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SENATE BILL NO. 1217

Offered January 9, 2019

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A BILL to amend and reenact §§ 32.1-126, 59.1-198, and 59.1-200 of the Code of Virginia, relating to nursing homes; truth in advertising for inspections, surveys, and investigations.

Patrons—Newman and Chase; Delegate: Yancey

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 32.1-126, 59.1-198, and 59.1-200 of the Code of Virginia are amended and reenacted as follows:

§ 32.1-126. Commissioner to inspect and to issue licenses to or assure compliance with certification requirements for hospitals, nursing homes, and certified nursing facilities; notice of denial of license; consultative advice and assistance; notice to electric utilities.

A. Pursuant to this article, the Commissioner shall issue licenses to, and assure compliance with certification requirements for hospitals and nursing homes, and assure compliance with certification requirements for facilities owned or operated by agencies of the Commonwealth as defined in subdivision (vi) of § 32.1-124, which after inspection are found to be in compliance with the provisions of this article and with all applicable state and federal regulations. The Commissioner shall notify by certified mail or by overnight express mail any applicant denied a license of the reasons for such denial.

B. The Commissioner shall cause each and every hospital, nursing home, and certified nursing facility to be inspected periodically, but not less often than biennially, in accordance with the provisions of this article and regulations of the Board. However, except when performed in conjunction with an inspection required by the Centers for Medicare and Medicaid Services, no hospital, nursing home, or certified nursing facility shall receive additional inspections until all other hospitals, nursing homes, or certified nursing facilities in the Commonwealth, respectively, have also been inspected, unless the additional inspections are (i) necessary to follow up on a preoperational inspection or one or more violations; (ii) required by a uniformly applied risk-based schedule established by the Department; (iii) necessary to investigate a complaint regarding the hospital, nursing home, or certified nursing facility; or (iv) otherwise deemed necessary by the Commissioner or his designee to protect the health and safety of the public.

Unless expressly prohibited by federal statute or regulation, the findings of the Commissioner, with respect to periodic surveys of nursing facilities conducted pursuant to the Survey, Certification, and Enforcement Procedures set forth in 42 C.F.R. Part 488, shall be considered case decisions pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) and shall be subject to the Department's informal dispute resolution procedures, or, at the option of the Department or the nursing facility, the formal fact-finding procedures under § 2.2-4020. The Commonwealth shall be deemed the proponent for purposes of § 2.2-4020. Further, notwithstanding the provisions of clause (iii) of subsection A of § 2.2-4025, such case decisions shall also be subject to the right to court review pursuant to Article 5 (§ 2.2-4025 et seq.) of Chapter 40 of Title 2.2.

C. The Commissioner may, in accordance with regulations of the Board, provide for consultative advice and assistance, with such limitations and restrictions as he deems proper, to any person who intends to apply for a hospital or nursing home license or nursing facility certification.

D. For the purpose of facilitating the prompt restoration of electrical service and prioritization of customers during widespread power outages, the Commissioner shall notify on a quarterly basis all electric utilities serving customers in Virginia as to the location of all nursing homes licensed in the Commonwealth. The requirements of this subsection shall be met if the Commissioner maintains such information on an electronic database accessible by electric utilities serving customers in Virginia.

E. The results of any survey, inspection, or investigation of a nursing home or certified nursing facility conducted by a state or federal agency, including any statement of deficiencies, finding of deficiencies, or plan of corrective action, shall not be used in an advertisement publication, unless the advertisement publication includes all of the following:

- 1. The date on which the survey, inspection, or investigation was conducted;*
- 2. A statement that the nursing home or certified nursing facility is required to submit a plan of correction in response to every statement of deficiency;*
- 3. If a finding or deficiency cited in a statement of deficiencies has been corrected, a statement that the finding or deficiency has been corrected and the date on which the finding or deficiency was*

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59 *corrected; and*

60 4. *A statement that the advertisement publication is not authorized or endorsed by the Virginia*
61 *Department of Health, the Centers for Medicare and Medicaid Services, the Office of the Inspector*
62 *General, or any other governmental agency.*

63 *The information required by this subsection shall be in the same color, font, and size as all other*
64 *language on or in the advertisement publication and shall appear as prominently as all other language*
65 *used in the advertisement publication. Nothing in this subsection shall be construed to prohibit the*
66 *results of a survey, inspection, or investigation from being used in any administrative proceeding, civil*
67 *proceeding, or criminal investigation or prosecution, in accordance with the rules set forth by the*
68 *applicable tribunal.*

69 **§ 59.1-198. Definitions.**

70 As used in this chapter:

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

75 "Children's product" means a consumer product designed or intended primarily for children 12 years
76 of age or younger. In determining whether a consumer product is primarily intended for a child 12 years
77 of age or younger, the following factors shall be considered:

78 1. A statement by a manufacturer about the intended use of such product, including a label on such
79 product if such statement is reasonable;

80 2. Whether the product is represented in its packaging, display, promotion, or advertising as
81 appropriate for use by children 12 years of age or younger;

82 3. Whether the product is commonly recognized by consumers as being intended for use by a child
83 12 years of age or younger; and

84 4. The Age Determination Guidelines issued by the staff of the Consumer Products Safety
85 Commission in September 2002, and any successor to such guidelines.

86 "Consumer transaction" means:

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

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

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

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

98 5. Transactions involving the advertisement, sale, lease, or license, or the offering for sale, lease or
99 license, of goods or services to a church or other religious body.

100 6. *Transactions involving the advertisement of legal services that contain information about the*
101 *results of a state or federal survey, inspection, or investigation of a nursing home or certified nursing*
102 *facility as described in subsection E of § 32.1-126.*

103 "Cure offer" means a written offer of one or more things of value, including but not limited to the
104 payment of money, that is made by a supplier and that is delivered to a person claiming to have
105 suffered a loss as a result of a consumer transaction or to the attorney for such person. A cure offer
106 shall be reasonably calculated to remedy a loss claimed by the person and it shall include a minimum
107 additional amount equaling 10 percent of the value of the cure offer or \$500, whichever is greater, as
108 compensation for inconvenience, any attorney's or other fees, expenses, or other costs of any kind that
109 such person may incur in relation to such loss; provided, however that the minimum additional amount
110 need not exceed \$4,000.

111 "Defective drywall" means drywall, or similar building material composed of dried gypsum-based
112 plaster, that (i) as a result of containing the same or greater levels of strontium sulfide that has been
113 found in drywall manufactured in the People's Republic of China and imported into the United States
114 between 2004 and 2007 is capable, when exposed to heat, humidity, or both, of releasing sulfur dioxide,
115 hydrogen sulfide, carbon disulfide, or other sulfur compounds into the air or (ii) has been designated by
116 the U.S. Consumer Product Safety Commission as a product with a product defect that constitutes a
117 substantial product hazard within the meaning of § 15(a)(2) of the Consumer Product Safety Act (15
118 U.S.C. § 2064 (a)(2)).

119 "Goods" means all real, personal or mixed property, tangible or intangible. For purposes of this
120 chapter, intangible property includes but shall not be limited to "computer information" and

"informational rights" in computer information as 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 (i) work performed in the business or occupation of the supplier, (ii) work 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, or (iii) the subject of an "access contract" as defined in § 59.1-501.2.

"Supplier" means a seller, lessor or, licensor, or *professional* who advertises, solicits, or engages in consumer transactions, or a manufacturer, distributor, or licensor who advertises and sells, leases, or licenses goods or services to be resold, leased, or sublicensed 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 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 by 16 C.F.R. Part 433 to so provide, use, or include the statement, disclosure, notice, or other information in connection with the consumer transaction;

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

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

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

a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be

182 readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does
183 not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of
184 this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not
185 less than 20 days after date of purchase, a cash refund or credit to the purchaser's credit card account
186 for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase.
187 In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any
188 refund may be delayed for a period of 10 banking days to allow for the check to clear. This subdivision
189 does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise
190 reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser
191 has requested the supplier to order merchandise of a specific or unusual size, color, or brand not
192 ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a
193 transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in §
194 46.2-100;

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

200 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess
201 of \$5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment
202 on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of
203 receiving overpayments. If the credit balance information is incorporated into statements of account
204 furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

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

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

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

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

213 21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4
214 (§ 59.1-207.17 et seq.);

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

216 23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32
217 (§ 59.1-424 et seq.);

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

219 25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter
220 17.6 (§ 59.1-207.34 et seq.);

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

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

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

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

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

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

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

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

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

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

235 36. Violating any provision of Chapter 18 (§ 6.2-1800 et seq.) of Title 6.2;

236 37. Violating any provision of § 8.01-40.2;

237 38. Violating any provision of Article 7 (§ 32.1-212 et seq.) of Chapter 6 of Title 32.1;

238 39. Violating any provision of Chapter 34.1 (§ 59.1-441.1 et seq.);

239 40. Violating any provision of Chapter 20 (§ 6.2-2000 et seq.) of Title 6.2;

240 41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46
241 (§ 59.1-525 et seq.);

242 42. Violating any provision of Chapter 47 (§ 59.1-530 et seq.);

243 43. Violating any provision of § 59.1-443.2;

244 44. Violating any provision of Chapter 48 (§ 59.1-533 et seq.);
 245 45. Violating any provision of Chapter 25 (§ 6.2-2500 et seq.) of Title 6.2;
 246 46. Violating the provisions of clause (i) of subsection B of § 54.1-1115;
 247 47. Violating any provision of § 18.2-239;
 248 48. Violating any provision of Chapter 26 (§ 59.1-336 et seq.);
 249 49. Selling, offering for sale, or manufacturing for sale a children's product the supplier knows or has
 250 reason to know was recalled by the U.S. Consumer Product Safety Commission. There is a rebuttable
 251 presumption that a supplier has reason to know a children's product was recalled if notice of the recall
 252 has been posted continuously at least 30 days before the sale, offer for sale, or manufacturing for sale
 253 on the website of the U.S. Consumer Product Safety Commission. This prohibition does not apply to
 254 children's products that are used, secondhand or "seconds";
 255 50. Violating any provision of Chapter 44.1 (§ 59.1-518.1 et seq.);
 256 51. Violating any provision of Chapter 22 (§ 6.2-2200 et seq.) of Title 6.2;
 257 52. Violating any provision of § 8.2-317.1;
 258 53. Violating subsection A of § 9.1-149.1;
 259 54. Selling, offering for sale, or using in the construction, remodeling, or repair of any residential
 260 dwelling in the Commonwealth, any drywall that the supplier knows or has reason to know is defective
 261 drywall. This subdivision shall not apply to the sale or offering for sale of any building or structure in
 262 which defective drywall has been permanently installed or affixed;
 263 55. Engaging in fraudulent or improper or dishonest conduct as defined in § 54.1-1118 while
 264 engaged in a transaction that was initiated (i) during a declared state of emergency as defined in
 265 § 44-146.16 or (ii) to repair damage resulting from the event that prompted the declaration of a state of
 266 emergency, regardless of whether the supplier is licensed as a contractor in the Commonwealth pursuant
 267 to Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1;
 268 56. Violating any provision of Chapter 33.1 (§ 59.1-434.1 et seq.);
 269 57. Violating any provision of § 18.2-178, 18.2-178.1, or 18.2-200.1; ~~and~~
 270 58. Violating any provision of Chapter 17.8 (§ 59.1-207.45 et seq.); *and*
 271 59. *Violating any provision of subsection E of § 32.1-126.*
 272 B. Nothing in this section shall be construed to invalidate or make unenforceable any contract or
 273 lease solely by reason of the failure of such contract or lease to comply with any other law of the
 274 Commonwealth or any federal statute or regulation, to the extent such other law, statute, or regulation
 275 provides that a violation of such law, statute, or regulation shall not invalidate or make unenforceable
 276 such contract or lease.