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SENATE BILL NO. 37

Offered January 8, 2020

Prefiled November 18, 2019

A BILL to amend and reenact §§ 6.2-312 and 59.1-200 of the Code of Virginia, relating to open-end credit plans; civil penalty.

Patron—Surovell

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 6.2-312 and 59.1-200 of the Code of Virginia are amended and reenacted as follows:

§ 6.2-312. Open-end credit plans.

A. *The provisions of this section shall apply to any person that makes a loan or otherwise extends credit under an open-end credit plan to any resident of the Commonwealth or any individual in the Commonwealth, whether or not the person making the loan or extending the credit maintains a physical presence in the Commonwealth. The provisions of this section shall not apply to any bank, savings institution, or credit union as such terms are defined in § 6.2-300.*

B. Notwithstanding any provision of this chapter other than § 6.2-327, and except as provided in subsection C, a seller or lender engaged in extending credit under an open-end credit plan may impose, on credit extended under the plan, finance charges and other charges and fees at such rates and in such amounts and manner as may be agreed upon by the creditor and the obligor, ~~if under the plan a.~~ However, (i) no finance charge ~~is~~ may be imposed upon the obligor if payment in full of the unpaid balance is ~~not~~ received at the place designated by the creditor prior to the next billing date, which shall be at least 25 days later than the prior billing date, and (ii) if the lender and obligor agree that the finance charge shall exceed a 36 percent annual interest rate, the lender shall be licensed in accordance with subsections G, H, I, and J and shall comply with the requirements of subsection K. Any participation fee, processing fee, or other fee, except a late fee, charged by a lender as a condition of making a loan to, or providing access to credit for, an obligor shall be deemed to constitute interest charged on the principal amount of the loan for purposes of determining whether the interest charged exceeds a 36 percent annual interest rate.

~~B.~~ C. Notwithstanding the provisions of § 6.2-327 and subject to the provisions of § 8.9A-204.1, any loan made under this section may be secured in whole or in part by a subordinate mortgage or deed of trust on residential real estate improved by the construction thereon of housing consisting of one- to four-family dwelling units.

~~C.~~ ~~(i)~~ D. A licensee, as defined in § 6.2-1800 or 6.2-2200, shall not engage in the extension of credit under an open-end credit plan described in this section ~~and~~, ~~(ii)~~ a. A third party shall not engage in the extension of credit under an open-end credit plan described in this section at any office, suite, room, or place of business where a licensee conducts the business of making payday loans or motor vehicle title loans. In addition to any other remedies or penalties provided for a violation of this section, any such extension of credit made by a licensee or third party in violation of this subsection shall be unenforceable against the borrower.

~~D.~~ E. No person shall make a loan or otherwise extend credit under an open-end credit plan or any other lending arrangement that is secured by a non-purchase money security interest in a motor vehicle, as such term is defined in § 6.2-2200, unless such loan or extension of credit is made in accordance with, or is exempt from, the provisions of Chapter 22 (§ 6.2-2200 et seq.).

~~E.~~ F. If a licensee, as defined in § 6.2-1800, surrenders its license under Chapter 18 (§ 6.2-1800 et seq.) or has its license revoked, and if following such surrender or revocation of its license the former licensee engages in the extension of credit under an open-end credit plan as described in this section, then the Commission shall not issue to such former licensee, or to any affiliate of the former licensee, a license under Chapter 18 (§ 6.2-1800 et seq.) for a period of 10 years from the date such license is surrendered or revoked. As used in this subsection, "affiliate of the former licensee" means a business entity that owns or controls, is owned or controlled by, or is under common ownership or control with, the former licensee.

G. No person shall engage in the business of extending credit under an open-end credit plan, whether or not the person has an office or conducts business at a location in the Commonwealth, to any resident of the Commonwealth or any individual in the Commonwealth (i) except in accordance with the provisions of this section and (ii) if the finance charge imposed on the obligor exceeds an annual interest rate of 36 percent, the lender has first obtained a license under this section from the

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59 Commission. Electing to become licensed under this section shall constitute a waiver of the benefit of
60 any and all laws of the Commonwealth and other states and federal laws preemptive of, or inconsistent
61 with, the provisions of this section.

62 H. An application for a license under this section shall be made in writing and on a form provided
63 by the Commissioner. The application shall be accompanied by payment of an application fee of \$500.
64 The application fee shall not be refundable in any event. The fee shall not be abated by surrender,
65 suspension, or revocation of the license. The Commissioner may make such investigations as he deems
66 necessary to determine if the applicant has complied with all applicable provisions of law and
67 regulations adopted thereunder. The application shall set forth:

68 1. The name and address of the applicant and (i) if the applicant is a partnership, firm, or
69 association, the name and address of each partner or member; (ii) if the applicant is a corporation or
70 limited liability company, the name and address of each director, member, registered agent, and
71 principal; or (iii) if the applicant is a business trust, the name and address of each trustee and
72 beneficiary;

73 2. The addresses of the locations of the business to be licensed; and

74 3. Such other information concerning the financial responsibility, background, experience, and
75 activities of the applicant and its members, officers, directors, and principals as the Commissioner may
76 require.

77 1. The application for a license shall also be accompanied by a bond filed with the Commissioner
78 with corporate surety authorized to execute such bond in the Commonwealth, in the sum of \$50,000 per
79 location, not to exceed a total of \$500,000. The form of such bond shall be approved by the
80 Commission. Such bond shall be continuously maintained thereafter in full force. Such bond shall be
81 conditioned upon the applicant or licensee performing all written agreements with borrowers or
82 prospective borrowers, correctly and accurately accounting for all funds received by him in his licensed
83 business, and conducting his licensed business in conformity with this section and all applicable laws.
84 Any person who may be damaged by noncompliance of the licensee with any condition of such bond
85 may proceed on such bond against the principal or surety thereon, or both, to recover damages. The
86 aggregate liability under the bond shall not exceed the penal sum of the bond. The required bond also
87 shall be in favor of the Commonwealth for the benefit of any person who is damaged by any violation
88 of this section.

89 J. Upon the filing and investigation of an application for a license, and compliance by the applicant
90 with the provisions of subsection H, the Commission shall issue and deliver to the applicant the license
91 applied for to engage in business under this section at the locations specified in the application if it
92 finds:

93 1. That the financial responsibility, character, reputation, experience, and general fitness of the
94 applicant and its members, senior officers, directors, trustees, and principals are such as to warrant
95 belief that the business will be operated efficiently and fairly, in the public interest, and in accordance
96 with law; and

97 2. That the applicant has unencumbered liquid assets per location available for the operation of the
98 business of at least \$75,000.

99 If the Commission fails to make such findings, no license shall be issued, and the Commissioner
100 shall notify the applicant of the denial and the reasons for such denial.

101 K. Any person that makes a loan or otherwise extends credit under an open-end credit plan shall
102 comply with the following if such loan imposes interest at an annual rate that exceeds 36 percent:

103 1. The person shall not obtain or accept from a borrower an authorization to electronically debit the
104 borrower's deposit account;

105 2. In collecting or attempting to collect a loan, the person shall comply with the restrictions and
106 prohibitions applicable to debt collectors contained in the federal Fair Debt Collection Practices Act
107 (15 U.S.C. § 1692 et seq.) regarding harassment or abuse; false, misleading, or deceptive statements or
108 representations; and unfair practices in collections;

109 3. The person shall not file or initiate a legal proceeding of any kind against a borrower until 60
110 days after the date of default on an open-end credit plan, during which period the person and the
111 borrower may voluntarily enter into a repayment arrangement; and

112 4. A licensee shall not cause any person to be obligated to the licensee in any capacity at any time
113 in the principal amount of more than \$500.

114 L. Any violation of the provisions of this section shall constitute a prohibited practice in accordance
115 with § 59.1-200 and shall be subject to any and all of the enforcement provisions of the Virginia
116 Consumer Protection Act (§ 59.1-196 et seq.).

117 **§ 59.1-200. Prohibited practices.**

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

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

182 of the layaway agreement, or (ii) by means of a sign placed in a conspicuous public area of the
183 premises of the supplier, so as to be readily noticeable and readable by the consumer, or (iii) on the bill
184 of sale. Disclosure shall include the conditions, charges, or fees in the event that a consumer breaches
185 the agreement;

186 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess
187 of \$5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment
188 on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of
189 receiving overpayments. If the credit balance information is incorporated into statements of account
190 furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

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

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

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

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

199 21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4
200 (§ 59.1-207.17 et seq.);

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

202 23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32
203 (§ 59.1-424 et seq.);

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

205 25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter
206 17.6 (§ 59.1-207.34 et seq.);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

226 41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46
227 (§ 59.1-525 et seq.);

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

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

230 44. Violating any provision of Chapter 48 (§ 59.1-533 et seq.);

231 45. Violating any provision of Chapter 25 (§ 6.2-2500 et seq.) of Title 6.2;

232 46. Violating the provisions of clause (i) of subsection B of § 54.1-1115;

233 47. Violating any provision of § 18.2-239;

234 48. Violating any provision of Chapter 26 (§ 59.1-336 et seq.);

235 49. Selling, offering for sale, or manufacturing for sale a children's product the supplier knows or has
236 reason to know was recalled by the U.S. Consumer Product Safety Commission. There is a rebuttable
237 presumption that a supplier has reason to know a children's product was recalled if notice of the recall
238 has been posted continuously at least 30 days before the sale, offer for sale, or manufacturing for sale
239 on the website of the U.S. Consumer Product Safety Commission. This prohibition does not apply to
240 children's products that are used, secondhand or "seconds";

241 50. Violating any provision of Chapter 44.1 (§ 59.1-518.1 et seq.);

242 51. Violating any provision of Chapter 22 (§ 6.2-2200 et seq.) of Title 6.2;

243 52. Violating any provision of § 8.2-317.1;

244 53. Violating subsection A of § 9.1-149.1;

245 54. Selling, offering for sale, or using in the construction, remodeling, or repair of any residential
246 dwelling in the Commonwealth, any drywall that the supplier knows or has reason to know is defective
247 drywall. This subdivision shall not apply to the sale or offering for sale of any building or structure in
248 which defective drywall has been permanently installed or affixed;

249 55. Engaging in fraudulent or improper or dishonest conduct as defined in § 54.1-1118 while
250 engaged in a transaction that was initiated (i) during a declared state of emergency as defined in
251 § 44-146.16 or (ii) to repair damage resulting from the event that prompted the declaration of a state of
252 emergency, regardless of whether the supplier is licensed as a contractor in the Commonwealth pursuant
253 to Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1;

254 56. Violating any provision of Chapter 33.1 (§ 59.1-434.1 et seq.);

255 57. Violating any provision of § 18.2-178, 18.2-178.1, or 18.2-200.1;

256 58. Violating any provision of Chapter 17.8 (§ 59.1-207.45 et seq.);

257 59. Violating any provision of subsection E of § 32.1-126; ~~and~~

258 60. Violating any provision of § 54.1-111 relating to the unlicensed practice of a profession licensed
259 under Chapter 11 (§ 54.1-1100 et seq.) or Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1; *and*

260 61. *Violating any provision of § 6.2-312.*

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