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HOUSE BILL NO. 2382

Offered January 10, 2001

Prefiled January 10, 2001

A BILL to amend and reenact §§ 59.1-198 and 59.1-200 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 8.01-40.3 and adding in Title 59.1 a chapter numbered 17.8, consisting of sections numbered 59.1-207.45 through 59.1-207.53, relating to the creation of the Virginia Internet Privacy Protection Act.

Patrons—Rhodes and Clement

Referred to Committee on Science and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-198 and 59.1-200 of the Code of Virginia are amended and reenacted and the Code of Virginia is amended by adding a section numbered 8.01-40.3 and adding in Title 59.1 a chapter numbered 17.8, consisting of sections numbered 59.1-207.45 through 59.1-207.53, as follows:

§ 8.01-40.3. Action for injury resulting from violation of the Virginia Internet Privacy Protection Act; limitations.

Any person whose property or person is injured by reason of a violation of the provisions of the Virginia Internet Privacy Protection Act (§ 59.1-207.45 et seq.) may sue and recover damages as provided in § 59.1-207.52. An action shall be commenced before the earlier of (i) five years after the last act in the course of conduct constituting a violation of the Virginia Internet Privacy Protection Act, or (ii) two years after the plaintiff discovers or reasonably should have discovered the last act in the course of conduct constituting a violation of the Virginia Internet Privacy Protection Act.

§ 59.1-198. Definitions.

As used in this chapter:

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

"Consumer transaction" means:

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

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

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

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

"Goods" means all real, personal or mixed property, tangible or intangible.

"Person" means any natural person, corporation, trust, partnership, association and any other legal entity.

"Services" includes but shall not be limited to work (i) performed in the business or occupation of the supplier or (ii) 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.

"Supplier" means a seller or lessor who advertises, solicits or engages in consumer transactions, or a manufacturer or distributor who advertises and sells or leases goods or services to be resold or leased by other persons in consumer transactions. *For purposes of subdivision 35 of subsection A of § 59.1-200 only, "supplier" shall mean Internet companies as that term is defined in § 59.1-207.46*

§ 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;

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- 59 4. Misrepresenting geographic origin in connection with goods or services;
- 60 5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or
- 61 benefits;
- 62 6. Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;
- 63 7. Advertising or offering for sale goods which are used, secondhand, repossessed, defective,
- 64 blemished, deteriorated, or reconditioned, or which are "seconds," irregulars, imperfects, or "not first
- 65 class," without clearly and unequivocally indicating in the advertisement or offer for sale that the goods
- 66 are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are "seconds,"
- 67 irregulars, imperfects or "not first class";
- 68 8. Advertising goods or services with intent not to sell them as advertised, or with intent not to sell
- 69 at the price or upon the terms advertised.
- 70 In any action brought under this subdivision, the refusal by any person, or any employee, agent, or
- 71 servant thereof, to sell any goods or services advertised or offered for sale at the price or upon the terms
- 72 advertised or offered, shall be prima facie evidence of a violation of this subdivision. This paragraph
- 73 shall not apply when it is clearly and conspicuously stated in the advertisement or offer by which such
- 74 goods or services are advertised or offered for sale, that the supplier or offeror has a limited quantity or
- 75 amount of such goods or services for sale, and the supplier or offeror at the time of such advertisement
- 76 or offer did in fact have or reasonably expected to have at least such quantity or amount for sale;
- 77 9. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts
- 78 of price reductions;
- 79 10. Misrepresenting that repairs, alterations, modifications, or services have been performed or parts
- 80 installed;
- 81 11. Misrepresenting by the use of any written or documentary material which appears to be an
- 82 invoice or bill for merchandise or services previously ordered;
- 83 12. Notwithstanding any other provision of law, using in any manner the words "wholesale,"
- 84 "wholesaler," "factory," or "manufacturer" in the supplier's name, or to describe the nature of the
- 85 supplier's business, unless the supplier is actually engaged primarily in selling at wholesale or in
- 86 manufacturing the goods or services advertised or offered for sale;
- 87 13. Using in any contract or lease any liquidated damage clause, penalty clause, or waiver of
- 88 defense, or attempting to collect any liquidated damages or penalties under any clause, waiver, damages,
- 89 or penalties which are void or unenforceable under any otherwise applicable laws of this
- 90 Commonwealth, or under federal statutes or regulations;
- 91 14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection
- 92 with a consumer transaction;
- 93 15. Violating any provision of §§ 3.1-796.78, 3.1-796.79, or § 3.1-796.82, relating to the sale of
- 94 certain animals by pet dealers which is described in such sections, is a violation of this chapter;
- 95 16. Failing to disclose all conditions, charges, or fees relating to:
- 96 a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign
- 97 attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be
- 98 readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does
- 99 not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of
- 100 this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not
- 101 less than twenty days after date of purchase, a cash refund or credit to the purchaser's credit card
- 102 account for the return of defective, unused, or undamaged merchandise upon presentation of proof of
- 103 purchase. In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase
- 104 and any refund may be delayed for a period of ten banking days to allow for the check to clear. This
- 105 subdivision does not apply to sale merchandise which is obviously distressed, out of date, post season,
- 106 or otherwise reduced for clearance; nor does this subdivision apply to special order purchases where the
- 107 purchaser has requested the supplier to order merchandise of a specific or unusual size, color, or brand
- 108 not ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection
- 109 with a transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in
- 110 § 46.2-100;
- 111 b. A layaway agreement. Such disclosure shall be furnished to the consumer (i) in writing at the time
- 112 of the layaway agreement, or (ii) by means of a sign placed in a conspicuous public area of the
- 113 premises of the supplier, so as to be readily noticeable and readable by the consumer, or (iii) on the bill
- 114 of sale. Disclosure shall include the conditions, charges, or fees in the event that a consumer breaches
- 115 the agreement;
- 116 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess
- 117 of five dollars (i) on an account maintained by the supplier and (ii) resulting from such consumer's
- 118 overpayment on such account. Suppliers shall give consumers written notice of such credit balances
- 119 within sixty days of receiving overpayments. If the credit balance information is incorporated into
- 120 statements of account furnished consumers by suppliers within such sixty-day period, no separate or

additional notice is required;

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

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

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

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

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

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

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

24. Violating any provision of § 54.1-1505;

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

26. Violating any provision of § 3.1-949.1, relating to the pricing of merchandise;

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

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

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

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

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

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

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

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

35. Violating any provision of the Virginia Internet Privacy Protection Act (§ 59.1-207.45 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 17.8. VIRGINIA INTERNET PRIVACY PROTECTION ACT.

§ 59.1-207.45. Title.

This chapter may be cited as the "Virginia Internet Privacy Protection Act."

§ 59.1-207.46. Definitions.

As used in this chapter:

"Affiliate" means an entity that controls, is controlled by, or is under common control or common ownership with another entity.

"Consumer" or "customer" means a natural person or his legal representative who is a resident of the Commonwealth and who contracts with an Internet company (i) to obtain access to the Internet, (ii) to purchase, license, or to obtain by electronic means access to informational products, or (iii) to purchase or lease goods or services as those terms are defined in § 59.1-198.

"Cookie" means a set of computer data or instructions that is placed on a consumer's computer by a website server to collect or store information about the consumer.

"Informational products" includes computer information, as defined in § 59.1-501.2, and access to information, as defined in § 59.1-501.2, via the Internet.

"Internet company" means a business (i) that provides access to the Internet to consumers, (ii) that sells, licenses, or provides or offers to sell, license or provide access to informational products, or (iii) that sells or leases or offers to sell or lease goods or services via the Internet.

"License" shall have the same meaning as that term is defined in § 59.1-501.2.

"Necessary personal information" means personal information provided by a consumer to an Internet company that (i) is for the purpose of conducting a transaction with the Internet company and is necessary to conduct or complete that transaction, or (ii) is reasonably necessary to establish, administer or maintain a business relationship between the Internet company and the consumer. The

term includes but is not limited to name, street address, electronic mail address, telephone number, social security number, driver's license, identification number, and credit card, debit card, bank account or other billing and payment account information.

"Optional personal information" means personal information provided by a consumer to an Internet company that is not necessary personal information, and includes but is not limited to gender, age, income, education level and other demographic information, interests, purchasing habits, history or preferences.

"Personal information" includes necessary personal information, optional personal information, and profiled personal information.

"Profiled personal information" means information that is collected by the Internet company but was not expressly or knowingly provided by a consumer. The term includes but is not limited to (i) the consumer's purchasing history with the Internet company, (ii) history of Internet protocol numbers, Uniform Resource Locators, domain names, or names of the web sites the consumer had visited, and (iii) any other information about the consumer that the Internet company acquired through use of cookies or other similar technology.

§ 59.1-207.47. Internet privacy policy.

A. An Internet company shall establish an Internet privacy policy that discloses to existing and prospective consumers the policies and practices of the Internet company regarding the collection and use of consumers' personal information.

B. An Internet privacy policy, at a minimum, shall (i) describe both the Internet company's responsibilities and the consumer's rights and remedies under this chapter, (ii) describe what profiled information is collected or stored, and (iii) generally describe with whom the consumer's personal information will be shared or to whom it will be sold or transferred, including but not limited to, either the names of those with whom the information is shared, sold, or transferred or a reasonable description of the nature of the business of each entity with which information is shared, sold or transferred.

§ 59.1-207.48. Personal information; consumer control.

An Internet company shall provide a reasonable process for its customers to access, review, and correct any erroneous necessary personal information or optional personal information. An Internet company shall provide a reasonable process for its customers to contact the Internet company regarding the customer's personal information.

§ 59.1-207.49. Restriction on collection of optional personal information.

It shall be unlawful for an Internet company to collect optional personal information unless the Internet company specifies to the consumer that the consumer is not required to provide such information and that the consumer is given the option not to provide it.

§ 59.1-207.50. Restriction on disclosure of personal information.

A. Subject to exclusions under § 59.1-207.51, it shall be unlawful for Internet companies to disclose, sell, transfer or share a consumer's credit card, debit card, bank account or other billing and payment account information to any third party.

B. Subject to exclusions under § 59.1-207.51, it shall be unlawful for Internet companies to disclose, sell, transfer or share (i) necessary personal information, other than those described in subsection A, (ii) optional personal information, and (iii) profiled personal information that identifies a specific consumer without the express consent of that consumer. For purposes of this subsection, such consent shall not be valid unless the consumer specifically assents to the term authorizing such disclosure, sale, transfer or sharing in accordance with § 59.1-501.12.

C. Subject to exclusions under § 59.1-207.51, it shall be unlawful for Internet companies to disclose, sell, transfer or share a consumer's profiled personal information that does not specifically identify a consumer if the consumer expressly prohibits the Internet company from doing so.

§ 59.1-207.51. Exclusions to the restrictions on disclosure of personal information.

Section 59.1-207.50 does not apply to disclosure of personal information under the following circumstances:

1. Disclosure to the consumer who is the subject of the personal information being disclosed, or where the consumer is a minor, a disclosure to his parent or guardian;

2. Disclosure to another entity or person at the direction of the consumer who is the subject of the personal information being disclosed, or where the consumer is a minor, at the direction of the consumer's parent or guardian;

3. Disclosure to a federal, state or local agency as required by that agency to fulfill its legal obligations on behalf of a consumer;

4. Disclosure to another entity or person to conduct or complete the transaction for which the necessary personal information was submitted to the Internet company;

5. Disclosure to another entity or person to perform services or functions on behalf of the Internet company as part of the Internet company's provision of access to the Internet, informational products,

244 goods, or services to its customers;

245 6. Disclosure to an affiliate;

246 7. Disclosure required by federal, state, or local statute, rule or regulation;

247 8. Disclosure made (i) in the course of a properly authorized civil, criminal, or regulatory
248 examination or investigation or (ii) under a search warrant, court order, or subpoena, including an
249 administrative subpoena or other legal process;

250 9. Disclosure to a non-affiliate for the purpose of collecting a debt incurred by the customer against
251 the Internet company or a dishonored item;

252 10. Disclosure to protect confidentiality or security of the Internet company's records; and

253 11. Disclosure to protect against, investigate, or prevent actual or potential fraud, unauthorized
254 transactions, claims, or other liability.

255 § 59.1-207.52. Civil relief; damages.

256 A. Any consumer whose property or person is injured by reason of a violation of any provision of
257 this chapter may sue therefor and recover for all actual damages sustained by the consumer or five
258 hundred dollars, whichever is greater, the cost of suit, and reasonable attorney's fees.

259 B. At the request of any party to an action brought pursuant to this section, the court may, in its
260 discretion, conduct all legal proceedings in such a way as to protect the secrecy and security of the
261 computer, computer network, computer data, computer program and computer software involved in
262 order to prevent possible recurrence of the same or a similar act by another person and to protect any
263 trade secrets of any party.

264 C. The provisions of this chapter shall not be construed to limit any person's right to pursue any
265 additional civil remedy otherwise allowed by law.

266 D. A civil action under this section must be commenced before expiration of the time period
267 prescribed in § 8.01-40.3.

268 § 59.1-207.53. Civil action; affirmative defense.

269 In any action brought pursuant to § 59.1-207.52, the Internet company is entitled to assert as an
270 affirmative defense that the violation of the provisions of this chapter was not intentional but was the
271 result of a bona fide error, including but not limited to clerical, computer malfunction and programming
272 and printing errors.