasonable diligence, he was unable to ~~so~~ invest the funds in accordance with these provisions and that the investment made was reasonable and proper under all of the circumstances and fair to the beneficiary of the funds.

B. This section shall not be construed as altering the provisions of any will, deed, or other instrument ~~giving to that give~~ the fiduciary discretion as to the rate of interest, character of security, nature or investment under the trust, or time within which the trust funds are to be loaned or invested.

Drafting note: Technical changes.

~~§ 26-40.2.2-4519. In what securities fiduciaries may invest~~ Investment of funds by the Virginia Housing Development Authority and the Virginia Resources Authority.

A. For purposes of §§ 36-55.44 and 62.1-221 only, the following investments shall be considered lawful investments and shall be conclusively presumed to have been prudent:

~~(1)~~1. Obligations of the Commonwealth.— Stocks, bonds, notes, and other evidences of indebtedness of the Commonwealth ~~of Virginia~~, and those unconditionally guaranteed as to the payment of principal and interest by the Commonwealth ~~of Virginia~~.

~~(2)~~2. Obligations of the United States, ~~etc.~~— Stocks, bonds, treasury notes, and other evidences of indebtedness of the United States, including the guaranteed portion of any loan guaranteed by the Small Business Administration, an agency of the United States government, and those unconditionally guaranteed as to the payment of principal and interest by the United States; ~~and~~ bonds of the District of Columbia; ~~and~~ bonds and notes of the Federal National Mortgage Association and the Federal Home Loan Banks; ~~and~~ bonds, debentures, or other similar obligations of federal land banks, federal intermediate credit banks, or banks of cooperatives, issued pursuant to acts of Congress; and obligations issued by the United States Postal Service when the principal and interest thereon is guaranteed by the government of the United States. The evidences of indebtedness enumerated by this ~~paragraph~~ subdivision may be held directly ~~or~~ in the form of repurchase agreements collateralized by such debt securities, or in the form of securities of any open-end or closed-end management type investment company or investment trust registered under the federal Investment Company Act of 1940, provided that the portfolio of such investment company or investment trust is limited to such evidences of indebtedness or repurchase agreements collateralized by such debt securities, or securities of other such investment companies or investment trusts whose portfolios are so restricted.

~~(3)~~3. Obligations of other states.— Stocks, bonds, notes, and other evidences of indebtedness of any state of the United States upon which there is no default and upon which there has been no default for more than ~~ninety~~ 90 days; provided, that within the ~~twenty~~ 20 fiscal years next preceding the making of such investment, such state has not been in default for more than ~~ninety~~ 90 days in the payment of any part of principal or interest of any debt authorized by the legislature of such state to be contracted.

~~(4)~~4. Obligations of Virginia counties, cities, ~~etc or other public bodies~~.— Stocks, bonds, notes, and other evidences of indebtedness of any county, city, town, district, authority, or other public body in the Commonwealth ~~of Virginia~~ upon which there is no default; provided, that if the principal and interest ~~be~~ is payable from revenues or tolls and the project has not been

completed, or if completed, has not established an operating record of net earnings available for payment of principal and interest equal to estimated requirements for that purpose according to the terms of the issue, the standards of judgment and care required in ~~Article 2~~ the Uniform Prudent Investor Act (§ ~~26-45.3~~ 64.2-780 et seq.), without reference to this section, shall apply.

In any case in which an authority, having an established record of net earnings available for payment of principal and interest equal to estimated requirements for that purpose according to the terms of the issue, issues additional evidences of indebtedness for the purposes of acquiring or constructing additional facilities of the same general character that it is then operating, such additional evidences of indebtedness shall be governed fully by the provisions of this section without limitation.

~~(5)~~5. Obligations of cities, counties, ~~etc., towns, or districts~~ of other states.— Legally authorized stocks, bonds, notes, and other evidences of indebtedness of any city, county, town, or district situated in any one of the states of the United States upon which there is no default and upon which there has been no default for more than ~~ninety~~ 90 days; provided, that ~~(a) (i)~~ within the ~~twenty~~ 20 fiscal years next preceding the making of such investment, ~~such the~~ city, county, town, or district has not been in default for more than ~~ninety~~ 90 days in the payment of any part of principal or interest of any stock, bond, note, or other evidence of indebtedness issued by it; ~~(b) such (ii) the~~ city, county, town, or district shall have been in continuous existence for at least ~~twenty~~ 20 years; ~~(c) such (iii) the~~ city, county, town, or district has a population, as shown by the federal census next preceding the making of such investment, of not less than 25,000 inhabitants; ~~(d) (iv)~~ the stocks, bonds, notes, or other evidences of indebtedness in which such investment is made are the direct legal obligations of the city, county, town, or district issuing the same; ~~(e) (v)~~ the city, county, town, or district has power to levy taxes on the taxable real property therein for the payment of such obligations without limitation of rate or amount; and ~~(f) (vi)~~ the net indebtedness of ~~such the~~ city, county, town, or district ~~(including the issue in which such investment is made)~~, after deducting the amount of its bonds issued for self-sustaining public utilities, does not exceed ~~ten~~ 10 percent of the value of the taxable property in ~~such the~~ city, county, town, or district, to be ascertained by the valuation of such property therein for the assessment of taxes next preceding the making of such investment.

~~(5a)~~6. Obligations subject to repurchase.— Investments set forth in ~~the first five paragraphs of this statute subdivisions 1 through 5~~ may also be made subject to the obligation or right of the seller to repurchase these on a specific date.

~~(6)~~7. Bonds secured on real estate.— Bonds and negotiable notes directly secured by a first lien on improved real estate or farm property in the Commonwealth ~~of Virginia~~, or in any state contiguous to the Commonwealth ~~of Virginia~~ within a ~~fifty-mile~~ 50-mile area from the borders of the Commonwealth ~~of Virginia~~, not to exceed ~~eighty~~ 80 percent of the fair market value of such real estate, including any improvements thereon at the time of making such investment, as ascertained by an appraisal thereof made by two reputable persons who are not interested in whether or not such investment is made.

~~(7)~~8. Bonds secured on city property in Fifth Federal Reserve District.— Bonds and negotiable notes directly secured by a first lien on improved real estate situated in any incorporated city in any of the states of the United States which lie wholly or in part within the Fifth Federal Reserve District of the United States as constituted on June 18, 1928, pursuant to the act of Congress of December 23, 1913, known as the Federal Reserve Act, as amended, not to exceed ~~sixty~~ 60 percent of the fair market value of such real estate, with the improvements thereon, at the time of making such investment, as ascertained by an appraisal thereof made by two reputable persons who are not interested in whether or not such investment is made; ~~provided~~, that such city has a population, as shown by the federal census next preceding the making of such investments, of not less than 5,000 inhabitants.

~~(8)~~9. Bonds of Virginia educational institutions.— Bonds of any of the educational institutions of the Commonwealth ~~of Virginia, which that~~ have been or may be authorized to be issued by the General Assembly ~~of the Commonwealth of Virginia~~.

~~(9)~~10. Securities of the ~~R. F. & P.~~ Richmond, Fredericksburg and Potomac Railroad Company.— Stocks, bonds, and other securities of the Richmond, Fredericksburg and Potomac Railroad Company, including bonds or other securities guaranteed by the Richmond, Fredericksburg and Potomac Railroad Company.

~~(10)~~11. Obligations of railroads.— Bonds, notes, and other evidences of indebtedness, including equipment trust obligations, which are direct legal obligations of or which have been unconditionally assumed or guaranteed as to the payment of principal and interest by, any railroad corporation operating within the United States ~~which that~~ meets the following conditions and requirements:

~~(a)~~a. The gross operating revenue of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have not been less than ~~ten~~ \$10 million ~~dollars~~;

~~(b)~~b. The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of the investment, shall have been earned an average of at least two times annually during the seven fiscal years preceding the making of the investment and at least ~~1 1/2~~ one and one-half times during the fiscal year immediately preceding the making of the investment ~~(the. The~~ term "total fixed charges" as used in this ~~paragraph subdivision and subdivision c~~ shall be deemed to refer to the term used in the accounting reports of common carriers as prescribed by the regulations of the Interstate Commerce Commission); and

~~(c)~~c. The aggregate of the average market prices of the total amounts of each of the individual securities of such corporation junior to its bonded debt and outstanding at the time of the making of such investment shall be equal to at least two-thirds of the total fixed charges, ~~as defined in paragraph (b) of clause (10) of this section~~, for such railroad corporation for the fiscal year next preceding the making of such investment capitalized at an annual interest rate of five percent ~~per annum~~. Such average market price of any one of such individual securities shall be

determined by the average of the highest quotation and the lowest quotation of the individual security for a period immediately preceding the making of such investment, which period shall be the full preceding calendar year plus the ~~then-expired~~ then-expired portion of the calendar year in which such investment is made; ~~provided,~~ that if more than six months of the calendar year in which such investment is made shall have expired, then such period shall be only the ~~then-expired~~ then-expired portion of the calendar year in which such investment is made; ~~and provided further,~~ that if such individual security shall not have been outstanding during the full extent of such period, such period shall be deemed to be the length of time such individual security shall have been outstanding.

~~(11)~~12. Obligations of leased railroads.— Stocks, bonds, notes, other evidences of indebtedness, and any other securities of any railroad corporation operating within the United States, the railroad lines of which have been leased by a railroad corporation, either alone or jointly with other railroad corporations, whose bonds, notes, and other evidences of indebtedness shall, at the time of the making of such investment, qualify as lawful investments for fiduciaries under the terms of ~~clause (10) of this section;~~ subdivision 11, ~~provided,~~ that the terms of such lease shall provide for the payment by such lessee railroad corporation individually, irrespective of the liability of other joint lessee railroad corporations, if any, in this respect, of an annual rental of an amount sufficient to defray the total operating expenses and maintenance charges of the lessor railroad corporation plus its total fixed charges, plus, in the event of the purchase of such a stock ~~as aforesaid~~, a fixed dividend upon any issue of such stock in which such investment is made; ~~and provided,~~ that, if such investment so purchased shall consist of an obligation of definite maturity, such lease shall be one which shall, according to its terms, provide for the payment of the obligation at maturity or extend for a period of not less than ~~twenty~~ 20 years beyond the maturity of such obligations so purchased, or if such investment so purchased shall be a stock or other form of investment having no definite date of maturity, such lease shall be one which shall, according to its terms, extend for a period of at least ~~fifty~~ 50 years beyond the date of the making of such investment.

~~(12)~~13. Equipment trust obligations.— Equipment trust obligations issued under the "Philadelphia Plan" in connection with the purchase for use on railroads of new standard gauge rolling stock; ~~provided that the owner, purchaser, or lessee of such equipment,~~ or one or more of such owners, purchasers, or lessees, shall be a railroad corporation whose bonds, notes, and other evidences of indebtedness shall, at the time of the making of such investment, qualify as lawful investments for fiduciaries under the terms of ~~clause (10) of this section;~~ subdivision A 11, and provided that all of such owners, purchasers, or lessees shall be both jointly and severally liable under the terms of such contract of purchase or lease, or both, for the fulfillment thereof.

~~(13)~~14. Preferred stock of railroads.— Any preference stock of any railroad corporation operating within the United States; ~~provided such stock and such railroad corporation meet the following conditions and requirements:~~

~~(a)~~a. Such stock shall be preferred as to dividends, such dividends shall be cumulative, and such stock shall be preferred as to assets in the event of liquidation or dissolution;

~~(b)~~b. The gross operating revenue of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ~~ten \$10~~ million ~~dollars~~;

~~(c)~~c. The total fixed charges, as defined in ~~paragraph (b) of clause (10) of this section subdivision 11 b~~, of such corporation, as reported for the fiscal year next preceding the making of such investment, plus the amount, at the time of making such investment, of the annual dividend requirements on such preference stock and any preference stock having the same or senior rank, such fixed charges and dividend requirements being considered the same for every year, shall have been earned an average of at least ~~2 1/2~~ two and one-half times annually for the seven fiscal years preceding the making of such investment and at least two times for the fiscal year immediately preceding the making of such investment; and

~~(d)~~d. The aggregate of the average market prices of the total amount of each of the individual securities of such corporation, junior to such preference stock and outstanding at the time of the making of such investment, shall be at least equal to the par value of the total issue of the preference stock in question plus the total par value of all other issues of its preference stock having either the same rank as, or a senior rank to, the issue of such preference stock plus total fixed charges, as defined in ~~paragraph (b) of clause (10) of this section subdivision 11 b~~, for such railroad corporation for the fiscal year next preceding the making of such investment capitalized at an annual interest rate of five percent ~~annually~~. Such average market price of any one of such individual securities shall be determined in the same manner as prescribed in ~~paragraph (c) of clause (10) of this section subdivision 11 c~~.

~~(14)~~15. Obligations of public utilities.— Bonds, notes, and other evidences of indebtedness of any public utility operating company operating within the United States; provided such company meets the following conditions and requirements:

~~(a)~~a. The gross operating revenue of such public utility operating company for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ~~five \$5~~ million ~~dollars~~;

~~(b)~~b. The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of the investment, shall have been earned, after deducting operating expenses, depreciation and taxes, other than income taxes, an average of at least ~~1 3/4~~ one and three-quarters times annually during the seven fiscal years preceding the making of the investment and at least ~~1 1/2~~ one and one-half times during the fiscal year immediately preceding the making of the investment;

~~(c)~~c. In the fiscal year next preceding the making of such investment, the ratio of the total par value of the bonded debt of such public utility operating company, including the total bonded

indebtedness of all its subsidiary companies, whether assumed by the public utility operating company in question or not, to its gross operating revenue shall not be greater than four to one; and

~~(d)~~d. Such public utility operating company shall be subject to permanent regulation by a state commission or other duly authorized and recognized regulatory body.

The term "public utility operating company" as used in this ~~clause (14) shall mean subdivision and subdivision 16 means~~ a public utility or public service corporation (i) of whose total income available for fixed charges for the fiscal year next preceding the making of such investment at least ~~fifty-five~~ 55 percent thereof shall have been derived from direct payments by customers for service rendered them, (ii) of whose total operating revenue for the fiscal year next preceding the making of such investment at least ~~sixty~~ 60 percent thereof shall have been derived from the sale of electric power, gas, water, or telephone service and not more than ~~ten~~ 10 percent thereof shall have been derived from traction operations, and (iii) whose gas properties are all within the limits of one state, if more than ~~twenty~~ 20 percent of its total operating revenues are derived from gas.

~~(15)~~16. Preferred stock of public utilities.— Any preference stock of any public utility operating company operating within the United States, provided such stock and such company meet the following conditions and requirements:

~~(a)~~a. Such stock shall be preferred as to dividends, such dividends shall be cumulative, and such stock shall be preferred as to assets in the event of liquidation or dissolution;

~~(b)~~b. The gross operating revenue of such public utility operating company for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ~~five~~ \$5 million ~~dollars~~;

~~(c)~~c. The total fixed charges of such public utility operating company, as reported for the fiscal year next preceding the making of such investment, plus the amount, at the time of making such investment, of the annual dividend requirements on such preference stock and any preference stock having the same or senior rank, such fixed charges and dividend requirements being considered the same for every year, shall have been earned, after deducting operating expenses, depreciation, and taxes, including income taxes, an average of at least two times annually for the seven fiscal years preceding the making of such investment and at least two times for the fiscal year immediately preceding the making of such investment;

~~(d)~~d. In the fiscal year next preceding the making of such investment, the ratio of the sum of the total par value of the bonded debt of such public utility operating company, the total par value of the issue of such preference stock, and the total par value of all other issues of its preference stock having the same or senior rank to its gross operating revenue shall not be greater than four to one; and

~~(e)~~e. Such public utility operating company shall be subject to permanent regulation by a state commission or other duly authorized and recognized regulatory body.

~~For the purposes of this clause (15) of this section, the term "public utility operating company" shall be construed in the same manner as defined in clause (14) of this section.~~

~~(16)~~17. Obligations of the following telephone companies.— Bonds, notes, and other evidences of indebtedness of American Telephone and Telegraph, Bell Atlantic, Bell South, Southwestern Bell, Pacific Telesis, Nynex, American Information Technologies, or U.S. West; and bonds, notes, and other evidences of indebtedness unconditionally assumed or guaranteed as to the payment of principal and interest by any such company; provided, that the total fixed charges, as reported for the fiscal year next preceding the making of the investment, of such company and all of its subsidiary corporations on a consolidated basis shall have been earned, after deducting operating expenses, depreciation, and taxes, other than income taxes, an average of at least ~~1 3/4~~ one and three-fourths times annually during the seven fiscal years preceding the making of the investment and at least ~~1 1/2~~ one and one-half times during the fiscal year immediately preceding the making of the investment.

~~(17)~~18. Obligations of municipally owned utilities.— The stocks, bonds, notes, and other evidences of indebtedness of any electric, gas, or water department of any state, county, city, town, or district whose obligations would qualify as legal for purchase under ~~clause (3), (4) or (5) of this section~~ subdivision 3, 4, or 5, the interest and principal of which are payable solely out of the revenues from the operations of the facility for which the obligations were issued; provided, that the department issuing such obligations meet the requirements applying to public utility operating companies as set out in ~~paragraphs (a), (b) and (c) of clause (14) of this section~~ subdivisions 15 a through c.

~~(18)~~19. Obligations of industrial corporations.— Bonds, notes, and other evidences of indebtedness of any industrial corporation incorporated under the laws of the United States or of any state thereof; provided such corporation meets the following conditions and requirements:

~~(a)~~a. The gross operating revenue of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ~~ten \$10 million dollars~~;

~~(b)~~b. The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of the investment, shall have been earned, after deducting operating expenses, depreciation, and taxes, other than income taxes, and depletion in the case of companies commonly considered as depleting their natural resources in the course of business, an average of at least three times annually during the seven fiscal years preceding the making of the investment and at least ~~2 1/2~~ two and one-half times during the fiscal year immediately preceding the making of the investment;

~~(c)~~c. The net working capital of such industrial corporation, as shown by its last published fiscal year-end statement prior to the making of such investment, or in the case of a new issue, as shown by the financial statement of such corporation giving effect to the issuance

of any new security, shall be at least equal to the total par value of its bonded debt as shown by such statement; and

~~(d)~~d. The aggregate of the average market prices of the total amounts of each of the individual securities of such industrial corporation, junior to its bonded debt and outstanding at the time of the making of such investment, shall be at least equal to the total par value of the bonded debt of such industrial corporation at the time of the making of such investment, such average market price of any one of such individual securities being determined in the same manner as prescribed in ~~paragraph (c) of clause (10) of this section~~ subdivision 11 c.

~~(19)~~20. Preferred stock of industrial corporations.— Any preference stock of any industrial corporation incorporated under the laws of the United States or of any state thereof, provided such stock and such industrial corporation meet the following conditions and requirements:

~~(a)~~a. Such stock shall be preferred as to dividends, such dividends shall be cumulative, and such stock shall be preferred as to assets in the event of liquidation or dissolution;

~~(b)~~b. The gross operating revenue of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating revenue for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ~~ten \$10~~ million ~~dollars~~;

~~(c)~~c. The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of such investment, plus the amount, at the time of making such investment, of the annual dividend requirements on such preference stock and any preference stock having the same or senior rank, such fixed charges and dividend requirements being considered the same for every year, shall have been earned, after deducting operating expenses, depreciation, and taxes, including income taxes, and depletion in the case of companies commonly considered as depleting their natural resources in the course of business, an average of at least four times annually for the seven fiscal years preceding the making of such investment and at least three times for the fiscal year immediately preceding the making of such investment;

~~(d)~~d. The net working capital of such industrial corporation, as shown by its last published fiscal year-end statement prior to the making of such investment, or, in the case of a new issue, as shown by the financial statement of such corporation giving effect to the issuance of any new security, shall be at least equal to the total par value of its bonded debt plus the total par value of the issue of such preference stock plus the total par value of all other issues of its preference stock having the same or senior rank; and

~~(e)~~e. The aggregate of the lowest market prices of the total amounts of each of the individual securities of such industrial corporation junior to such preference stock and outstanding at the time of the making of such investment shall be at least ~~2 1/2~~ two and one-half times the par value of the total issue of such preference stock plus the total par value of all other issues of its preference stock having the same or senior rank plus the par value of the total bonded debt of such industrial corporation. Such lowest market price of any one of such

individual securities shall be determined by the lowest single quotation of the individual security for a period immediately preceding the making of such investment, which period shall be the full preceding calendar year plus the ~~then-expired~~ then-expired portion of the calendar year in which such investment is made; ~~and provided, that~~ if such individual security shall not have been outstanding during the full extent of such period, such period shall be deemed to be the length of time such individual security shall have been outstanding.

~~(20)~~21. Obligations of finance corporations.— Bonds, notes, and other evidences of indebtedness of any finance corporation incorporated under the laws of the United States or of any state thereof; ~~provided~~ such corporation meets the following conditions and requirements:

~~(a)~~a. The gross operating income of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating income for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ~~five~~ \$5 million ~~dollars~~;

~~(b)~~b. The total fixed charges of such corporation, as reported for the fiscal year next preceding the making of the investment, shall have been earned, after deducting operating expenses, depreciation, and taxes, other than income taxes, an average of at least ~~2 1/2~~ two and one-half times annually during the seven fiscal years preceding the making of the investment and at least two times during the fiscal year immediately preceding the making of the investment;

~~(c)~~c. The aggregate indebtedness of such finance corporation as shown by its last fiscal year-end statement, or, in the case of a new issue, as shown by the financial statement giving effect to the issuance of any new securities, shall be no greater than three times the aggregate net worth, as represented by preferred and common stocks and surplus of such corporation; and

~~(d)~~d. The aggregate of the average market prices of the total amounts of each of the individual securities of such finance corporation, junior to its bonded debt and outstanding at the time of the making of such investment, shall be at least equal to one-third of the sum of the par value of the bonded debt plus all other indebtedness of such finance corporation as shown by the last published fiscal year-end statement, such average market price of any one of such individual securities being determined in the same manner as prescribed in ~~paragraph (c) of clause (10) of this section~~ subdivision 11 c.

~~(21)~~22. Preferred stock of finance corporations.— Any preference stock of any finance corporation, incorporated under the laws of the United States or of any state thereof; ~~provided~~, such stock and such corporation meet the following conditions and requirements:

~~(a)~~a. Such stock shall be preferred as to dividends, such dividends shall be cumulative, and such stock shall be preferred as to assets in the event of liquidation or dissolution;

~~(b)~~b. The gross operating income of such corporation for the fiscal year preceding the making of such investment, or the average of the gross operating income for the five fiscal years next preceding the making of such investment, whichever of these two is the larger, shall have been not less than ~~five~~ \$5 million ~~dollars~~;

~~(e)c.~~ The total fixed charges of such finance corporation, as reported for the fiscal year next preceding the making of such investment, plus the amount, at the time of making such investment, of the annual dividend requirements on such preference stock and any preference stock having the same or senior rank, such fixed charges and dividend requirements being considered the same for every year, shall have been earned, after deducting operating expenses, depreciation, and taxes, including income taxes, an average of at least ~~3 1/2~~ three and one-half times annually for the seven fiscal years preceding the making of such investment and at least three times for the fiscal year immediately preceding the making of such investment;

~~(d)d.~~ The aggregate indebtedness and par value of the purchased stock, both the issue in question and any issues equal or senior thereto, of such finance corporation as shown by its last published fiscal year-end statement, or, in the case of a new issue, as shown by the financial statement giving effect to the issuance of any new securities, shall be no greater than three times the aggregate par value of the junior securities and surplus of such corporation; and

~~(e)e.~~ The aggregate of the lowest market prices of the total amounts of each of the individual securities of such finance corporation junior to such preference stock and outstanding at the time of the making of such investment shall be at least equal to one-third of the sum of the par value of such preference stock plus the total par value of all other issues of preference stock having the same or senior rank plus the par value of the total bonded debt plus all other indebtedness of such finance corporation as shown by the last published fiscal year-end statement, such lowest market price of any one of such individual securities being determined in the same manner as prescribed in ~~paragraph (e) of clause (19) of this section~~ subdivision 20 e.

~~(22)23.~~ Federal housing loans.— First mortgage real estate loans insured by the Federal Housing Administrator, under Title II of the National Housing Act.

~~(23)24.~~ Certificates of deposit and savings accounts.— Certificates of deposit of, and savings accounts in, any bank, banking institution, or trust company, whose deposits are insured by the Federal Deposit Insurance Corporation at the prevailing rate of interest on such certificates or savings accounts; ~~provided,~~ however, no such fiduciary shall invest in such certificates of, or deposits in, any one bank, banking institution, or trust company an amount from any one fund in his or its care which shall be in excess of such amount as shall be fully insured as a deposit in such bank, banking institution, or trust company by the Federal Deposit Insurance Corporation. A corporate fiduciary shall not, however, be prohibited by the terms of this ~~clause (23) of this section~~ subdivision from depositing in its own banking department, in the form of demand deposits, savings accounts, time deposits, or certificates of deposit, funds in any amount awaiting investments or distribution, provided that it shall have complied with the provisions of §§ 6.2-1005 and 6.2-1007, with reference to the securing of such deposits.

~~(24)25.~~ Obligations of International Bank, Asian Development Bank, and African Development Bank.— Bonds and other obligations issued, guaranteed, or assumed by the International Bank for Reconstruction and Development, ~~by~~ the Asian Development Bank, ~~or by~~ the African Development Bank.

~~(25)~~26. Deposits in savings institutions.— Certificates of deposit of, and savings accounts in, any state or federal savings institution or savings bank lawfully authorized to do business in ~~this the~~ Commonwealth whose accounts are insured by the Federal Deposit Insurance Corporation or other federal insurance agency; however, no such fiduciary shall invest in such shares of any one such association an amount from any one fund in his or its care which shall be in excess of such amount as shall be fully insured as an account in such association by the Federal Deposit Insurance Corporation or other federal insurance agency.

~~(26)~~27. Certificates evidencing ownership of undivided interests in pools of mortgages.— Certificates evidencing ownership of undivided interests in pools of bonds or negotiable notes directly secured by first lien deeds of trust or mortgages on real property located in the Commonwealth ~~of Virginia~~ improved by single-family residential housing units or multi-family dwelling units; provided that (i) such certificates are rated AA or better by a nationally recognized independent rating agency; (ii) the loans evidenced by such bonds or negotiable notes do not exceed ~~eighty~~ 80 percent of the fair market value, as determined by an independent appraisal thereof, of the real property and the improvements thereon securing such loans; and (iii) such bonds or negotiable notes are assigned to a corporate trustee for the benefit of the holders of such certificates.

~~(27)~~28. Shares in credit unions.— Shares and share certificates in any credit union lawfully authorized to do business in ~~this the~~ Commonwealth whose accounts are insured by the National Credit Union Share Insurance Fund or the Virginia Credit Union Share Insurance Corporation; provided no such fiduciary shall invest in such shares an amount from any one fund in his or its care which shall be in excess of such amount as shall be fully insured as an account in such credit union by the National Credit Union Share Insurance Fund or the Virginia Credit Union Share Insurance Corporation.

B. Whenever under the terms of this section the par value of a preference stock is required to be used in a computation, there shall be used instead of such par value the liquidating value of such preference stock in the case of involuntary liquidation, as prescribed by the terms of its issue, in the event that such liquidating value shall be greater than the par value of such preference stock; or in the event that the preference stock in question has no par value, then such liquidating value shall be used instead; or when such preference stock shall be one of no par value and one for which no such liquidating value shall have been so prescribed, then for the purposes of such computation the preference stock in question shall be deemed to have a value of \$100 per share.

C. When any security provided for in this section is purchased by a fiduciary and at the time of such purchase the statement for the preceding fiscal year of the corporation issuing the security so being purchased has not been published and is therefore not available, the statement of such corporation for the fiscal year immediately prior to such preceding fiscal year shall be considered the statement for such preceding fiscal year and shall have the same force and effect

as the statement for the fiscal year preceding such purchase, provided the date of such purchase is not more than four months after the end of the last fiscal year of the corporation.

D. In testing a new issue of securities under the provisions of this section, it shall be permissible, in determining the number of times that fixed charges or preferred dividend requirements have been earned, to use pro forma fixed charges or dividend requirements, provided the corporation or its corporate predecessor has been in existence for a period of not less than seven years.

E. Investments made under the provisions of this section, if in conformity with the requirements of this section at the time such investments were made, may be retained even though they cease to be eligible for purchase under the provisions of this section, but shall be subject to the provisions of the Uniform Prudent Investor Act (§ 64.2-780 et seq.).

Drafting note: Existing § 26-40 contains the “legal list” of lawful fiduciary investments. Originally, this section applied to all fiduciaries. However, in 1992 (1992 Acts Ch. 810), a new “legal list” was enacted for fiduciaries (existing § 26-40.01) and the provisions of this section were limited to investments made by the Virginia Resources Authority and the Virginia Housing Development Authority. In light of the limited application of this section to specific government authorities, it has been relocated to the Investment of Public Funds Act (§ 2.2-4500 et seq.), which likewise deals with the investment of public funds.

It should be noted that certain lawful investment vehicles authorized by this section, such as securities of the Richmond, Fredericksburg and Potomac Railroad Company may no longer exist in the same form as they did at the time they were added to this section. It was determined to be beyond the scope of this revision to address this issue, especially in light of proposed subsection E which provides that investments purchased in conformity with this section may be retained even if such investments cease to be eligible for purchase.

Existing §§ 26-41, 26-42, and 26-43 have been relocated, respectively, to proposed subsections B, C, and D with technical changes. These sections only apply to investments made under existing § 26-40. Existing § 26-44 also deals with investments made under existing § 26-40 as well as existing § 26-40.01. The language of that section, as it pertains to existing § 26-40 has been relocated to proposed subsection E with technical changes.

§ ~~26-40.01~~ 64.2-1502. In what securities fiduciaries may invest; definitions.

A. As used in this section:

"Fiduciary" ~~shall be defined~~ has the same meaning as provided in § 8.01-2 and ~~shall~~ also ~~include~~ includes an ~~attorney-in-fact~~ attorney-in-fact or agent acting for a principal under a written power of attorney, a custodian under § ~~31-48~~ 64.2-1911, and a custodial trustee under § ~~55-34.7~~ 64.2-906.

"National rating service" ~~shall mean~~ means Standard & Poor's Corporation, Moody's Investors Service, Inc., Duff and Phelps, Inc., Fitch Investors Corporation, and any successor to the rating business of any of them.

B. Notwithstanding any other provision of law designating as legal investments for fiduciaries the bonds, notes, obligations, or other evidences of indebtedness issued by a governmental entity or political subdivision of the Commonwealth, including but not limited to agencies, authorities, commissions, districts, boards, or local governments, and except as specifically provided in §~~26-40~~ 2.2-4519, fiduciaries, whether individual or corporate, shall, except as limited in subsection E, be conclusively presumed to have been prudent in investing the funds held by them in a fiduciary capacity in only the following securities:

1. Obligations of the Commonwealth, its agencies and political subdivisions.— The following obligations:

a. Bonds, notes, and other evidences of indebtedness of the Commonwealth, and securities unconditionally guaranteed as to the payment of principal and interest by the Commonwealth;

b. Revenue bonds, revenue notes, or other evidences of revenue indebtedness issued by agencies or authorities of the Commonwealth upon which there is no default; and

c. Bonds, notes, and other evidences of indebtedness of any county, city, town, district, authority, or other public body in the Commonwealth upon which there is no default provided that such bonds, notes, and other evidences of indebtedness are (i) direct legal obligations of the public body, for the payment of which the public body has pledged its full faith and credit and unlimited taxing power, or (ii) unconditionally guaranteed as to the payment of principal and interest by the public body.

In every case referred to in ~~subsection B-1~~ this subdivision, such bonds, notes, or other evidences of indebtedness shall be rated in one of the two highest rating categories of at least one national rating service and not rated in a category lower than the two highest rating categories of any national rating service. Determination of an obligation's rating in one of the two highest rating categories shall be made without regard to any refinement or gradation of such rating category by numerical or other modifier. In addition, the remaining maturity of such bonds, notes, or other evidences of indebtedness shall not be greater than five years.

2. Obligations of the United States.— Bonds, notes, and other obligations of the United States, and securities unconditionally guaranteed as to the payment of principal and interest by the United States with a remaining maturity not greater than five years, except in the case of savings bonds, which may have a longer maturity. The obligations enumerated in this subdivision may be held directly or in the form of repurchase agreements collateralized by such obligations or in the form of securities of any open-end or closed-end management type investment company or investment trust registered under the federal Investment Company Act of 1940, provided that the portfolio of such investment company or investment trust is limited to such obligations or repurchase agreements collateralized by such obligations, or securities of other such investment companies or investment trusts whose portfolios are so restricted.

3. Savings accounts, time deposits, or certificates of deposit.— Savings accounts, time deposits, or certificates of deposit in any bank, savings bank, trust company, savings and loan

association, or credit union authorized to do business ~~as such~~ in ~~this~~ the Commonwealth, but only to the extent that such accounts, deposits, or certificates are fully insured by the Federal Deposit Insurance Corporation or any successor federal agency or by the National Credit Union Share Insurance Fund or any successor to it.

C. Notwithstanding the provisions of this section, investments listed in § ~~26-40.2~~ 2.2-4519 as in effect prior to July 1, 1992, which continue to be held on July 1, 1992, shall be subject to § ~~26-45.3~~ 64.2-781, and any reference to the Virginia "legal list" or to § ~~26-40.2~~ 2.2-4519 or any predecessor statute contained in a will, trust, or other instrument that was irrevocable on June 30, 1992, shall be construed to refer to such section as in effect on June 30, 1992, or at such earlier time as may be specified in the controlling document, absent an expression of intent to the contrary contained in such document.

D. The permissible investments specified in subsection B are not exclusive and shall not be construed to limit a fiduciary's investments as permitted pursuant to ~~Article 2~~ the Uniform Prudent Investor Act (§ ~~26-45.3~~ 64.2-780 et seq.).

E. The presumption under subsection B shall apply to (i) a fiduciary only for a calendar year in which the value of the intangible personal property under the fiduciary's control or management does not exceed \$100,000 at the beginning of such year; or (ii) a fiduciary who, on motion for good cause shown, has obtained express authorization from the court having jurisdiction over ~~such~~ the fiduciary for the presumption under subsection B to apply.

Drafting note: Technical changes.

§ ~~26-40.1~~ 64.2-1503. Investment in bonds or other obligations issued, guaranteed, or assured by Inter-American Development Bank.

Executors, administrators, trustees, and other fiduciaries, both individual and corporate, ~~also~~ may invest the funds held by them in a fiduciary capacity in bonds and other obligations issued, guaranteed, or assured by the Inter-American Development Bank ~~(22 U.S.C. §§ 283-283i)~~, which are and shall be considered lawful investments.

Drafting note: Technical changes

§ ~~26-40.2~~ 64.2-1504. Investments in municipal bonds by banks or trust companies.

Subject to ~~Article 2~~ the Uniform Prudent Investor Act (§ ~~26-45.3~~ 64.2-780 et seq.) and the common law duties of a fiduciary, unless the governing instrument or a court order specifically directs otherwise, a bank or trust company serving as personal representative, trustee, guardian, agent, or in any other fiduciary capacity, may purchase during the existence of any underwriting or selling syndicate any state or municipal security otherwise authorized by this title in spite of the fact that ~~such~~ the fiduciary, or an affiliate thereof under common ownership, participates or has participated as a member of a syndicate underwriting such security; if the fiduciary purchases the security from another syndicate member or from an affiliate thereof; and not from itself or any of its affiliates.

Drafting note: Technical changes.

~~§ 26-41. Other values used in computations instead of par value of stock.~~

~~Whenever under the terms of § 26-40 the par value of a preference stock is required to be used in a computation, there shall be used instead of such par value the liquidating value of such preference stock in the case of involuntary liquidation, as prescribed by the terms of its issue, in the event that such liquidating value shall be greater than the par value of such preference stock; or in the event that the preference stock in question has no par value, then such liquidating value shall be used instead; or when such preference stock shall be one of no par value and one for which no such liquidating value shall have been so prescribed, then for the purposes of such computation the preference stock in question shall be deemed to have a value of \$100 per share.~~

Drafting note: Relocated to subsection B of proposed § 2.2-4519.

~~§ 26-42. Last fiscal statement to govern.~~

~~When any security provided for in § 26-40 is purchased by a fiduciary and at the time of such purchase the statement for the preceding fiscal year of the corporation issuing the security so being purchased has not been published and is therefore not available, the statement of such corporation for the fiscal year immediately prior to such preceding fiscal year shall be considered the statement for such preceding fiscal year and shall, for the purposes of § 26-40, have the same force and effect as the statement for the fiscal year preceding such purchase, provided the date of such purchase is not more than four months after the end of the last fiscal year of the corporation.~~

Drafting note: Relocated to subsection C of proposed § 2.2-4519.

~~§ 26-43. When pro forma fixed charges or dividend requirements may be used.~~

~~In testing a new issue of securities under the provisions of § 26-40, it shall be permissible, in determining the number of times that fixed charges or preferred dividend requirements have been earned, to use pro forma fixed charges or dividend requirements, provided the corporation or its corporate predecessor has been in existence for a period of not less than seven years.~~

Drafting note: Relocated to subsection D of proposed § 2.2-4519.

~~§ 26-44~~ 64.2-1505. Investments that cease to be eligible may be retained.

Investments made under the provisions of ~~§ 26-40 or § 26-40.01~~ § 64.2-1502, if in conformity with the requirements of ~~such that~~ section at the time ~~such the~~ investments were made, may be retained even though they cease to be eligible for purchase under the provisions of ~~such that~~ section, but shall be subject to the provisions of ~~Article 2 the Uniform Prudent Investor Act~~ (~~§ 26-45.3~~ 64.2-780 et seq.).

Drafting note: The provisions dealing with existing § 26-40 have been relocated to subsection E of proposed § 2.2-4519. There are also technical changes.

~~§ 26-44.1~~ 64.2-1506. Investment in mutual fund affiliated with fiduciary.

Unless prohibited or otherwise limited by the instrument under which a fiduciary, ~~including one of an agency account~~, is acting, including a fiduciary of an agency account, the fiduciary may invest in a mutual company, investment trust, or investment company, sponsored,

advised, or sold by ~~it~~ the fiduciary or an affiliate, if ~~such~~ the investment is otherwise appropriate as an investment. In such case, the fiduciary shall not take a commission as fiduciary to the extent ~~it that the fiduciary~~, or its ~~affiliates receive~~ affiliate or division, receive compensation for services relating to advice or services to such mutual fund, investment trust, or investment company, unless (i) otherwise expressly agreed in writing by the creator of the trust or affected beneficiary or (ii) the fiduciary discloses by statement, prospectus, or otherwise, to all current income beneficiaries of an account the rate, formula, or other method by which the compensation, received or to be received by the fiduciary or affiliate or division of the fiduciary for such advice and services, is determined. In such case, the compensation for such advice and services shall not exceed the customary or prevailing amount that is charged by a fiduciary, or its affiliate or division, for providing comparable advice and services for the benefit of nonfiduciary accounts.

Drafting note: Technical changes.

~~§ 26-45.~~

Drafting note: Repealed by Acts 1977, c. 152.

~~§ 26-45.1.~~

Drafting note: Repealed by Acts 1999, c. 772.