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HOUSE BILL NO. 20

Offered January 10, 2018

Prefiled November 22, 2017

A BILL to amend and reenact § 59.1-200 of the Code of Virginia and to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 52, consisting of sections numbered 59.1-571 through 59.1-575, relating to the Fair Repair Act; access to diagnostics, tools, service documentation, and firmware; penalties.

Patrons—Cole (By Request), Landes, Carter, Guzman, Helsel, Rasoul, Simon, Thomas and Webert;
Senator: Black

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 59.1-200 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 52, consisting of sections numbered 59.1-571 through 59.1-575, as follows:

§ 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 that are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or that 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";

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

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

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

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

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

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

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

13a. Failing to provide to a consumer, or failing to use or include in any written document or material provided to or executed by a consumer, in connection with a consumer transaction any statement, disclosure, notice, or other information however characterized when the supplier is required

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58 by 16 C.F.R. Part 433 to so provide, use, or include the statement, disclosure, notice, or other
59 information in connection with the consumer transaction;

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

62 15. Violating any provision of § 3.2-6512, 3.2-6513, or 3.2-6516, relating to the sale of certain
63 animals by pet dealers which is described in such sections, is a violation of this chapter;

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

65 a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign
66 attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be
67 readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does
68 not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of
69 this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not
70 less than 20 days after date of purchase, a cash refund or credit to the purchaser's credit card account
71 for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase.
72 In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any
73 refund may be delayed for a period of 10 banking days to allow for the check to clear. This subdivision
74 does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise
75 reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser
76 has requested the supplier to order merchandise of a specific or unusual size, color, or brand not
77 ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a
78 transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in §
79 46.2-100;

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

85 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess
86 of \$5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment
87 on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of
88 receiving overpayments. If the credit balance information is incorporated into statements of account
89 furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

90 17. If a supplier enters into a written agreement with a consumer to resolve a dispute that arises in
91 connection with a consumer transaction, failing to adhere to the terms and conditions of such an
92 agreement;

93 18. Violating any provision of the Virginia Health Club Act, Chapter 24 (§ 59.1-294 et seq.);

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

96 20. Violating any provision of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et
97 seq.);

98 21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4
99 (§ 59.1-207.17 et seq.);

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

101 23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32
102 (§ 59.1-424 et seq.);

103 24. Violating any provision of § 54.1-1505;

104 25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter
105 17.6 (§ 59.1-207.34 et seq.);

106 26. Violating any provision of § 3.2-5627, relating to the pricing of merchandise;

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

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

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

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

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

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

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

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

117 35. Using the consumer's social security number as the consumer's account number with the supplier,
118 if the consumer has requested in writing that the supplier use an alternate number not associated with
119 the consumer's social security number;

36. Violating any provision of Chapter 18 (§ 6.2-1800 et seq.) of Title 6.2;
 37. Violating any provision of § 8.01-40.2;
 38. Violating any provision of Article 7 (§ 32.1-212 et seq.) of Chapter 6 of Title 32.1;
 39. Violating any provision of Chapter 34.1 (§ 59.1-441.1 et seq.);
 40. Violating any provision of Chapter 20 (§ 6.2-2000 et seq.) of Title 6.2;
 41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46 (§ 59.1-525 et seq.);
 42. Violating any provision of Chapter 47 (§ 59.1-530 et seq.);
 43. Violating any provision of § 59.1-443.2;
 44. Violating any provision of Chapter 48 (§ 59.1-533 et seq.);
 45. Violating any provision of Chapter 25 (§ 6.2-2500 et seq.) of Title 6.2;
 46. Violating the provisions of clause (i) of subsection B of § 54.1-1115;
 47. Violating any provision of § 18.2-239;
 48. Violating any provision of Chapter 26 (§ 59.1-336 et seq.);
 49. Selling, offering for sale, or manufacturing for sale a children's product the supplier knows or has reason to know was recalled by the U.S. Consumer Product Safety Commission. There is a rebuttable presumption that a supplier has reason to know a children's product was recalled if notice of the recall has been posted continuously at least 30 days before the sale, offer for sale, or manufacturing for sale on the website of the U.S. Consumer Product Safety Commission. This prohibition does not apply to children's products that are used, secondhand or "seconds";
 50. Violating any provision of Chapter 44.1 (§ 59.1-518.1 et seq.);
 51. Violating any provision of Chapter 22 (§ 6.2-2200 et seq.) of Title 6.2;
 52. Violating any provision of § 8.2-317.1;
 53. Violating subsection A of § 9.1-149.1;
 54. Selling, offering for sale, or using in the construction, remodeling, or repair of any residential dwelling in the Commonwealth, any drywall that the supplier knows or has reason to know is defective drywall. This subdivision shall not apply to the sale or offering for sale of any building or structure in which defective drywall has been permanently installed or affixed;
 55. Engaging in fraudulent or improper or dishonest conduct as defined in § 54.1-1118 while engaged in a transaction that was initiated (i) during a declared state of emergency as defined in § 44-146.16 or (ii) to repair damage resulting from the event that prompted the declaration of a state of emergency, regardless of whether the supplier is licensed as a contractor in the Commonwealth pursuant to Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1; ~~and~~
 56. Violating any provision of Chapter 33.1 (§ 59.1-434.1 et seq.); *and*
 57. *Violating any provision of Chapter 52 (§ 59.1-571 et seq.).*
 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.

CHAPTER 52.
FAIR REPAIR ACT.

§ 59.1-571. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Authorized repair provider" means (i) a person that has an arrangement for a definite or indefinite period with an OEM in which the OEM grants to a person a license to use a trade name, service mark, or related characteristic for the purposes of offering repair services under the name of the OEM or (ii) a person retained by the OEM to provide refurbishing services for the OEM's product or products.

"Embedded software" means any programmable instructions provided on firmware delivered with the equipment for the purposes of equipment operation, including all relevant patches and fixes made by the original equipment manufacturer for this purpose. "Embedded software" includes such instructions that are designated as a basic internal operating system, internal operating system, machine code, assembly code, root code, microcode, or any synonym thereof.

"Equipment" means digital electronic equipment or a part for such equipment originally manufactured for distribution and sale in the United States.

"Fair and reasonable terms" means an equitable price in light of relevant factors, including:

1. The net cost to the authorized repair provider for similar information obtained from an OEM, less any discounts, rebates, or other incentive programs;

2. The cost to the OEM for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading, or altering the product, but including amortized capital costs for the preparation and distribution of the information;

3. The price charged by other OEMs for similar information;
4. The price charged by OEMs for similar information prior to the launch of OEM websites;
5. The ability of aftermarket technicians or shops to afford the information;
6. The means by which the information is distributed;
7. The extent to which the information is used, which includes the number of users and the frequency, duration, and volume of use; and
8. Inflation.

"Firmware" means a software program or set of instructions programmed on a hardware device to allow the device to communicate with other computer hardware.

"Independent repair provider" means a person or business operating in the Commonwealth that is (i) not affiliated with an OEM or an OEM's authorized repair provider and (ii) is engaged in the diagnosis, service, maintenance, or repair of equipment. However, an OEM shall be considered an independent repair provider for purposes of those instances when the OEM engages in the diagnosis, service, maintenance, or repair of equipment that is not affiliated with the original equipment manufacturer.

"Medical device" means any instrument, apparatus, implement, machine, contrivance, implant, or other similar or related article, including a component part or accessory, as defined in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321(H), as amended from time to time, which is intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals.

"Motor vehicle" has the same meaning ascribed to that term in § 46.2-100, provided that "motor vehicle" does not include a motorcycle or a recreational vehicle or manufactured home equipped for habitation.

"Motor vehicle dealer" has the same meaning ascribed to that term in § 46.2-1500.

"Motor vehicle manufacturer" means any person or business engaged in the business of manufacturing or assembling new motor vehicles.

"Original equipment manufacturer" or "OEM" means any person who, in the ordinary course of its business, is engaged in the business of selling or leasing new equipment to any person and is engaged in the diagnosis, service, maintenance, or repair of equipment.

"Owner" means a person or business who owns or leases a digital electronic product purchased or used in the Commonwealth.

"Remote diagnostics" means any remote data transfer function between equipment and the provider of repair services, including for the purposes of remote diagnostics, settings controls, or location identification.

"Service part" or "part" means any replacement part, either new or used, made available by the OEM to the authorized repair provider for the purposes of effecting repair.

"Trade secret" means anything tangible or intangible or electronically stored or kept that constitutes, represents, evidences, or records intellectual property, including secret or confidentially held designs, processes, procedures, formulas, inventions, or improvements, or secret or confidentially held scientific, technical, merchandising, production, financial, business, or management information, or any other trade secret as defined in 18 U.S.C. § 1839, as such section existed on January 1, 2016.

§ 59.1-572. Requirements of original equipment manufacturers.

A. Each OEM of equipment and parts sold and used in the Commonwealth shall:

1. Make available to independent repair providers or owners of equipment manufactured by such OEM the same diagnostic and repair information, including repair technical updates, schematic diagrams, updates, corrections to embedded software, and safety and security patches, timely and for no charge, or for the same charge and in the same format such OEM makes available to its authorized repair provider and subcontract repair of refurbishment facilities; and

2. Make available for purchase by the owner, his authorized agent, or independent repair provider any equipment or service parts, inclusive of any updates to the embedded software of the equipment or parts, upon fair and reasonable terms.

Nothing in this subsection shall require the original equipment manufacturer to sell equipment or service parts if the parts are no longer available to the OEM or the authorized repair provider of the OEM.

B. Each OEM that sells any diagnostic, service, or repair documentation to any independent repair provider or to any owner in a format that is standardized with other OEMs, and on terms and conditions more favorable than the manner and the terms and conditions pursuant to which the authorized repair provider obtains the same diagnostic, service, or repair documentation, shall be prohibited from requiring any authorized repair provider to continue purchasing diagnostic, service, or repair documentation in a proprietary format, unless such proprietary format includes diagnostic, service, or repair documentation or functionality that is not available in such standardized format.

C. Each OEM of equipment sold or used in the Commonwealth shall:

1. Make available for purchase by owners and independent repair providers all diagnostic repair

tools incorporating the same diagnostic, repair, and remote communications capabilities that such OEM makes available to its own repair or engineering staff or any authorized repair provider; and

2. Offer all diagnostic repair tools described in subdivision 1 for sale to owners and independent repair providers upon fair and reasonable terms. Each OEM that provides diagnostic repair documentation to aftermarket tool, diagnostics, or third party service information publications and systems shall have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of such aftermarket diagnostic tools, diagnostics, or service information systems.

D. OEM equipment or parts sold or used in the Commonwealth for the purpose of providing security-related functions shall not exclude diagnostic, service, and repair information necessary to reset a security-related electronic function from information provided to owners and independent repair facilities. If excluded under this subsection, the information necessary to reset an immobilizer system or security-related electronic module shall be accessible to owners and independent repair facilities through the appropriate secure data release systems.

§ 59.1-573. Limitations.

A. Nothing in this chapter shall be construed to require an original equipment manufacturer to divulge a trade secret.

B. Notwithstanding any law, rule, or regulation to the contrary, no provision of this chapter shall be read, interpreted, or construed to abrogate, interfere with, contradict, or alter the terms of any agreement executed and in force between an authorized repair provider and an original equipment manufacturer, including the performance or provision of warranty or recall repair work by an authorized repair provider on behalf of an original equipment manufacturer pursuant to such authorized repair agreement, except that any provision in such an authorized repair agreement that purports to waive, avoid, restrict, or limit an original equipment manufacturer's compliance with this chapter shall be void and unenforceable.

C. Nothing in this chapter shall be construed to require OEMs or authorized repair providers to provide an owner or independent repair provider access to non-diagnostic and repair information by an OEM to an authorized repair provider pursuant to the terms of an authorizing agreement.

§ 59.1-574. Exclusions.

A. Nothing in this chapter shall apply to motor vehicle manufacturers, any product or service of a motor vehicle manufacturer, or motor vehicle dealers.

B. Nothing in this chapter shall require a manufacturer of a medical device to implement any provision of this chapter that is not permitted under the federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., or any other federal law, rule, or regulation that preempts a provision of this chapter.

§ 59.1-575. Violation of chapter; penalty.

Any violation of the provisions of this chapter shall constitute a prohibited practice pursuant to the provisions of § 59.1-200 and shall be subject to any and all of the enforcement provisions of the Virginia Consumer Protection Act (§ 59.1-196 et seq.) of this title.

2. That the provisions of this act shall become effective on January 1, 2019.