VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act 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 47, consisting of sections numbered 59.1-530 through 59.1-534, relating to price gouging in connection with the sale of influenza vaccine.

[S 707]

Approved

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 This subdivision does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser has requested the supplier to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

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

16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess of $5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of receiving overpayments. If the credit balance information is incorporated into statements of account furnished consumers by suppliers within such 60-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 that 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;

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

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

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

37. Violating any provision of § 8.01-40.2;

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

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

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

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.

CHAPTER 47.

INFLUENZA VACCINE PRICE GOUGING.

§ 59.1-530. Definitions.

As used in this chapter:

"Influenza vaccine" means a vaccine, intended to be administered by injection, that contains inactivated influenza viruses, that is prepared for the applicable influenza season.

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

§ 59.1-531. Proclamation of influenza vaccine shortage.

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

1. The amount of influenza vaccine available for administration in the Commonwealth is not reasonably sufficient to provide influenza vaccinations to those persons residing in the Commonwealth who are in primary target groups recommended for annual influenza 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 influenza vaccine is occurring or is likely to occur as the proximate result of the influenza vaccine shortage.

§ 59.1-532. Prohibitions.

During any influenza vaccine shortage period, it shall be unlawful for any person to sell or administer, or to offer to sell or administer, influenza 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 influenza 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 influenza vaccine grossly exceeded the price charged by the person therefor during the 10 days immediately prior to the commencement of the influenza vaccine shortage period; however, with respect to any person who was offering influenza vaccine at a reduced price immediately prior to the commencement of the influenza vaccine shortage period, the price at which the person usually offers influenza vaccine shall be used as the benchmark for these purposes;

2. Whether the price charged by the person grossly exceeded the price at which influenza vaccine was readily obtainable by consumers in the trade area during the 10 days immediately prior to the commencement of the influenza 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 influenza vaccine, including additional costs imposed by the person's source. Proof that the person incurred such additional costs during the time of the influenza vaccine shortage period shall be prima facie evidence that the price increase was not unconscionable.

§ 59.1-533. Complaint investigations.

In the event that the Attorney General, any attorney for the Commonwealth, or the attorney for any county, city, or town investigates a complaint for a violation of § 59.1-532 and determines that the person has not violated the section, and if the person requests, the Attorney General, any attorney for the Commonwealth, or the attorney for any county, city, or town shall promptly issue a signed statement indicating that a violation of § 59.1-532 has not been found. Subject to the disclosures allowed by this section, it shall be the duty of the Attorney General, the attorney for the Commonwealth, or the attorney for any county, city, or town, or their designees, that investigates any complaint for violation of § 59.1-532 to maintain the confidentiality of all evidence, testimony, documents, or other results of such investigations, including the names of the complainant, and the person that is the subject of the investigation. Nothing herein contained shall be construed to prevent the presentation and disclosure of

any such investigative evidence in an action or proceeding brought under this chapter.

§ 59.1-534. Enforcement; penalties.

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