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SENATE BILL NO. 800

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Corporations, Insurance and Banking
on February 16, 1995)

(Patron Prior to Substitute—Senator Wampler)

A *BILL to amend and reenact §§ 3.1-18.2, 59.1-199, 59.1-201, 59.1-204, 59.1-204.1, 59.1-206 and 59.1-207 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 59.1-200.1 and 59.1-201.1, relating to the Virginia Consumer Protection Act; civil penalties.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 3.1-18.2, 59.1-199, 59.1-201, 59.1-204, 59.1-204.1, 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 sections numbered 59.1-200.1 and 59.1-201.1 as follows:

§ 3.1-18.2. Powers and duties.

A. The Administrator of Consumer Affairs shall have only such powers as may be necessary to perform the following duties:

(a) ~~To promote~~ 1. *Promote* consumer education in cooperation with the Department of Education and inform the public of policies, decisions and legislation affecting consumers.

(b) ~~To serve~~ 2. *Serve* as a central coordinating agency and clearinghouse for receiving *and investigating* complaints by Virginia consumers of illegal, fraudulent, deceptive or dangerous practices and referring ~~such appropriate~~ complaints to the federal, state and local departments or agencies charged with enforcement of consumer laws.

(c) ~~If the department or agency to which a complaint is referred determines that the matter cannot be settled at an administrative level, but requires either civil or criminal legal action, then the complaint together with all supporting evidence shall be transmitted to the appropriate enforcement officer for such legal action as may be necessary.~~

(d) ~~To maintain~~ 3. *Maintain* records of consumer complaints and their eventual disposition, which records shall be open for public inspection, provided that information disclosing the business interests of any person, trade secrets, or the names of customers shall be held confidential except to the extent that disclosure of such matters may be necessary for the enforcement of laws.

(e) ~~To enter~~ 4. *Enter* into agreements or ~~to~~ accept commissions from federal agencies.

5. *Exercise such powers and perform such duties as requested by the Commissioner of the Department of Agriculture and Consumer Services, or his designee, under the Virginia Consumer Protection Act (§ 59.1-196 et seq.).*

B. If the department or agency to which a complaint is referred pursuant to subdivision A 2 determines that the matter cannot be settled at an administrative level, the complaint together with all supporting evidence may be transmitted to the appropriate enforcement officer for such legal action as may be necessary.

C. The responsibility of the Administrator in these matters shall not be limited to those areas of peculiar interest to the Department of Agriculture and Consumer Services, but shall embrace the consumer programs and responsibilities of all the departments and agencies of the Commonwealth.

§ 59.1-199. Exclusions.

Nothing in this chapter shall apply to:

A. Any aspect of a consumer transaction which aspect is authorized under laws or regulations of this Commonwealth or the United States, or the formal advisory opinions of any regulatory body or official of this Commonwealth or the United States.

B. Acts done by the publisher, owner, agent or employee of a newspaper, periodical, or radio or television station, or other advertising media such as outdoor advertising and advertising agencies, in the publication or dissemination of an advertisement in violation of § 59.1-200, unless it be proved that such person knew that the advertisement was of a character prohibited by § 59.1-200.

C. Those aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq.

D. Banks, savings and loan associations, credit unions, small loan companies, public service corporations, *mortgage lenders as defined in § 6.1-409, broker-dealers as defined in § 13.1-501* and insurance companies regulated and supervised by the State Corporation Commission or a comparable federal regulating body.

E. Employment agencies licensed under Chapter 13 (§ 54.1-1300 et seq.) of Title 54.1.

F. Any aspect of a consumer transaction which is subject to the Landlord and Tenant Act, Chapter 13 (§ 55-217 et seq.) of Title 55 or the Virginia Residential Landlord and Tenant Act, Chapter 13.2 (§ 55-248.2 et seq.) of Title 55, unless the act or practice of a landlord constitutes a misrepresentation or

60 fraudulent act or practice under § 59.1-200.

61 *G. Real estate licensees who are licensed under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1.*

62 *§ 59.1-200.1. Investigations by the Commissioner of the Virginia Department of Agriculture and*
63 *Consumer Services.*

64 *A. Upon reasonable cause to believe that a violation of this chapter has occurred or is about to*
65 *occur and upon his own motion or the complaint of any person, the Commissioner of the Department of*
66 *Agriculture and Consumer Services, or his designee, may:*

67 *1. Make necessary investigations within or without this Commonwealth to determine whether any*
68 *person has violated, or is about to violate, the provisions of this chapter or any rule, regulation, or*
69 *order issued pursuant to this chapter or any chapter incorporated by reference into this chapter;*

70 *2. Require or permit any person to file a statement in writing, under oath or otherwise as the*
71 *Commissioner determines, as to all facts and circumstances concerning the matter under investigation;*
72 *and*

73 *3. Administer oaths or affirmations and, upon motion or request of any party, subpoena witnesses,*
74 *compel their attendance, take evidence, and require the production of any matter that is relevant to the*
75 *investigation, including (i) the existence, description, nature, custody, condition, and location of any*
76 *books, documents, or other tangible things; (ii) the identity and location of persons having knowledge of*
77 *relevant facts; or (iii) any other matter reasonably calculated to lead to the discovery of material*
78 *evidence.*

79 *B. Any proceeding or hearing of the Commissioner, or his designee, pursuant to this section in which*
80 *witnesses are subpoenaed and their attendance is required for evidence to be taken or any matter*
81 *produced to ascertain material evidence may take place within the City of Richmond or any forum*
82 *convenient to the parties under the provisions of §§ 8.01-261 and 8.01-262.*

83 *C. If any person fails to obey a subpoena or to answer questions propounded by the Commissioner,*
84 *or his designee, and upon reasonable notice to all persons affected thereby, the Commissioner, or his*
85 *designee, may apply to the Circuit Court of the City of Richmond or any circuit court convenient to the*
86 *parties under the provisions of §§ 8.01-261 and 8.01-262 for an order compelling compliance.*

87 *§ 59.1-201. Civil investigative orders.*

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

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

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

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

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

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

110 *C. Within twenty-one days after the service upon a person of an investigative order, or at any time*
111 *before the return date specified in such order, whichever is later, such person may file a motion to*
112 *modify or set aside such investigative order or to seek a protective order as provided by the Rules of the*
113 *Supreme Court of Virginia. Such motion shall specify the grounds for modifying or setting aside the*
114 *order, and may be based upon the failure of the application or the order to comply with the*
115 *requirements of this section, or upon any constitutional or other legal basis or privilege of such person.*

116 *D. Where the information requested by an investigative order may be derived or ascertained from the*
117 *business records of the person upon whom the order is served, or from an examination, audit or*
118 *inspection of such business records, or from a compilation, abstract or summary thereof, and the burden*
119 *of deriving or ascertaining the information is substantially the same for the ~~Attorney General~~, attorney*
120 *for the Commonwealth, or attorney for a county, city, or town as for the person from whom such*
121 *information is requested, it shall be sufficient for that person to specify the records from which the*

requested information may be derived or ascertained, and to afford the ~~Attorney General~~, attorney for the Commonwealth, or attorney for the county, city, or town reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries thereof.

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

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

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

§ 59.1-201.1. Attorney General empowered to issue civil investigative demands.

Whenever the Attorney General has reasonable cause to believe that any person has engaged in, or is engaging in, or is about to engage in, any violation of this chapter, the Attorney General is empowered to issue a civil investigative demand. The provisions of § 59.1-9.10 shall apply mutatis mutandis to civil investigative demands issued pursuant to this section.

§ 59.1-204. Individual action for damages or penalty.

A. Any person who suffers loss as the result of a violation of ~~§ 59.1-200~~ *this chapter* shall be entitled to initiate an action to recover actual damages, or ~~\$100~~ \$500, whichever is greater. *If the trier of fact finds that the violation was willful, it may increase damages to an amount not exceeding three times the actual damages sustained, or \$1,000, whichever is greater.*

B. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded, such person also may be awarded reasonable attorney's fees and court costs.

§ 59.1-204.1. Tolling of limitation.

A. *Any individual action pursuant to § 59.1-204 for which the right to bring such action first accrues on or after July 1, 1995, shall be commenced within two years after such accrual. The cause of action shall accrue as provided in § 8.01-230.*

B. When any of the authorized government agencies files suit under this chapter, the time during which such governmental suit and all appeals therefrom is pending shall not be counted as any part of the period within which an action under § 59.1-204 shall be brought.

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

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 has willfully violated the terms of any assurance of voluntary compliance,~~ the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover for the ~~literary fund~~ *Literary Fund*, upon petition to the court, a civil penalty of not more than \$1,000 \$2,500 per violation. ~~Such attorney may also recover, upon petition to the court, court costs; reasonable expenses incurred by the state or local agency in investigating and preparing the case not to exceed \$200 per violation; and attorney's fees. Such 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.~~ 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, 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~~ *Literary Fund* a civil penalty of not more than \$5,000 per violation. For purposes of this section, the circuit court issuing an

183 injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney
184 General, the attorney for the Commonwealth, or the attorney for the county, city, or town may petition
185 for recovery of civil penalties; attorney's fees, court costs for the Commonwealth, and reasonable
186 expenses incurred by the state or local agency in investigating and preparing the case for the
187 Commonwealth or for the county, city, or town represented. Such expenses shall not exceed the sum of
188 \$200 per violation. Such expenses and attorney's fees shall be paid into the appropriate general fund as
189 provided in subsection A of this section.

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

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

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

201 § 59.1-207. Unintentional violations.

202 In any case arising under this chapter, no liability shall be imposed upon a supplier who shows by a
203 preponderance of the evidence ~~(i)~~ that (i) the act or practice alleged to be in violation of § 59.1-200 was
204 an act or practice of the manufacturer or distributor to the supplier over which the supplier had no
205 control; or (ii) ~~that~~ the alleged violation resulted from a bona fide error notwithstanding the maintenance
206 of procedures reasonably adopted to avoid a violation; ~~provided, however, that~~ nothing in this section
207 shall prevent the court from ordering restitution *and payment of reasonable attorney's fees and court*
208 *costs pursuant to § 59.1-204 B* to individuals aggrieved as a result of an unintentional violation of
209 ~~§ 59.1-200 this chapter.~~