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HOUSE BILL NO. 2523

Offered January 8, 2003

Prefiled January 8, 2003

A BILL to amend and reenact § 59.1-200 of the Code of Virginia and to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 46, consisting of sections numbered 59.1-525 through 59.1-535, relating to The Virginia Anti-Spamming Act; commercial electronic mail messages; penalties.

Patron—Morgan

Referred to Committee on Science and Technology

Be it enacted by the General Assembly of Virginia:

1. That § 59.1-200 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 46, consisting of sections numbered 59.1-525 through 59.1-535, 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;

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

117 35. Using the consumer's social security number as the consumer's account number with the supplier,
118 if the consumer has requested in writing that the supplier use an alternate number not associated with
119 the consumer's social security number; ~~and~~

120 36. Violating any provision of Chapter 18 (§ 6.1-444 et seq.) of Title 6.1; *and*

37. Violating any provision of the Virginia Anti-Spamming Act, Chapter 46 (§ 59.1-525 et seq.) of this title.

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 46. THE VIRGINIA ANTI-SPAMMING ACT.

§ 59.1-525. Definitions.

As used in this chapter:

"Assist the transmission" means actions taken by a person to provide substantial assistance or support that enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates this chapter.

"Commercial electronic mail message" means an electronic mail message sent for the purpose of advertising, promoting, marketing or otherwise attempting to solicit interest in any property, goods, services, website content, or enterprise for sale, lease, license, gift, offer or other disposition. It does not mean an electronic mail message (i) to which an interactive computer service provider has attached an advertisement in exchange for free use of an electronic mail account when the recipient has agreed to such an arrangement or (ii) sent at the request of, or with the express consent of, the recipient.

"Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.

"Functioning return electronic mail address" means a legitimately obtained electronic mail address, clearly and conspicuously displayed in a commercial electronic mail message, that (i) remains capable of receiving messages for no less than 30 days after the transmission of such commercial electronic mail message and (ii) has capacity reasonably calculated, in light of the number of recipients of the commercial electronic mail message, to enable it to receive the full expected quantity of reply messages from such recipients. An electronic mail address that meets these requirements shall not be excluded from this definition because of a temporary inability to receive electronic mail messages due to technical problems, provided steps are taken to correct such technical problems within a reasonable time.

"Initiate the transmission" refers to the action by the person initially sending an electronic mail message, not to the action by any intervening interactive computer service provider that may handle or retransmit the message, unless such intervening interactive computer service provider assists in the transmission of an electronic mail message when it knows, or consciously avoids knowing, that the person initiating the transmission is engaged, or intends to engage, in any act or practice that violates this chapter or the Virginia Consumer Protection Act (§ 59.1-196 et seq.).

"Interactive computer service" means the same as that term is defined in § 8.01-49.1.

"Internet domain name" means a globally unique, hierarchical reference to an Internet host or service, assigned through centralized Internet-naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.

"Sender" means the person initially sending an electronic mail message.

"Spamming" means sending commercial electronic mail messages in a manner prohibited by § 59.1-526.

"Transacting any business in the Commonwealth" refers to the transmission of a commercial electronic mail message from computer located in the Commonwealth or in any other state to an electronic mail address held by a resident of the Commonwealth.

§ 59.1-526. Prohibited acts.

A. No person shall initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in the Commonwealth or to an electronic mail address that the sender knows, or has reason to know, is held by a resident of the Commonwealth that:

1. Uses a third party's Internet domain name or electronic mail address without permission of the third party; or

2. Contains false, misleading or no information in the subject line.

B. No person shall initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in the Commonwealth or to an electronic mail address that the sender knows, or has reason to know, is held by a resident of the Commonwealth, unless the message states clearly (i) a functioning return electronic mail address to which a recipient may send a reply to the sender to indicate a desire not to receive

182 further messages from that sender at the electronic mail address at which the message was received and
183 (ii) a valid street address or mailing address at which the recipient may notify the sender not to send
184 any subsequent electronic mail messages.

185 C. If the recipient of a commercial electronic mail message requests the message's sender, via an
186 electronic mail message sent to an electronic mail address or via U.S. mail to an address provided by
187 the sender as required by subdivision 5 of § 59.1-527, not to send further commercial electronic mail
188 messages, the sender, or any person acting on behalf of the sender, shall not, after the tenth day
189 following the sender's receipt of such request, initiate the transmission of a commercial electronic mail
190 message to such person.

191 D. No person shall give, transfer, sell or otherwise share with another person the electronic mail
192 address of any person who has notified the sender not to send any further electronic mail messages for
193 any use other than for such other person to place the electronic mail address on a list of persons who
194 have requested that they not be sent further commercial electronic mail messages.

195 § 59.1-527. Required information in commercial electronic mail messages.

196 Any person sending a commercial electronic mail message from a computer located in the
197 Commonwealth or to an electronic mail address that the sender knows, or has reason to know, is held
198 by a resident of the Commonwealth, shall include in the message the following information, which shall
199 be clearly and conspicuously stated:

200 1. That the message is an advertisement or solicitation;

201 2. That the recipient has the option to request the sender not to send further commercial electronic
202 mail messages, and that the sender's disregard of such request can constitute a violation of subsection C
203 of § 59.1-526;

204 3. The legal name of the sender;

205 4. The legal name of the person on whose behalf the commercial electronic mail message was sent;
206 and

207 5. A means of contacting the sender at no or minimal cost to the recipient, which may include an
208 electronic mail address, a street address or mailing address or a toll-free telephone number.

209 § 59.1-528. Affirmative defense.

210 It shall be an affirmative defense in any action brought under this chapter for a violation of this
211 section that the defendant has established and implemented, with due care, reasonable practices and
212 procedures to effectively prevent commercial electronic mail messages in violation of subsection C of
213 § 59.1-526.

214 § 59.1-529. Liability for blocking of commercial electronic mail by interactive computer service.

215 A. No interactive computer service may be held liable for any action voluntarily taken in good faith
216 to block the receipt or transmission through its service of any commercial electronic mail that it
217 reasonably believes is, or will be, sent in violation of this chapter.

218 B. Nothing in this chapter shall be construed to have any effect on the lawfulness or unlawfulness,
219 under any other provision of law, of the adoption, implementation, or enforcement by an interactive
220 computer service provider of a policy of declining to transmit, route, relay, handle, or store certain
221 types of electronic mail messages.

222 § 59.1-530. Knowledge of residence in the Commonwealth.

223 For purposes of this chapter, a person knows that the intended recipient of a commercial electronic
224 mail message is a resident of the Commonwealth if that information is available, upon request, from the
225 registrant of the Internet domain name contained in the recipient's electronic mail address or is
226 otherwise publicly available.

227 § 59.1-531. Private action for damages.

228 A. Any natural person who is aggrieved by spamming or any other violation of this chapter shall be
229 entitled to initiate an action to enjoin such violation and to recover damages in the amount of \$500 for
230 each such violation.

231 B. If the court finds a willful violation, the court may, in its discretion, increase the amount of the
232 award to an amount not exceeding \$1,500.

233 C. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded,
234 such person may be awarded reasonable attorneys' fees and court costs.

235 D. An action for damages, attorneys' fees, and costs brought under this section may be filed in an
236 appropriate general district court or small claims court so long as the amount claimed does not exceed
237 the jurisdictional limits set forth in § 16.1-77 or § 16.1-122.2, as applicable. Any action brought under
238 this section that includes a request for an injunction shall be filed in an appropriate circuit court.

239 E. At the request of any party to an action brought pursuant to this chapter, the court may, in its
240 discretion, conduct all legal proceedings in a such a way as to protect the secrecy and security of the
241 computer, computer network, computer data, computer program and computer software involved in
242 order to prevent possible recurrence of the same or a similar act by another person and to protect any
243 trade secrets or any party.

§ 59.1-532. Investigative authority.

A. The Commissioner of the Department of Agriculture and Consumer Services, or his duly authorized representative, shall have the power to inquire into possible violations of this chapter, and to request, but not to require, an appropriate legal official to bring an action under § 59.1-533 with respect to such violation.

B. 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.

§ 59.1-533. Enforcement; penalties; jurisdiction over nonresident defendants.

A. The Attorney General, an attorney for the Commonwealth or the attorney for any county, city or town may cause an action to be brought 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. If the court finds a willful violation, the court may, in its discretion, also award a civil penalty of not more than \$1,500 for each such violation.

B. 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 reasonable expenses incurred by the state or local agency in investigating and preparing the case, and attorneys' fees.

C. Any penalties awarded under this section in an action brought in the name of the Commonwealth shall be paid into the Literary Fund. Any 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.

D. 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.

§ 59.1-534. Limitations period.

A private action under this chapter shall be commenced before the earlier of (i) 5 years after the last act in the course of conduct constituting a violation of this chapter or (ii) 2 years after the plaintiff discovers or reasonably should have discovered the last act in the course of conduct constituting a violation of this chapter.

§ 59.1-535. Effect on other remedies, causes of action or penalties.

Nothing in this chapter shall be construed to limit any remedies, causes of action or penalties available to any person or governmental agency under any other federal or state law.