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HOUSE BILL NO. 2387

Offered January 10, 2001

Prefiled January 10, 2001

A BILL to amend and reenact §§ 59.1-198, 59.1-200, 59.1-501.4, 59.1-501.5, 59.1-501.9, 59.1-501.10, and 59.1-502.12 of the Code of Virginia, relating to the Uniform Computer Information Transactions Act and consumer protection.

 Patron—Clement

Referred to Committee on Science and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-198, 59.1-200, 59.1-501.4, 59.1-501.5, 59.1-501.9, 59.1-501.10, and 59.1-502.12 of the Code of Virginia are amended and reenacted as follows:

§ 59.1-198. Definitions.

As used in this chapter:

"Business opportunity" means the sale of any products, equipment, supplies or services which are sold to an individual for the purpose of enabling such individual to start a business to be operated out of his residence, but does not include a business opportunity which is subject to the Business Opportunity Sales Act, Chapter 21 (§ 59.1-262 et seq.) of this title.

"Consumer transaction" means:

1. The advertisement, sale, lease or offering for sale or lease, of goods or services to be used primarily for personal, family or household purposes;

2. Transactions involving the advertisement, offer or sale to an individual of a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged;

3. Transactions involving the advertisement, offer or sale to an individual of goods or services relating to the individual's finding or obtaining employment; and

4. A layaway agreement, whereby part or all of the price of goods is payable in one or more payments subsequent to the making of the layaway agreement and the supplier retains possession of the goods and bears the risk of their loss or damage until the goods are paid in full according to the layaway agreement.

"Goods" means all real, personal or mixed property, *that is* tangible or intangible. *For purposes of this chapter, "intangible" includes but is not limited to "computer information" and "informational rights" in computer information as those terms are defined in § 59.1-501.2.*

"Person" means any natural person, corporation, trust, partnership, association and any other legal entity.

"Services" includes but shall not be limited to work (i) performed in the business or occupation of the supplier or (ii) performed for the supplier by an agent whose charges or costs for such work are transferred by the supplier to the consumer or purchaser as an element of the consumer transaction.

"Supplier" means a seller or lessor who advertises, solicits or engages in consumer transactions, or a manufacturer or distributor who advertises and sells or leases goods or services to be resold or leased by other persons in consumer transactions.

§ 59.1-200. Prohibited practices.

A. The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

1. Misrepresenting goods or services as those of another;

2. Misrepresenting the source, sponsorship, approval, or certification of goods or services;

3. Misrepresenting the affiliation, connection or association of the supplier, or of the goods or services, with another;

4. Misrepresenting geographic origin in connection with goods or services;

5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits;

6. Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;

7. Advertising or offering for sale goods which are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or which are "seconds," irregulars, imperfects, or "not first class," without clearly and unequivocally indicating in the advertisement or offer for sale that the goods are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are "seconds," irregulars, imperfects or "not first class";

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59 8. Advertising goods or services with intent not to sell them as advertised, or with intent not to sell
60 at the price or upon the terms advertised.

61 In any action brought under this subdivision, the refusal by any person, or any employee, agent, or
62 servant thereof, to sell any goods or services advertised or offered for sale at the price or upon the terms
63 advertised or offered, shall be prima facie evidence of a violation of this subdivision. This paragraph
64 shall not apply when it is clearly and conspicuously stated in the advertisement or offer by which such
65 goods or services are advertised or offered for sale, that the supplier or offeror has a limited quantity or
66 amount of such goods or services for sale, and the supplier or offeror at the time of such advertisement
67 or offer did in fact have or reasonably expected to have at least such quantity or amount for sale;

68 9. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts
69 of price reductions;

70 10. Misrepresenting that repairs, alterations, modifications, or services have been performed or parts
71 installed;

72 11. Misrepresenting by the use of any written or documentary material which appears to be an
73 invoice or bill for merchandise or services previously ordered;

74 12. Notwithstanding any other provision of law, using in any manner the words "wholesale,"
75 "wholesaler," "factory," or "manufacturer" in the supplier's name, or to describe the nature of the
76 supplier's business, unless the supplier is actually engaged primarily in selling at wholesale or in
77 manufacturing the goods or services advertised or offered for sale;

78 13. Using in any contract or lease any liquidated damage clause, penalty clause, or waiver of
79 defense, or attempting to collect any liquidated damages or penalties under any clause, waiver, damages,
80 or penalties which are void or unenforceable under any otherwise applicable laws of this
81 Commonwealth, or under federal statutes or regulations;

82 14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection
83 with a consumer transaction;

84 15. Violating any provision of §§ 3.1-796.78, 3.1-796.79, or § 3.1-796.82, relating to the sale of
85 certain animals by pet dealers which is described in such sections, is a violation of this chapter;

86 16. Failing to disclose all conditions, charges, or fees relating to:

87 a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign
88 attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be
89 readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does
90 not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of
91 this subdivision shall not apply to any *transaction involving an Internet or similar electronic site or to*
92 *any* retail merchant who has a policy of providing, for a period of not less than twenty days after date
93 of purchase, a cash refund or credit to the purchaser's credit card account for the return of defective,
94 unused, or undamaged merchandise upon presentation of proof of purchase. In the case of merchandise
95 paid for by check, the purchase shall be treated as a cash purchase and any refund may be delayed for a
96 period of ten banking days to allow for the check to clear. This subdivision does not apply to sale
97 merchandise which is obviously distressed, out of date, post season, or otherwise reduced for clearance;
98 nor does this subdivision apply to special order purchases where the purchaser has requested the supplier
99 to order merchandise of a specific or unusual size, color, or brand not ordinarily carried in the store or
100 the store's catalog; nor shall this subdivision apply in connection with a transaction for the sale or lease
101 of motor vehicles, farm tractors, or motorcycles as defined in § 46.2-100;

102 b. A layaway agreement. Such disclosure shall be furnished to the consumer (i) in writing at the time
103 of the layaway agreement, or (ii) by means of a sign placed in a conspicuous public area of the
104 premises of the supplier, so as to be readily noticeable and readable by the consumer, or (iii) on the bill
105 of sale. Disclosure shall include the conditions, charges, or fees in the event that a consumer breaches
106 the agreement;

107 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess
108 of five dollars (i) on an account maintained by the supplier and (ii) resulting from such consumer's
109 overpayment on such account. Suppliers shall give consumers written notice of such credit balances
110 within sixty days of receiving overpayments. If the credit balance information is incorporated into
111 statements of account furnished consumers by suppliers within such sixty-day period, no separate or
112 additional notice is required;

113 17. If a supplier enters into a written agreement with a consumer to resolve a dispute which arises in
114 connection with a consumer transaction, failing to adhere to the terms and conditions of such an
115 agreement;

116 18. Violating any provision of the Virginia Health Spa Act, Chapter 24 (§ 59.1-294 et seq.) of this
117 title;

118 19. Violating any provision of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et
119 seq.) of this title;

120 20. Violating any provision of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et

seq.) of this title;

21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4 (§ 59.1-207.17 et seq.) of this title;

22. Violating any provision of the Prizes and Gifts Act, Chapter 31 (§ 59.1-415 et seq.) of this title;

23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32 (§ 59.1-424 et seq.) of this title;

24. Violating any provision of § 54.1-1505;

25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter 17.6 (§ 59.1-207.34 et seq.) of this title;

26. Violating any provision of § 3.1-949.1, relating to the pricing of merchandise;

27. Violating any provision of the Pay-Per-Call Services Act, Chapter 33 (§ 59.1-429 et seq.) of this title;

28. Violating any provision of the Extended Service Contract Act, Chapter 34 (§ 59.1-435 et seq.) of this title;

29. Violating any provision of the Virginia Membership Camping Act, Chapter 25 (§ 59.1-311 et seq.) of this title;

30. Violating any provision of the Comparison Price Advertising Act, Chapter 17.7 (§ 59.1-207.40 et seq.) of this title;

31. Violating any provision of the Virginia Travel Club Act, Chapter 36 (§ 59.1-445 et seq.) of this title;

32. Violating any provision of §§ 46.2-1231 and 46.2-1233.1;

33. Violating any provision of Chapter 40 (§ 54.1-4000 et seq.) of Title 54.1; and

34. Violating any provision of Chapter 10.1 (§ 58.1-1031 et seq.) of Title 58.1.

B. Nothing in this section shall be construed to invalidate or make unenforceable any contract or lease solely by reason of the failure of such contract or lease to comply with any other law of the Commonwealth or any federal statute or regulation, to the extent such other law, statute or regulation provides that a violation of such law, statute or regulation shall not invalidate or make unenforceable such contract or lease.

§ 59.1-501.4. (Effective July 1, 2001) Mixed transactions; agreement to opt-in or opt-out.

The parties may agree that this chapter, including contract-formation rules, governs the transaction, in whole or part, or that other law governs the transaction and this chapter does not apply, if a material part of the subject matter to which the agreement applies is computer information or informational rights in it that are within the scope of this chapter, or is subject matter within this chapter under § 59.1-501.3 (b), or is subject matter excluded by § 59.1—501.3 (d) (1) or § 59.1-501.3 (d) (2). However, any agreement to do so is subject to the following rules:

(1) An agreement that this chapter governs a transaction does not alter the applicability of any statute, administrative rule, regulation, or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the statute, administrative rule, regulation, or procedure, including the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.) and other consumer protection statutes, administrative rules, or regulations. In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form.

(2) An agreement that this chapter does not govern a transaction:

(A) does not alter the applicability of § 59.1-502.14 or § 59.1-508.16; and

(B) in a mass-market transaction, does not alter the applicability under this chapter of the doctrine of unconscionability or fundamental public policy or the obligation of good faith.

(3) In a mass-market transaction, any term under this section which changes the extent to which this chapter governs the transaction must be conspicuous.

(4) A copy of a computer program contained in and sold or leased as part of goods and which is excluded from this chapter by § 59.1-501.3 (b) (1) cannot provide the basis for an agreement under this section that this chapter governs the transaction.

§ 59.1-501.5. (Effective July 1, 2001) Relation to federal law; fundamental public policy; transactions subject to other state law.

(a) A provision of this chapter which is preempted by federal law is unenforceable to the extent of the preemption.

(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

(c) Except as otherwise provided in subsection (d), if this chapter or a term of a contract under this chapter conflicts with a consumer protection statute, administrative rule, or regulation, including but not

182 *limited to* the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.), the Virginia Consumer
183 Protection Act, *consumer protection statute, administrative rule or regulation* governs.

184 (d) If a law of the Commonwealth in effect on the effective date of this chapter applies to a
185 transaction governed by this chapter, the following rules apply:

186 (1) A requirement that a term, waiver, notice, or disclaimer be in a writing is satisfied by a record.

187 (2) A requirement that a record, writing, or term be signed is satisfied by an authentication.

188 (3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous
189 under this chapter.

190 (4) A requirement of consent or agreement to a term is satisfied by a manifestation of assent to the
191 term in accordance with this chapter.

192 (e) If this chapter conflicts with Chapter 39 (§ 59.1-469 et seq.) of this title, Chapter 39 governs.

193 § 59.1-501.9. (Effective July 1, 2001) Choice of law.

194 (a) The parties in their agreement may choose the applicable law. However, the choice is not
195 enforceable in a consumer contract to the extent it would vary a *statute, administrative rule, or*
196 *regulation* that may not be varied by agreement under the law of Virginia.

197 (b) In the absence of an enforceable agreement on choice of law, the contract is governed by the law
198 of Virginia.

199 § 59.1-501.10. (Effective July 1, 2001) Contractual choice of forum.

200 (a) The parties in their agreement may choose an exclusive judicial forum unless the choice is
201 unreasonable and unjust.

202 (b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly so
203 provides, *and in a consumer contract, conspicuously so provides*.

204 § 59.1-502.12. (Effective July 1, 2001) Efficacy and commercial reasonableness of attribution
205 procedure.

206 The efficacy, including the commercial reasonableness, of an attribution procedure is determined by
207 the court. In making this determination, the following rules apply:

208 (1) An attribution procedure established by law is effective for transactions within the coverage of
209 the statute, ~~or~~ *administrative rule, or regulation*.

210 (2) Except as otherwise provided in paragraph (1), commercial reasonableness and effectiveness is
211 determined in light of the purposes of the procedure and the commercial circumstances at the time the
212 parties agreed to or adopted the procedure.

213 (3) An attribution procedure may use any security device or method that is commercially reasonable
214 under the circumstances.