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## HOUSE BILL NO. 408

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology  
on February 20, 2008)

(Patron Prior to Substitute—Delegate Oder)

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, the following fraudulent acts or practices committed by a supplier, as defined in §59.1-198, in a consumer transaction involving residential real property owned and occupied as the primary dwelling unit of the owner, are prohibited:

1. The supplier of service to avoid or prevent foreclosure 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 a sale of such residential real property;

2. The supplier 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, where the supplier has agreed to do so, regardless of whether the purchaser is obligated on the loan, and (ii) applies rents received from such dwellings for his own use;

3. The supplier 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, unless there is a written contract providing such option to repurchase on terms and at a price stated in such contract; or

4. The supplier advertises 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 before the return date specified in such order, whichever is later, such person may file a motion to

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

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

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

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

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

93 § 59.1-203. Restraining prohibited acts.

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

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

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

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

114 § 59.1-205. Additional relief.

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

120 § 59.1-206. Civil penalties; attorney's fees.

121 A. In any action brought under this chapter, if the court finds that a person has willfully engaged in

an act or practice in violation of § 59.1-200 *or* 59.1-200.1, the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover for the Literary Fund, upon petition to the court, a civil penalty of not more than \$2,500 per violation. For purposes of this section, prima facie evidence of a willful violation may be shown when the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town notifies the alleged violator by certified mail that an act or practice is a violation of § 59.1-200 *or* 59.1-200.1, and the alleged violator, after receipt of said notice, continues to engage in the act or practice.

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

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

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

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

§ 59.1-207. Unintentional violations.

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