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SENATE BILL NO. 1336

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Education and Health
on February 3, 2005)

(Patron Prior to Substitute—Senator Rerras)

A BILL to amend and reenact §§ 59.1-200 and 59.1-526 of the Code of Virginia and to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 47, consisting of sections numbered 59.1-530 through 59.1-534, relating to price gouging in connection with the sale of a vaccine; penalties.

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-200 and 59.1-526 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 47, consisting of sections numbered 59.1-530 through 59.1-534, 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 that are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or that are "seconds," irregulars, imperfections, 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, imperfections 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 that 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 that are void or unenforceable under any otherwise applicable laws of the 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:

a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does

60 not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of
61 this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not
62 less than 20 days after date of purchase, a cash refund or credit to the purchaser's credit card account
63 for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase.
64 In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any
65 refund may be delayed for a period of 10 banking days to allow for the check to clear. This subdivision
66 does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise
67 reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser
68 has requested the supplier to order merchandise of a specific or unusual size, color, or brand not
69 ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a
70 transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in
71 § 46.2-100;

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

77 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess
78 of \$5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment
79 on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of
80 receiving overpayments. If the credit balance information is incorporated into statements of account
81 furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

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

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

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

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

91 21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4
92 (§ 59.1-207.17 et seq.) of this title;

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

94 23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32
95 (§ 59.1-424 et seq.) of this title;

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

97 25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter
98 17.6 (§ 59.1-207.34 et seq.) of this title;

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

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

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

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

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

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

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

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

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

113 35. Using the consumer's social security number as the consumer's account number with the supplier,
114 if the consumer has requested in writing that the supplier use an alternate number not associated with
115 the consumer's social security number;

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

117 37. Violating any provision of § 8.01-40.2;

118 38. Violating any provision of Article 7 (§ 32.1-212 et seq.) of Chapter 6 of Title 32.1;

119 39. Violating any provision of Chapter 34.1 (§ 59.1-441.1 et seq.) of this title;

120 40. Violating any provision of Chapter 10.2 (§ 6.1-363.2 et seq.) of Title 6.1; and

121 41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46

(§ 59.1-525 et seq.) of this title; and

42. *Violating any provision of Chapter 47 (§ 59.1-530 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.

§ 59.1-526. Definitions.

As used in this chapter:

"Disaster" means any "natural disaster," "man-made disaster," "emergency," or "major disaster," as those terms are used and defined in § 44-146.16, that results in the declaration of a state of emergency by the Governor or the President of the United States.

"Goods," "services," and "supplier" have the same meanings as are set forth for those terms in § 59.1-198.

"Necessary goods and services" means any necessary good or service for which consumer demand does, or is likely to, increase as a consequence of the disaster, and includes, but is not limited to, water; ice; consumer food items or supplies; property or services for emergency cleanup; emergency supplies; communication supplies and services; medical supplies and services, *including any vaccine*; home heating fuel; building materials and services; tree removal supplies and services; freight; storage services; housing; lodging; transportation; and motor fuels.

"Time of disaster" means the period of time when a declaration of a state of emergency by the Governor or the President of the United States is in effect, or 30 days after the occurrence of the event that constitutes the disaster, whichever is shorter.

CHAPTER 47.

VACCINE PRICE GOUGING.

§ 59.1-530. Definitions.

"Vaccine" means a suspension of infectious agents or some part of them, given for the purpose of establishing resistance to an infectious disease.

"Vaccine shortage period" means the period of time during which a proclamation of the Governor provides that a vaccine shortage exists.

§ 59.1-531. Proclamation of vaccine shortage.

In the event of an existing or threatened vaccine shortage due to an abnormal market disruption or other extraordinary adverse circumstance, the Governor may issue an executive order proclaiming that a vaccine shortage exists. Prior to issuing such a proclamation, the Governor shall consult with the State Health Commissioner. An executive order proclaiming that a vaccine shortage exists shall not be issued unless the Governor determines that:

1. The amount of vaccine available for administration in the Commonwealth is not reasonably sufficient to provide vaccinations to those persons residing in the Commonwealth who are in primary target groups recommended for vaccination in accordance with the most recently available recommendations of the Advisory Committee on Immunization Practices of the federal Department of Health and Human Services' Centers for Disease Control and Prevention; and

2. Price gouging with respect to the vaccine is occurring or is likely to occur as the proximate result of the vaccine shortage.

§ 59.1-532. Prohibitions.

During any vaccine shortage period, it shall be unlawful for any person to sell or administer, or to offer to sell or administer, vaccine at an unconscionable price within the Commonwealth. Actual sales at the increased price shall not be required for the increase to be considered unconscionable. In determining whether the price at which the vaccine is sold or administered is unconscionable, the following shall be considered:

1. Whether the price charged by the person for selling or administering the vaccine grossly exceeded the price charged by the person therefor during the 10 days immediately prior to the commencement of the vaccine shortage period; however, with respect to any person who was offering vaccine at a reduced price immediately prior to the commencement of the vaccine shortage period, the price at which the person usually offers the vaccine shall be used as the benchmark for these purposes;

2. Whether the price charged by the person grossly exceeded the price at which the vaccine was readily obtainable by consumers in the trade area during the 10 days immediately prior to the commencement of the vaccine shortage period; and

3. Whether the increase in the amount charged by the person was attributable solely to additional costs incurred by the person in connection with the sale of the vaccine, including additional costs imposed by the person's source. Proof that the person incurred such additional costs during the time of the vaccine shortage period shall be *prima facie* evidence that the price increase was not

183 *unconscionable.*

184 *§ 59.1-533. Complaint investigations.*

185 *In the event that the Attorney General, any attorney for the Commonwealth, or the attorney for any*
186 *county, city, or town investigates a complaint for a violation of § 59.1-532 and determines that the*
187 *person has not violated the section, and if the person requests, the Attorney General, any attorney for*
188 *the Commonwealth, or the attorney for any county, city, or town shall promptly issue a signed statement*
189 *indicating that a violation of § 59.1-532 has not been found. Subject to the disclosures allowed by this*
190 *section, it shall be the duty of the Attorney General, the attorney for the Commonwealth, or the attorney*
191 *for any city, county or town, or their designees, that investigates any complaint for violation of*
192 *§ 59.1-532 to maintain the confidentiality of all evidence, testimony, documents, or other results of such*
193 *investigations, including the names of the complainant and the person that is the subject of the*
194 *investigation. Nothing herein contained shall be construed to prevent the presentation and disclosure of*
195 *any such investigative evidence in an action or proceeding brought under this chapter.*

196 *§ 59.1-534. Enforcement; penalties.*

197 *Any violation of this chapter shall constitute a prohibited practice under the provisions of § 59.1-200*
198 *and shall be subject to any and all of the enforcement provisions of Chapter 17 (§ 59.1-196 et seq.)*
199 *except that, § 59.1-204 notwithstanding, nothing in this chapter shall create a private cause of action in*
200 *favor of any person aggrieved by a violation of this chapter.*