REPORT OF PORT OF VIRGINIA
STRUCTURAL REVIEW COMMITTEE

Revised by Virginia Port Authority Board of Commissioners - January 24, 2006

On May 24, 2005, the Virginia Port Authority ("VPA") established a working group of six individuals ("Working Group") to evaluate the efficacy of the relationship between the VPA and the Virginia International Terminals, Inc. ("VIT"). The Working Group consisted of both current and former members of VPA and VIT. The VPA specifically asked the Working Group to determine if the VPA receives adequate information to fulfill its statutory and fiduciary responsibilities with regard to VIT. Additionally, the Working Group was tasked with evaluating the confidential nature of certain information provided to VPA by VIT.

EXECUTIVE SUMMARY

The Working Group met five times and reviewed substantial information regarding the relationship between VIT and VPA. The Working Group heard presentations from a wide range of individuals regarding the history of VIT and its relationship with VPA. A list of the presenters is attached to this report. The minutes of the meetings are posted to the VPA website. The clear conclusion from the available information was that the current structure has served and continues to serve Virginia well. VIT has facilitated and played a significant part in the success of Virginia's ports.

The Working Group, through its deliberations, confirmed that VIT is a private entity. As a private entity it is not subject to rules and regulations that apply to agencies of the Commonwealth, including, but not limited to, the Freedom of Information Act (FOIA).

The Working Group heard compelling evidence that certain information provided by VIT to VPA needs to remain confidential. The Working Group has no desire to undermine or interfere with the successful operation of VIT. VIT currently provides substantial budget and proprietary information to VPA. The Working Group is not aware of any information that has been withheld by VIT. Yet, under current law, VPA is not

able to discuss any of the confidential and proprietary VIT information it receives in a closed session. The Working Group believes that the ability of the VPA Board to discuss this VIT information in a closed session is important in order that the VPA Board exercises its proper oversight. A closed session protects VIT's confidential information while allowing VPA Commissioners a better forum in which to evaluate VIT's performance. The Working Group recommends that VPA seeks legislative changes to allow it to discuss the confidential and proprietary information provided by VIT in a closed session. Furthermore, the Working Group recommends that the VPA and VIT Boards meet at least twice a year in a closed session to discuss budget and operational issues.

The Working Group had differing opinions regarding whether the compensation paid to certain VIT employees should be disclosed. The revelation of salaries for a small number of VIT employees would not seem to provide a competitive disadvantage to VIT. Yet, the Working Group understands that private companies that are not publicly traded have no obligation to reveal salary information. The Working Group does not desire to place VIT in a competitive disadvantage to other ports. Furthermore, the Working Group does not desire to blur the legal distinctions between VIT and VPA. Finally, the Working Group acknowledges that VPA does not have the legal authority to release information regarding compensation paid to VIT management. Yet, the Working Group recognizes the value of transparency with regard to compensation paid to specific VIT employees. While some members expressed concern that the revelation of compensation would have unintended consequences and do not personally support disclosure of the compensation, the Working Group suggests that VIT disclose publicly the compensation it pays to its three highest compensated individuals. The disclosure should be made in conjunction with the submission of VIT's annual budget.

Furthermore, VIT and VPA should continue their current actual structural separation and continue to operate at arm’s length. The Working Group recommends that all material agreements between VIT and VPA be in writing, including, but not limited to, the current lease agreement.

The Working Group recognizes that the relationship between VIT and VPA is critical to the future success of Virginia's ports. The Working Group understands the need to keep VIT operating as a separate entity. Furthermore, the Working Group anticipates that the relationship between VIT and VPA should be reviewed on a regular basis. Consequently, the Working Group recommends that the VPA establish a permanent Committee that will convene approximately every three years, or as appropriate, to review the relationship between VIT and VPA and make recommendations to VPA.

I. Success of the Current Structure

The Commonwealth created VIT as a non-stock, non-profit corporation. The structure was deliberate and reflected input from Virginia's Attorney General and key legislators. The legislator's intent was to create a private entity that could operate in a competitive business environment. VIT was, also, created to allow it to negotiate and be bound by agreements with organized labor. The Commonwealth, then and now, could not enter into contracts with organized labor. However, virtually all east coast and gulf coast ports are subject to a master collective bargaining contract with the International Longshoreman's Association (ILA). Some shipping lines are obligated to only use ports that employ ILA labor. Consequently, the creation of VIT or a similar entity was critical for the viability and operation of Virginia's ports.

VIT also created efficiencies in the operation of the ports. Prior to the creation of VIT, the various ports were operated by separate terminal operators. Each of the terminals aggressively competed against each other for the available business. VIT was able to eliminate duplicate positions and focus more resources on competing with other port communities instead of competing with other Virginia ports.

The relationship between VPA and VIT is defined by a service agreement. VIT generates revenues from the operation of Virginia's ports, and such revenue is first applied to cover VIT's operating expenses. The revenue remaining after VIT pays its expenses is returned to VPA. VPA uses the funds to issue bonds to improve Virginia's

port facilities and to fund its operations. The structure has enabled VPA to essentially fund its own operations from port revenue.

The Working Group recognizes the success of the existing structure. Since unification of the ports, Virginia has grown into the third largest port on the eastern seaboard. In the near future, Virginia has the potential of becoming the largest port in terms of volume on the East Coast. Since the incorporation of VIT, the port has increased its cargo handling from 289,000 TEUs to 1.9 million TEUs. Additionally, gross terminal revenues have increased from $25.4 million dollars in 1982 to $204.9 million dollars in 2005. In October 2005, VIT set a record for the number of TEUs handled by the Port in a single month.

The success of VIT has enabled VPA to significantly reduce the appropriations it receives from the Commonwealth's general fund. Currently, the only appropriation from the Commonwealth's general fund to the VPA is for dredging projects. Additionally, VPA has reduced the number of its employees from 172 in 1982 to 145 in 2005. The revenue from VIT has allowed the VPA to modernize its facilities and equip Virginia's ports to aggressively compete with other terminals.

The Working Group recognizes that these successes were the result of an efficient cooperative and effective operation of the Port facilities. The Working Group acknowledges that the leadership at VPA and VIT has been a significant factor in the Port's success. The solid reputation of VPA has induced shipping lines to enter into long-term contracts with VIT. The Working Group has no compelling reason to recommend any significant changes in the current structure of VIT and VPA. Instead, the Working Group recommends that VPA take whatever steps may be necessary to preserve VIT as a private entity.

II. The Relationship Between VIT and VPA

The Working Group recognizes the importance of preserving VIT and VPA as independent entities. VIT competes with private terminal operators from all over the world. The competitive environment requires VIT to operate as a private business. VIT

must be separate from VPA to ensure that VIT can negotiate with organized labor. The Port Authority Bonds have been issued on the premise that VIT and VPA are separate entities. Certain laws and regulations that protect and provide remedies to terminal employees are provided only to the private sector and not to governmental agencies. The Working Group, therefore, recommends that VPA take no action that would jeopardize the private status of VIT.

The Working Group also recognizes that VPA and VIT must work closely together. The leadership of VPA and VIT must embrace a common vision of the Port's future. VIT must operate efficiently to generate the revenue necessary for the Port's future growth. The Working Group recognizes that the nature of the interaction between VPA and VIT could blur lines that separate VIT and VPA's operations. The tension between a close working relationship and the need to operate as separate entities creates some legal risks.

VIT is a private corporation. As a private corporation it is not subject to laws and regulations that apply to agencies of the State. For example, VIT is not required to comply with state procurement or disclosure laws. VPA, however, exercises considerable oversight with regard to VIT's corporate activity. The Executive Director of the VPA is a permanent member of VIT's Board. The Board of Commissioners of the VPA has the authority to remove and replace a member of the Board at any time. VIT submits both its budget and audited financial statements to VPA for its review.

The formal relationship between VIT and VPA is governed by a written agreement known as a Service Agreement. The VPA and VIT periodically renegotiates the terms and conditions of the Service Agreement. The latest version of the Service Agreement was executed on August 28, 2003. The Service Agreement provides generally that VIT shall have primary responsibility for the management, operation and conduct of the business of the public terminals of Virginia. Furthermore, VIT is responsible for the maintenance of the terminals. As part of its responsibilities as a terminal operator, VIT is responsible for obtaining insurance coverage for the terminals. VIT publishes a tariff which describes the rules and regulations applicable to the receipt,

storage and transit of cargo in Virginia's terminals. The tariff also describes the cost of VIT's services. Alternatively, VPA is responsible for the engineering, design and construction of the terminal's infrastructure. VPA is also tasked with promoting and marketing the Port worldwide and providing security to all of Virginia's terminals.

VIT has historically operated independently of VPA. VIT negotiates contracts with its major customers and enters into long term contracts with carriers. VIT negotiates with organized labor as part of a private multi employer group. VIT has the authority to sue and be sued. VIT hires, fires and promotes its employees. VIT institutes, funds and provides for the management of its employee pension, health, and benefit plans.

The Working Group does not believe an alternate structure will significantly enhance the efficiency of the Port's operations. The existing structure allows VIT to effectively compete with other terminals. VIT can respond swiftly to trends in the terminal and port community. Consequently, the Working Group has no recommendation to alter the basic structure of VIT and VPA.

III. Legal Concerns Regarding the Relationship Between VPA and VIT

The operation of the terminals and administration of the Service Agreement requires significant collaboration between VPA and VIT. The common threads that connect VPA and VIT also create potential threats to VIT's private status.

A good example of this concern is reflected in the opinion written by Judge Doumar in the case styled Artist v. Virginia International Terminals, Inc., 679 F. Supp. 587 (E.D. Va. 1988). Artist involved a suit filed by an employee of a trucking company. VIT had banned the employee from entering VIT terminals. The banned employee filed an action against VIT alleging a violation of the Civil Rights Act, 42 U. S. C. § 1983. The lawsuit alleged that VIT, by denying the employee access, had deprived the employee of his right to "property" and "liberty" without due process.

VIT argued that it was not covered by § 1983 since it was a private corporation that was not acting under "color of state law." Alternatively, VIT argued that if the Court

found it acted as a public entity then it could not be sued as a result of immunity provided to public entities under the Eleventh Amendment. The Artist Court ruled that VIT had a sufficient connection with a state agency to bring VIT within the coverage of §1983. Yet, the Court determined that VIT was sufficiently independent of the Commonwealth so as to be unable to assert the defense of sovereign immunity. The critical factors considered by the Artist Court in holding that VIT was not a public entity for purposes of the Eleventh Amendment was the fact that VIT did not receive taxpayer dollars, that the Commonwealth would not be liable for any judgment rendered against VIT, and that Virginia, by its Attorney General's opinion, had determined that VIT was not an agency of the Commonwealth.

The determination that VIT had a "symbiotic" relationship with VPA sufficient to sustain a § 1983 action against VIT reflects other concerns. While the Artist decision may not be controlling for other controversies, it does establish that the close relationship between VIT and VPA results in a higher level of legal scrutiny. If a Court disregards the private status of VIT, the negative impact on Virginia's ports would be significant. While a court does not lightly disregard a properly incorporated entity, a court's analysis is influenced by the facts presented as evidence. Other jurisdictions have been willing to characterize private entities as essentially public agencies for certain purposes. Consequently, VPA and VIT must be diligent in protecting VIT's private status.

In certain instances, the courts may pierce a corporation to render a judgment or remedy against its stockholders. The factors analyzed by the courts in "piercing the corporate veil" are instructive. The courts scrutinize the level of control that one entity asserts over another. If one entity is completely controlled by another entity or corporate formalities are ignored, then a risk exists that the corporate status of the entities could be ignored. While the National Labor Relations Act (NRLA) does not apply to VPA, some of the National Labor Relations Board (NLRB) decisions offer some guidance as to when corporate status would be ignored in the context of the enforcement of collective bargaining agreements. The "single employer" doctrine allows the NLRB to enforce an agreement between one party and a union against a separate and distinct

legal entity. The criteria used by the NLRB in determining single employer status are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. The current structure of VPA and VIT would not likely trigger the application of the single employer doctrine. Additionally, the mere request for additional information from VIT should not trigger single employer status. Furthermore, the NLRB would have no incentive to apply the single employer doctrine to require VPA to honor labor agreements entered into by VIT. VPA is clearly not subject to the NLRA. Yet, the Working Group recognizes that any reforms that result in the combination of the operations of VIT and VPA, that consolidates management, that centralizes labor relations or consolidates ownership will potentially risk VIT's private status. Furthermore, the Working Group recognizes that the NLRB decisions provide, by analogy, guidance if VIT's private status is challenged and a reading to craft any structural changes.

The Working Group's concern for the integrity of VIT's private status requires caution in recommending any change that creates additional consolidation. Instead, the Working Group recommends that VIT and VPA continue to operate, to the extent possible, at an arm's length basis. The Working Group suggests that, at a minimum, the lease agreement between VIT and VPA be reduced to writing. Furthermore, the Working Group recommends that VPA and/or VIT review the legal implications of any structural changes or consolidations recommended in the future.

IV. Public Disclosure of VIT Information

The Working Group is mindful that the Commissioners of the VPA have a duty to oversee the operation of VIT on behalf of the Commonwealth. The Commissioners appoint and replace the VIT directors. Consequently, its primary control is to appoint VIT directors who diligently protect Virginia's interests in its terminals. The Working Group has no concerns that the Commissioners have not appointed qualified directors. In fact, several members of the Working Group have served as VIT directors. Furthermore, the Working Group is not aware of any information that has not been provided to the VPA, either as part of the budget submission or as the result of a

specific request. The primary challenge is that the current statutes prevent VPA from reviewing and discussing the information submitted by VIT in a closed session. Consequently, VPA is unable to have candid discussion with VIT about some of the information that is shared.

The current law reflects an appropriate concern for maintaining the confidentiality of VIT's data and operating information. Specifically, Va. Code § 62.1-132.4. states, that "notwithstanding any provision of law to the contrary, the Authority (VPA) shall not disclose proprietary information and data furnished to it in confidence, including, but not limited to ship tally sheets, ship manifests, information relating to tonnages and cargoes, information and annual budgets furnished to it by any entity, including but not limited to any entity operating a terminal on behalf of the Virginia Port Authority." Furthermore, the Virginia Freedom of Information Act clearly states that the VPA is not required to disclose information it receives from VIT under § 62.1-132. (See Va. Code § 2.2-3705.6) While the written data submitted by VIT is protected from disclosure, meetings in which the data is discussed must, under current law, be held in public.

The Working Group reviewed concerns that VIT, due to its relationship with VPA, would be considered a public agency for purposes of FOIA. The law, however, clearly excludes VIT from FOIA's provisions. Furthermore, a number of Attorney General Opinions have stated that VIT is a private entity and is not subject to, *inter alia*, the Conflict of Interest Act and the Virginia Supplemental Retirement System. The logic in each of these opinions, along with the clear statement of the law, supports a finding that VIT is excluded from FOIA. The Virginia Supreme Court has also ruled that RF&P Corp., an entity with some similarity to VIT, was not subject to FOIA. See in RF&P Corp. v. Little, 247 Va. 309 (1994). The Little Court stated that a corporate entity can not be disregarded unless a party proves that the corporation was the "alter ego, alias, stooge, or dummy of the individuals sought to be held personally accountable." The concept used by the Little Court is similar to the piercing the corporate veil doctrine discussed above. The Court was not concerned that the Virginia Retirement System ("VRS"), a public entity subject to FOIA, controlled the RF&P Corporation through its ability to appoint RF&P's directors.

Notwithstanding that VIT has no obligation to disclose any information to the public, some members of the Working Group felt that the disclosure of the compensation paid to certain VIT managers would not undermine VIT's mission. Compensation to key managers is disclosed by other not for profit entities and by publicly traded companies. Yet, no member of the Working Group wanted VIT or VPA to take any action that would jeopardize VIT's private status. Furthermore, no member of the Working Group desired VIT to disclose any information that would create a competitive disadvantage to Virginia's ports. Furthermore, the Working Group recognizes that VPA, under current law, is precluded from disclosing any information provided by VIT in its budget. The compensation paid to VIT employees is budgetary information.

The Working Group recommends operating within the current structure to seek disclosure of the compensation paid to certain VIT employees. The Working Group would suggest that on an annual basis that VIT voluntarily disclose the salaries of the three highest compensated individuals at VIT. The disclosure would be made in conjunction with the submission of its annual budget. VIT should also provide VPA any material that supports the compensation of the VIT management. The disclosure of the supporting material would be submitted to VPA in a manner that would not subject it to disclosure under FOIA. VIT and VPA would reconsider any disclosure of salary information if compelling evidence suggests that the disclosure would damage VIT's private status. Furthermore, the Working Group recommends that the VPA seek an amendment to FOIA to expressly allow it to discuss information provided by VIT in a closed session. The amendment would be in a form comparable to the recommendation attached to this report.

V. Summary

The Working Group recognizes that the current relationship between VPA and VIT has played a critical role in the success of the Port. The private status of VIT is important and should be safeguarded. As a private company, VIT does not need to disclose any information under FOIA. Any disclosures would be voluntary or required

by agreement. Also, VIT can enter into contracts with organized labor. VIT's private status can be challenged if VIT and VPA do not operate at arm's length or do not operate separately from VPA. Any restructuring should only be recommended after a careful analysis of the restructuring's impact on VIT's private status.

VPA does not have the authority to disclose any information about VIT's budget, including the compensation paid to VIT's managers. Based on the current structure and law, the disclosure of certain information regarding VIT's salaries should not impact VIT's private status. Furthermore, the disclosure of the compensation would instill greater public confidence in VIT.

As a result of the Working Groups' deliberations, it would recommend the following, to-wit:

1. The submission of the legislation necessary to allow VPA to discuss information submitted by VIT in a closed session.

2. Identify all relationships between VIT and VPA that need to be in writing, including, but not limited to, the lease agreement between VIT and VPA.

3. With the understanding that some members of the Working Group do not agree that the compensation paid to VIT employees should be disclosed, it requests that VIT disclose publicly on an annual basis the salaries of the three highest compensated individuals at VIT. The disclosure would be made as part of VIT's annual submission of budget information to VPA. Furthermore, the information that supports the compensation recommendations should also be provided to VPA in a manner that it will not need to be disclosed under FOIA.

4. The Boards of VPA and VIT should meet at least twice a year in closed sessions to discuss budget and operational issues.

5. That a new Working Committee convene every third year, or as appropriate, to evaluate the relationship between VIT and VPA and recommend any additional changes that may be warranted.

6. That VPA reaffirm the importance of retaining the private status of VIT and states that VIT is and shall remain a private non-stock, non-profit corporation and any efforts to undermine the private status of VIT should be vigorously resisted.

Individuals Who Presented Information to
The Port of Virginia Structural Review Committee

The Honorable A. Linwood Holton, former Governor of Virginia
J. Robert Bray, Executive Director
Thomas D. Capozzi, Senior Managing Director of Marketing Services
B. W. (Bill) Franks, Division President, Lydall Logistics Management
Edward L. Brown, Sr., International Vice President, International Longshoremen's Association (ILA)
Arthur W. Moye, Jr., Executive Vice President, Hampton Roads Maritime Association
Roger Geisinger, President, Hampton Roads Shipping Association and Chief ILA Negotiator
John M. Ryan, Vandeventer Black, LLP (VIT Corporate Counsel)
R. Kenneth Johns, Sr., R. K. Johns & Associates
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Richard L. Walton, Jr., Senior Assistant Attorney General and Section Chief for Transportation
Marvin S. Friedberg, Vice President of VIT Board of Directors (and incoming President 2006)

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