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HOUSE BILL NO. 408**AMENDMENT IN THE NATURE OF A SUBSTITUTE**(Proposed by the House Committee on General Laws
on February 8, 2008)

(Patrons Prior to Substitute—Delegates Oder and Iaquinto [HB 947])

A BILL to amend and reenact §§ 59.1-201, 59.1-203, 59.1-205, 59.1-206, and 59.1-207 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 59.1-200.1, relating to the Virginia Consumer Protection Act; prohibited practices involving residential real property.

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-201, 59.1-203, 59.1-205, 59.1-206, and 59.1-207 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 59.1-200.1 as follows:

§ 59.1-200.1. Prohibited practices; foreclosure rescue.

A. In addition to the provisions of § 59.1-200, in a consumer transaction involving residential real property owned and occupied as the primary dwelling unit of the owner, it is hereby declared unlawful to enter into an agreement with the owner of such residential real property to provide services to avoid foreclosure with the intent to defraud if:

1. The provider of such services is to be paid a fee prior to the settlement on a sale of such residential real property, regardless of whether the fee is charged or collected as part of the transaction involving such residential real property;

2. The provider of such services (i) fails to make payments under the mortgage or deed of trust that is a lien on such residential real property as the payments become due, regardless of whether the purchaser is obligated on the loan, and (ii) applies the application of rents from such dwellings for his own use;

3. The provider of such services represents to the seller of such residential real property that the seller has an option to repurchase such residential real property, after the provider of such services takes legal or equitable title to such residential real property; or

4. The provider advertises using terms like "foreclosure rescue" or "save your house from foreclosure," or offers such services as are prohibited by this section.

B. This section shall not apply to any mortgage lender or servicer regularly engaged in making or servicing mortgage loans that is subject to the supervisory authority of the State Corporation Commission, a comparable regulatory authority of another state, or a federal banking agency.

C. Any provision in an agreement with the owner of such residential real property that requires the owner to submit to mandatory arbitration shall be null and void, and notwithstanding any such provisions, the owner of such residential real property shall have the rights and remedies under this chapter.

§ 59.1-201. Civil investigative orders.

A. Whenever the attorney for the Commonwealth or the attorney for a county, city, or town has reasonable cause to believe that any person has engaged in, or is engaging in, or is about to engage in, any violation of § 59.1-200 or 59.1-200.1, the attorney for the Commonwealth or the attorney for a county, city, or town if, after making a good faith effort to obtain such information, is unable to obtain the data and information necessary to determine whether such violation has occurred, or that it is impractical for him to do so, he may apply to the circuit court within whose jurisdiction the person having information resides, or has its principal place of business, for an investigative order requiring such person to furnish to the attorney for the Commonwealth or attorney for a county, city, or town such data and information as is relevant to the subject matter of the investigation.

B. The circuit courts are empowered to issue investigative orders, authorizing discovery by the same methods and procedures as set forth for civil actions in the Rules of the Supreme Court of Virginia, in connection with investigations of violations of § 59.1-200 or 59.1-200.1 by the attorney for the Commonwealth or the attorney for a county, city, or town. An application for an investigative order shall identify:

1. The specific act or practice alleged to be in violation of § 59.1-200 or 59.1-200.1;

2. The grounds which shall demonstrate reasonable cause to believe that a violation of § 59.1-200 or 59.1-200.1 may have occurred, may be occurring or may be about to occur;

3. The category or class of data or information requested in the investigative order; and

4. The reasons why the attorney for the Commonwealth or attorney for a county, city, or town is unable to obtain such data and information, or the reason why it is impractical to do so, without a court order.

C. Within twenty-one days after the service upon a person of an investigative order, or at any time

60 before the return date specified in such order, whichever is later, such person may file a motion to
61 modify or set aside such investigative order or to seek a protective order as provided by the Rules of the
62 Supreme Court of Virginia. Such motion shall specify the grounds for modifying or setting aside the
63 order, and may be based upon the failure of the application or the order to comply with the
64 requirements of this section, or upon any constitutional or other legal basis or privilege of such person.

65 D. Where the information requested by an investigative order may be derived or ascertained from the
66 business records of the person upon whom the order is served, or from an examination, audit or
67 inspection of such business records, or from a compilation, abstract or summary thereof, and the burden
68 of deriving or ascertaining the information is substantially the same for the attorney for the
69 Commonwealth or attorney for a county, city, or town as for the person from whom such information is
70 requested, it shall be sufficient for that person to specify the records from which the requested
71 information may be derived or ascertained, and to afford the attorney for the Commonwealth or attorney
72 for the county, city, or town reasonable opportunity to examine, audit or inspect such records and to
73 make copies, compilations, abstracts or summaries thereof.

74 E. It shall be the duty of the attorney for the Commonwealth or attorney for a county, city, or town,
75 his assistants, employees and agents, to maintain the secrecy of all evidence, documents, data and
76 information obtained through the use of investigative orders or obtained as a result of the voluntary act
77 of the person under investigation and it shall be unlawful for any person participating in such
78 investigations to disclose to any other person not participating in such investigation any information so
79 obtained. Any person violating this subsection shall be guilty of a Class 2 misdemeanor and shall be
80 punished in accordance with § 18.2-11. Notwithstanding the foregoing, this section shall not preclude the
81 presentation and disclosure of any information obtained pursuant to this section in any suit or action in
82 any court of this Commonwealth wherein it is alleged that a violation of § 59.1-200 *or* 59.1-200.1 has
83 occurred, is occurring or may occur, nor shall this section prevent the disclosure of any such information
84 by the attorney for the Commonwealth or attorney for a county, city, or town to any federal or state
85 law-enforcement authority that has restrictions governing confidentiality and the use of such information
86 similar to those contained in this subsection; however, such disclosures may only be made as to
87 information obtained after July 1, 1979.

88 F. Upon the failure of a person without lawful excuse to obey an investigative order under this
89 section, the attorney for the Commonwealth or attorney for the county, city, or town may initiate
90 contempt proceedings in the circuit court that issued the order to hold such person in contempt.

91 G. No information, facts or data obtained through an investigative order shall be admissible in any
92 civil or criminal proceeding other than for the enforcement of this chapter and the remedies provided
93 herein.

94 § 59.1-203. Restraining prohibited acts.

95 A. Notwithstanding any other provisions of law to the contrary, the Attorney General, any attorney
96 for the Commonwealth, or the attorney for any city, county, or town may cause an action to be brought
97 in the appropriate circuit court in the name of the Commonwealth, or of the county, city, or town to
98 enjoin any violation of § 59.1-200 *or* 59.1-200.1. The circuit court having jurisdiction may enjoin such
99 violations notwithstanding the existence of an adequate remedy at law. In any action under this section,
100 it shall not be necessary that damages be proved.

101 B. Unless the Attorney General, any attorney for the Commonwealth, or the attorney for any county,
102 city, or town determines that a person subject to the provisions of this chapter intends to depart from
103 this Commonwealth or to remove his property herefrom, or to conceal himself or his property herein, or
104 on a reasonable determination that irreparable harm may occur if immediate action is not taken, he shall,
105 before initiating any legal proceedings as provided in this section, give notice in writing that such
106 proceedings are contemplated, and allow such person a reasonable opportunity to appear before said
107 attorney and show that a violation did not occur or execute an assurance of voluntary compliance, as
108 provided in § 59.1-202.

109 C. The circuit courts are authorized to issue temporary or permanent injunctions to restrain and
110 prevent violations of § 59.1-200 *or* 59.1-200.1.

111 D. The Commissioner of the Department of Agriculture and Consumer Services, or his duly
112 authorized representative, shall have the power to inquire into possible violations of § 59.1-200 *or*
113 59.1-200.1, and, if necessary, to request, but not to require, an appropriate legal official to bring an
114 action to enjoin such violation.

115 § 59.1-205. Additional relief.

116 The circuit court may make such additional orders or decrees as may be necessary to restore to any
117 identifiable person any money or property, real, personal, or mixed, tangible or intangible, which may
118 have been acquired from such person by means of any act or practice declared to be unlawful in
119 § 59.1-200 *or* 59.1-200.1, provided, that such person shall be identified by order of the court within 180
120 days from the date of the order permanently enjoining the unlawful act or practice.

121 § 59.1-206. Civil penalties; attorney's fees.

122 A. In any action brought under this chapter, if the court finds that a person has willfully engaged in
123 an act or practice in violation of § 59.1-200 *or* 59.1-200.1, the Attorney General, the attorney for the
124 Commonwealth, or the attorney for the county, city, or town may recover for the Literary Fund, upon
125 petition to the court, a civil penalty of not more than \$2,500 per violation. For purposes of this section,
126 prima facie evidence of a willful violation may be shown when the Attorney General, the attorney for
127 the Commonwealth, or the attorney for the county, city, or town notifies the alleged violator by certified
128 mail that an act or practice is a violation of § 59.1-200 *or* 59.1-200.1, and the alleged violator, after
129 receipt of said notice, continues to engage in the act or practice.

130 B. Any person who willfully violates the terms of an assurance of voluntary compliance or an
131 injunction issued under § 59.1-203 shall forfeit and pay to the Literary Fund a civil penalty of not more
132 than \$5,000 per violation. For purposes of this section, the circuit court issuing an injunction shall retain
133 jurisdiction, and the cause shall be continued, and in such cases the Attorney General, the attorney for
134 the Commonwealth, or the attorney for the county, city, or town may petition for recovery of civil
135 penalties.

136 C. In any action pursuant to subsection A or B and in addition to any other amount awarded, the
137 Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may
138 recover any applicable civil penalty or penalties, costs, reasonable expenses incurred by the state or local
139 agency in investigating and preparing the case not to exceed \$1,000 per violation, and attorney's fees.
140 Such civil penalty or penalties, costs, reasonable expenses, and attorney's fees shall be paid into the
141 general fund of the Commonwealth or of the county, city, or town which such attorney represented.

142 D. Nothing in this section shall be construed as limiting the power of the court to punish as
143 contempt the violation of any order issued by the court, or as limiting the power of the court to enter
144 other orders under § 59.1-203 or § 59.1-205.

145 E. The right of trial by jury as provided by law shall be preserved in actions brought under this
146 section.

147 § 59.1-207. Unintentional violations.

148 In any case arising under this chapter, no liability shall be imposed upon a supplier who shows by a
149 preponderance of the evidence that (i) the act or practice alleged to be in violation of § 59.1-200 *or*
150 59.1-200.1 was an act or practice of the manufacturer or distributor to the supplier over which the
151 supplier had no control or (ii) the alleged violation resulted from a bona fide error notwithstanding the
152 maintenance of procedures reasonably adopted to avoid a violation; however, nothing in this section
153 shall prevent the court from ordering restitution and payment of reasonable attorney's fees and court
154 costs pursuant to § 59.1-204 B to individuals aggrieved as a result of an unintentional violation of this
155 chapter.