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SENATE BILL NO. 924

Offered January 8, 2003

Prefiled January 7, 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 59.1-533, relating to commercial electronic mail; penalties.

Patron—Byrne

Referred to Committee on General Laws

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 59.1-533, 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;

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

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68 subdivision does not apply to sale merchandise which is obviously distressed, out of date, post season,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

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

79 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess
80 of five dollars (i) on an account maintained by the supplier and (ii) resulting from such consumer's
81 overpayment on such account. Suppliers shall give consumers written notice of such credit balances
82 within sixty days of receiving overpayments. If the credit balance information is incorporated into
83 statements of account furnished consumers by suppliers within such sixty-day period, no separate or
84 additional notice is required;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

120 37. Violating any provision of the Commercial Electronic Mail 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. COMMERCIAL ELECTRONIC MAIL 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 or the Virginia Consumer Protection Act (§ 59.1-196 et seq.).

"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 (including content on a website) 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; (ii) sent between persons with a personal relationship; or (iii) sent at the request of, or with the express consent of, the recipient. An electronic mail message shall not be considered to be a commercial electronic mail message solely because such message includes a reference to a commercial entity that serves to identify the sender or a reference or link to a website operated for a commercial purpose.

"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 original sender of 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.

"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.

"Person" means the same as that term is defined in § 1-13.19.

§ 59.1-526. Unpermitted electronic mail.

A. No person may 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. A commercial electronic mail message, sent 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, must provide in a manner that is clear and conspicuous to the recipient:

1. Identification that the message is an advertisement or solicitation, though those actual words need not be used;

2. Notice of the opportunity under subsection A of § 59.1-527 to decline to receive further

182 commercial electronic mail messages from the sender;

183 3. The legal name of the sender;

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

186 5. A valid means of contacting the sender at no cost to the recipient; such means includes, but is not
187 limited to, an electronic mail address, a physical postal address or a toll-free telephone number.

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

192 § 59.1-527. Same; option to unsubscribe required.

193 A. No person may initiate the transmission, conspire with another to initiate the transmission, or
194 assist the transmission, of a commercial electronic mail message from a computer located in the
195 Commonwealth or to an electronic mail address that the sender knows, or has reason to know, is held
196 by a resident of the Commonwealth, unless it contains a functioning return electronic mail address to
197 which a recipient may send a reply to the sender to indicate a desire not to receive further messages
198 from that sender at the electronic mail address at which the message was received and a valid United
199 States or postage-free postal address at which the recipient may notify the sender not to send any
200 subsequent electronic mail messages.

201 B. If a recipient makes a request to a sender, through an electronic mail message sent to an
202 electronic mail address or through a postal address provided by the sender pursuant to subsection A,
203 not to receive further electronic mail messages from that sender, the sender, or any person acting on
204 behalf of the sender, shall not initiate the transmission of a commercial electronic mail message to such
205 recipient within the Commonwealth more than 10 days after receipt of such request.

206 C. No person shall give, transfer, sell or otherwise share with another the electronic mail address of
207 any person who has notified the sender not to send any further electronic mail messages for any use
208 other than for the third party to place the electronic mail address on a "do not contact" list.

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

212 § 59.1-528. Blocking of commercial electronic mail by interactive computer service; immunity from
213 liability.

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

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

221 § 59.1-529. Private action for damages.

222 A. Any person whose property or person is injured by reason of a violation of any provision of this
223 chapter may sue therefor and recover for any damages sustained and the costs of suit. Without limiting
224 the generality of the term, "damages" shall include loss of profits.

225 B. The injured recipient, other than an interactive computer service provider, may also recover
226 attorneys' fees and costs, and may elect, in lieu of actual damages, to recover \$100 for each and every
227 commercial electronic mail message sent in violation of this chapter up to \$500 for each day the
228 violation continues. The injured recipient shall not have a cause of action against the interactive
229 computer service provider that merely transmits the commercial electronic mail over its computer
230 network.

231 C. The third party without whose permission the third party's Internet domain name or electronic
232 mail address was used may also recover attorneys' fees and costs, and may elect, in lieu of actual
233 damages, to recover the greater of \$1,000 or \$100 for each and every commercial electronic mail
234 message sent in violation of this chapter up to \$25,000 for each day the violation continues. The injured
235 third party shall not have a cause of action against the interactive computer service provider that
236 merely transmits the commercial electronic mail over its computer network.

237 D. The injured interactive computer service provider may also recover attorneys' fees and costs, and
238 may elect, in lieu of actual damages, to recover the greater of \$1,000 or \$100 for each and every
239 commercial electronic mail message sent in violation of this chapter up to \$25,000 for each day the
240 violation continues.

241 E. If a violation of this chapter is a willing or knowing violation, the court may double the amount
242 recoverable, excluding attorneys' fees and costs, up to an additional \$500,000.

243 F. If a violation of this chapter is accompanied by a violation of subdivision A 7 of § 18.2-152.4,

there shall be no limit on the amount that may be recovered pursuant to this section.

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

§ 59.1-530. Enforcement; penalties.

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.

§ 59.1-531. Limitations.

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.

§ 59.1-532. 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.

§ 59.1-533. Severability.

If any provision or clause of this chapter or application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.