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SENATE BILL NO. 423

Offered January 9, 2002

Prefiled January 9, 2002

A BILL to amend and reenact §§ 59.1-200, 59.1-510, 59.1-512, 59.1-514, 59.1-516, and 59.1-517 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 44 of Title 59.1 sections numbered 59.1-513.1, 59.1-514.1, 59.1-514.2, 59.1-519, and 59.1-520, relating to telephone solicitation practices; consumer protection; penalties.

 Patron—Byrne

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-200, 59.1-510, 59.1-512, 59.1-514, 59.1-516, and 59.1-517 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Chapter 44 of Title 59.1 sections numbered 59.1-513.1, 59.1-514.1, 59.1-514.2, 59.1-519, and 59.1-520, 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 which are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or which 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 which 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 which are void or unenforceable under any otherwise applicable laws of this Commonwealth, or under federal statutes or regulations;

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

15. Violating any provision of §§ 3.1-796.78, 3.1-796.79, or § 3.1-796.82, relating to the sale of certain animals by pet dealers which is described in such sections, is a violation of this chapter;

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

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

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

80 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess
81 of five dollars (i) on an account maintained by the supplier and (ii) resulting from such consumer's
82 overpayment on such account. Suppliers shall give consumers written notice of such credit balances
83 within sixty days of receiving overpayments. If the credit balance information is incorporated into
84 statements of account furnished consumers by suppliers within such sixty-day period, no separate or
85 additional notice is required;

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

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

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

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

95 21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4
96 (§ 59.1-207.17 et seq.) of this title;

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

98 23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32
99 (§ 59.1-424 et seq.) of this title;

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

101 25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter
102 17.6 (§ 59.1-207.34 et seq.) of this title;

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

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

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

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

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

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

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; and

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

117 35. Violating any provision of the Virginia Telephone Privacy Protection Act, Chapter 44 (§ 59.1-510
118 et seq.) of this title.

119 B. Nothing in this section shall be construed to invalidate or make unenforceable any contract or
120 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.

§ 59.1-510. Definitions.

As used in this chapter:

"Board" means the Virginia Board of Agriculture and Consumer Services.

"Commissioner" means the Commissioner of Agriculture and Consumer Services, or a member of his staff to whom he may delegate his duties under this chapter.

"Consumer goods or services" means any real property or any tangible personal property or service, including a loan or extension of credit, that is normally used for personal, family, or household purposes.

"Office" means the Office of Consumer Affairs of the Department of Agriculture and Consumer Services.

"Predictive automated dialing system" means equipment that has the capacity (i) to store or produce telephone numbers to be called, using a random or sequential number generator and (ii) to dial such numbers.

"Registered residential subscriber" means a residential subscriber in Virginia who is included on the list maintained by the Office pursuant to § 59.1-513.1.

"Residential subscriber" means a person who has subscribed to residential telephone service from a local exchange company or the other persons living or residing with such person.

"Telephone solicitation call" means any telephone call made to any natural person's residence voice communication over a telephone line, whether made from a line operator or by other means, made by any person transacting any business in the Commonwealth to any residential subscriber in Virginia for the purpose of offering or advertising any property, goods or services for sale, lease, license or investment, including offering or advertising (i) soliciting or encouraging the purchase or rental of any consumer goods or services or an extension of credit for such purposes; or (ii) obtaining information that will or may be used for the purpose of soliciting or encouraging the purchase or rental of, or investment in, any consumer goods or services or an extension of credit for such purposes. "Telephone solicitation call" shall not include a telephone call made to by any Virginia public or nonprofit private institution of higher education seeking donations from any person; (i) with that person's prior express invitation or permission or (ii) with whom the person on whose behalf the telephone call is being made institution has an established business a prior relationship that has not been terminated by either party.

"Telephone solicitor" means any person who makes, or causes another person to make be made, a telephone solicitation call.

"Transacting any business in the Commonwealth" refers to the conduct of telephone solicitations from a location in Virginia or from any other state to a residential subscriber located within Virginia.

"Unwanted telephone solicitation" means any telephone solicitation made to a registered residential subscriber, excluding any telephone solicitation made to a registered residential subscriber (i) with such subscriber's prior express invitation or permission; (ii) in connection with an existing debt or contract of such subscriber, the payment or performance of which has not been completed at the time of such telephone solicitation; or (iii) with whom the telephone solicitor, or an affiliate or subsidiary thereof, has a prior or existing business or personal relationship.

§ 59.1-512. Identification of telephone solicitor required.

A Any telephone solicitor who makes a telephone solicitation call to the telephone number of any residential subscriber shall identify himself by his true first and last names and the name of the person or entity on whose behalf the telephone solicitation call is being made promptly upon making contact by telephone with the called person a residential subscriber who is the object of the telephone solicitation.

§ 59.1-513.1. Database of telephone subscribers not wishing to receive unsolicited calls; fees.

A. The Office shall establish and maintain a database consisting of a list of telephone numbers of residential subscribers who have notified the Office that they object to receiving telephone solicitations and have paid the required registration fee. The Office shall commence registering residential subscribers into the database no later than January 1, 2003.

B. Any residential subscriber who objects to receiving telephone solicitations, upon providing the Office with written notice and a ten-dollar annual listing fee, shall be placed on the database to be established and maintained by the Office pursuant to subsection A. Listing on the database indicates that such person does not wish to receive any telephone solicitations. A residential subscriber annually may renew his listing on the database upon providing the Office with a written renewal notice and a five-dollar renewal fee.

C. The Office shall prepare, for each calendar quarter commencing with the first calendar quarter of 2003, a listing of telephone numbers of the registered residential subscribers. Upon payment of a ten-dollar annual fee, the Office shall provide to any person or entity requesting such a copy of the

182 listing of the telephone numbers of registered residential subscribers, in a paper or electronic format,
183 for the current calendar quarter and the following three calendar quarters.

184 D. Any fees paid pursuant to this chapter shall be remitted to the State Treasurer and shall be
185 placed to the credit and special fund of the Department of Agriculture and Consumer Services for use in
186 the administration of this chapter.

187 E. If, pursuant to 47 U.S.C. Section 227(c)(3), the Federal Communications Commission establishes
188 a single national database of telephone numbers of subscribers who object to receiving telephone
189 solicitations, the Office shall include the part of such single national database that relates to Virginia in
190 the database established under this section.

191 F. Information contained in the database established under this section shall be used only for the
192 purpose of compliance with this section or in a proceeding or action to enforce the provisions of this
193 chapter. Except as provided in this section, information contained in the database shall not otherwise be
194 subject to public inspection or disclosure.

195 § 59.1-514. Certain telephone solicitations prohibited.

196 A. No telephone solicitor shall initiate, or cause to be initiated, a telephone solicitation call to a
197 telephone number when a person at such telephone number previously has stated that he does not wish
198 to receive a telephone solicitation call made by or on behalf of the person on whose behalf the
199 telephone solicitation call is being made. Such statement may be made to a telephone solicitor or to the
200 person on whose behalf the telephone solicitation call is being made if that person is different from the
201 telephone solicitor.

202 B. Any such request pursuant to subsection A not to receive telephone solicitation calls solicitations
203 shall be honored for at least ten years from the time the request is made.

204 C. No telephone solicitor shall make or cause to be made any unwanted telephonic solicitations to
205 the telephone number of any registered residential subscriber whose telephone number is included on
206 the listing prepared pursuant to subsection C of § 59.1-513.1 for such calendar quarter; however, a
207 telephone solicitation made within thirty days after the end of a calendar quarter and made in reliance
208 upon the most recently prepared quarterly listing shall not constitute a violation of this section.

209 C D. It shall be an affirmative defense in any action brought under § 59.1-515 or § 59.1-517 for a
210 violation of subsection A or B of this section that the defendant has established and implemented, with
211 due care, reasonable practices and procedures to effectively prevent telephone solicitation calls
212 solicitations in violation of subsection A or B of this section.

213 § 59.1-514.1. Notification to residential subscribers.

214 A. Every provider of local telephone service shall notify its residential subscribers of the provisions
215 of this chapter by displaying such information in the consumer information pages of its local telephone
216 directories.

217 B. The State Corporation Commission is authorized to promulgate regulations in order to implement
218 and enforce the provisions of this section.

219 § 59.1-514.2. Certain uses of predictive automated dialing systems prohibited.

220 No telephone solicitor shall use a predictive automated dialing system to make, or cause to be made,
221 a telephone solicitation if a telephone call generated by the predictive automated dialing system does
222 not immediately connect the person answering the telephone call with an individual who is the telephone
223 solicitor or an employee or agent thereof.

224 § 59.1-516. Investigative authority.

225 A. The Commissioner of the Department of Agriculture and Consumer Services, or his duly
226 authorized representative, shall have the power to inquire into possible violations of this chapter, and to
227 request

228 1. Make necessary public or private investigations within or without this Commonwealth to determine
229 any violations of the provisions of this chapter or any rule, regulation, or order issued pursuant to this
230 chapter;

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

234 3. request Request, but not to require, an appropriate legal official to bring an action under
235 § 59.1-517 with respect to such violation.

236 B. For the purpose of any investigation or proceeding under this chapter, the Commissioner may
237 administer oaths or affirmations, and upon such motion or upon request of any party, may subpoena
238 witnesses, compel their attendance, take evidence, and require the production of any matter that is
239 relevant to the investigation, including the existence, description, nature, custody, condition, and location
240 of any books, documents, or other tangible things and the identity and location of persons having
241 knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of
242 material evidence.

243 C. Any proceeding or hearing of the Commissioner pursuant to this chapter, in which witnesses are

subpoenaed and their attendance required for evidence to be taken, or any matter is to be produced to ascertain material evidence, shall take place within the City of Richmond.

D. If any person fails to obey a subpoena or to answer questions propounded by the Commissioner and upon reasonable notice to all persons affected thereby, the Commissioner may apply to the Circuit Court of the City of Richmond for an order compelling compliance.

B E. Whenever the Attorney General has reasonable cause to believe that any person has engaged in, 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.

§ 59.1-517. Enforcement; penalties.

A. 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 the enforcement provisions of the Virginia Consumer Protection Act (§ 59.1-196 et seq.), to the extent the remedies and sanctions provided therein are not inconsistent with specific provisions of this chapter; however, notwithstanding the provisions of § 59.1-204, any private action arising from a violation of this chapter for damages, costs and attorney's fees shall be commenced pursuant to § 59.1-515.

B. The Attorney General, any attorney for the Commonwealth, or the attorney for any city, county, or town may cause an action to be brought in the appropriate circuit court in the name of the Commonwealth, or of the county, city, or town to enjoin any violation of this chapter by any person and to recover damages for aggrieved persons in the amount of \$500 for each such violation pursue any other remedies as provided in subsection A.

~~B.~~ C. In any action brought under this chapter, if the court finds a willful violation, the court may, in its discretion, also award that a person has willfully engaged in an act or practice in violation of this chapter, the court may assess a civil penalty of not more than ~~\$1,000~~ \$2,500 for each such violation, as provided in subsection A of § 59.1-206.

C D. In any action brought under this section, the Attorney General, the attorney for the Commonwealth or the attorney for the county, city or town may recover any applicable civil penalty or penalties, costs, reasonable expenses incurred by the state or local agency in investigating and preparing the case, and attorneys' fees, as provided in subsection C of § 59.1-206.

~~D.~~ Any E. Notwithstanding the provisions of § 59.1-206, any civil penalties awarded under this section in an action brought in the name of the Commonwealth shall be paid into the Literary Fund. Any civil penalties awarded under this section in an action brought in the name of a county, city or town shall be paid into the general fund of the county, city or town.

§ 59.1-519. Regulations.

Except as provided in § 59.1-514.1, the Board is authorized to promulgate reasonable regulations in order to implement the provisions of this chapter. These regulations shall be adopted, amended, or repealed in accordance with the Administrative Process Act (§ 2.2-4000 et seq.).

§ 59.1-520. Jurisdiction over nonresident defendants.

A court of this Commonwealth may exercise personal jurisdiction over any nonresident transacting any business in the Commonwealth as to an action or proceeding authorized by this chapter in accordance with the provisions of § 8.01-328.1.