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SENATE BILL NO. 388

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Second Joint Conference Committee
on March 9, 2024)

(Patron Prior to Substitute—Senator Pekarsky)

*A BILL to amend and reenact § 59.1-200 of the Code of Virginia, relating to Virginia Consumer Protection Act; prohibited practices; mandatory fees disclosure.***Be it enacted by the General Assembly of Virginia:****1. That § 59.1-200 of the Code of Virginia is amended and reenacted 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;

13a. Failing to provide to a consumer, or failing to use or include in any written document or material provided to or executed by a consumer, in connection with a consumer transaction any statement, disclosure, notice, or other information however characterized when the supplier is required by 16 C.F.R. Part 433 to so provide, use, or include the statement, disclosure, notice, or other information in connection with the consumer transaction;

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

15. Violating any provision of § 3.2-6509, 3.2-6512, 3.2-6513, 3.2-6513.1, 3.2-6514, 3.2-6515, 3.2-6516, or 3.2-6519 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

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 20 days after date of purchase, a cash refund or credit to the purchaser's credit card account
65 for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase.
66 In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any
67 refund may be delayed for a period of 10 banking days to allow for the check to clear. This subdivision
68 does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise
69 reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser
70 has requested the supplier to order merchandise of a specific or unusual size, color, or brand not
71 ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a
72 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 \$5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment
81 on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of
82 receiving overpayments. If the credit balance information is incorporated into statements of account
83 furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

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

87 18. Violating any provision of the Virginia Health Club Act, Chapter 24 (§ 59.1-294 et seq.);

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

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

92 21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4
93 (§ 59.1-207.17 et seq.);

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

95 23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32
96 (§ 59.1-424 et seq.);

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

98 25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter
99 17.6 (§ 59.1-207.34 et seq.);

100 26. Violating any provision of § 3.2-5627, relating to the pricing of merchandise;

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

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

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

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

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

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

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

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

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

114 36. Violating any provision of Chapter 18 (§ 6.2-1800 et seq.) of Title 6.2;

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

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

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

118 40. Violating any provision of Chapter 20 (§ 6.2-2000 et seq.) of Title 6.2;

119 41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46
120 (§ 59.1-525 et seq.);

121 42. Violating any provision of Chapter 47 (§ 59.1-530 et seq.);

43. Violating any provision of § 59.1-443.2;
44. Violating any provision of Chapter 48 (§ 59.1-533 et seq.);
45. Violating any provision of Chapter 25 (§ 6.2-2500 et seq.) of Title 6.2;
46. Violating the provisions of clause (i) of subsection B of § 54.1-1115;
47. Violating any provision of § 18.2-239;
48. Violating any provision of Chapter 26 (§ 59.1-336 et seq.);
49. Selling, offering for sale, or manufacturing for sale a children's product the supplier knows or has reason to know was recalled by the U.S. Consumer Product Safety Commission. There is a rebuttable presumption that a supplier has reason to know a children's product was recalled if notice of the recall has been posted continuously at least 30 days before the sale, offer for sale, or manufacturing for sale on the website of the U.S. Consumer Product Safety Commission. This prohibition does not apply to children's products that are used, secondhand or "seconds";
50. Violating any provision of Chapter 44.1 (§ 59.1-518.1 et seq.);
51. Violating any provision of Chapter 22 (§ 6.2-2200 et seq.) of Title 6.2;
52. Violating any provision of § 8.2-317.1;
53. Violating subsection A of § 9.1-149.1;
54. Selling, offering for sale, or using in the construction, remodeling, or repair of any residential dwelling in the Commonwealth, any drywall that the supplier knows or has reason to know is defective drywall. This subdivision shall not apply to the sale or offering for sale of any building or structure in which defective drywall has been permanently installed or affixed;
55. Engaging in fraudulent or improper or dishonest conduct as defined in § 54.1-1118 while engaged in a transaction that was initiated (i) during a declared state of emergency as defined in § 44-146.16 or (ii) to repair damage resulting from the event that prompted the declaration of a state of emergency, regardless of whether the supplier is licensed as a contractor in the Commonwealth pursuant to Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1;
56. Violating any provision of Chapter 33.1 (§ 59.1-434.1 et seq.);
57. Violating any provision of § 18.2-178, 18.2-178.1, or 18.2-200.1;
58. Violating any provision of Chapter 17.8 (§ 59.1-207.45 et seq.);
59. Violating any provision of subsection E of § 32.1-126;
60. Violating any provision of § 54.1-111 relating to the unlicensed practice of a profession licensed under Chapter 11 (§ 54.1-1100 et seq.) or Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1;
61. Violating any provision of § 2.2-2001.5;
62. Violating any provision of Chapter 5.2 (§ 54.1-526 et seq.) of Title 54.1;
63. Violating any provision of § 6.2-312;
64. Violating any provision of Chapter 20.1 (§ 6.2-2026 et seq.) of Title 6.2;
65. Violating any provision of Chapter 26 (§ 6.2-2600 et seq.) of Title 6.2;
66. Violating any provision of Chapter 54 (§ 59.1-586 et seq.);
67. Knowingly violating any provision of § 8.01-27.5;
68. Failing to, in accordance with § 59.1-207.46, (i) make available a conspicuous online option to cancel a recurring purchase of a good or service or (ii) with respect to a free trial lasting more than 30 days, notify a consumer of his option to cancel such free trial within 30 days of the end of the trial period to avoid an obligation to pay for the goods or services;
69. Selling or offering for sale any substance intended for human consumption, orally or by inhalation, that contains a synthetic derivative of tetrahydrocannabinol. As used in this subdivision, "synthetic derivative" means a chemical compound produced by man through a chemical transformation to turn a compound into a different compound by adding or subtracting molecules to or from the original compound. This subdivision shall not (i) apply to products that are approved for marketing by the U.S. Food and Drug Administration and scheduled in the Drug Control Act (§ 54.1-3400 et seq.) or (ii) be construed to prohibit any conduct permitted under Chapter 16 (§ 4.1-1600 et seq.) of Title 4.1;
70. Selling or offering for sale to a person younger than 21 years of age any substance intended for human consumption, orally or by inhalation, that contains tetrahydrocannabinol. This subdivision shall not (i) apply to products that are approved for marketing by the U.S. Food and Drug Administration and scheduled in the Drug Control Act (§ 54.1-3400 et seq.) or (ii) be construed to prohibit any conduct permitted under Chapter 16 (§ 4.1-1600 et seq.) of Title 4.1;
71. Selling or offering for sale any substance intended for human consumption, orally or by inhalation, that contains tetrahydrocannabinol, unless such substance is (i) contained in child-resistant packaging, as defined in § 4.1-600; (ii) equipped with a label that states, in English and in a font no less than 1/16 of an inch, (a) that the substance contains tetrahydrocannabinol and may not be sold to persons younger than 21 years of age, (b) all ingredients contained in the substance, (c) the amount of such substance that constitutes a single serving, and (d) the total percentage and milligrams of tetrahydrocannabinol included in the substance and the number of milligrams of tetrahydrocannabinol

that are contained in each serving; and (iii) accompanied by a certificate of analysis, produced by an independent laboratory that is accredited pursuant to standard ISO/IEC 17025 of the International Organization of Standardization by a third-party accrediting body, that states the tetrahydrocannabinol concentration of the substance or the tetrahydrocannabinol concentration of the batch from which the substance originates. This subdivision shall not (i) apply to products that are approved for marketing by the U.S. Food and Drug Administration and scheduled in the Drug Control Act (§ 54.1-3400 et seq.) or (ii) be construed to prohibit any conduct permitted under Chapter 16 (§ 4.1-1600 et seq.) of Title 4.1;

72. Manufacturing, offering for sale at retail, or selling at retail an industrial hemp extract, as defined in § 3.2-5145.1, a food containing an industrial hemp extract, or a substance containing tetrahydrocannabinol that depicts or is in the shape of a human, animal, vehicle, or fruit;

73. Selling or offering for sale any substance intended for human consumption, orally or by inhalation, that contains tetrahydrocannabinol and, without authorization, bears, is packaged in a container or wrapper that bears, or is otherwise labeled to bear the trademark, trade name, famous mark as defined in 15 U.S.C. § 1125, or other identifying mark, imprint, or device, or any likeness thereof, of a manufacturer, processor, packer, or distributor of a product intended for human consumption other than the manufacturer, processor, packer, or distributor that did in fact so manufacture, process, pack, or distribute such substance;

74. Selling or offering for sale a topical hemp product, as defined in § 3.2-4112, that does not include a label stating that the product is not intended for human consumption. This subdivision shall not (i) apply to products that are approved for marketing by the U.S. Food and Drug Administration and scheduled in the Drug Control Act (§ 54.1-3400 et seq.), (ii) be construed to prohibit any conduct permitted under Chapter 16 (§ 4.1-1600 et seq.) of Title 4.1, or (iii) apply to topical hemp products that were manufactured prior to July 1, 2023, provided that the person provides documentation of the date of manufacture if requested;

75. Violating any provision of § 59.1-466.8;

76. Violating subsection F of § 36-96.3:1;

77. Selling or offering for sale (i) any kratom product to a person younger than 21 years of age or (ii) any kratom product that does not include a label listing all ingredients and with the following guidance: "This product may be harmful to your health, has not been evaluated by the FDA, and is not intended to diagnose, treat, cure, or prevent any disease." As used in this subdivision, "kratom" means any part of the leaf of the plant *Mitragyna speciosa* or any extract thereof; and

78. *Advertising or displaying a price for goods or services without clearly and conspicuously displaying the total price, which shall include all mandatory fees or charges. As used in this subdivision, "mandatory fees or charges" includes (i) any fee or surcharge that must be paid in order to purchase the good or service being advertised, (ii) any fee or surcharge that is not reasonably avoidable, and (iii) any fee or surcharge for any good or service that a reasonable consumer would expect to be included with the purchase of the good or service being advertised. "Mandatory fees or charges" does not include (a) shipping fees; (b) taxes or fees imposed on the consumer by a government or government-approved entity or assessment fees of a government-created special district or program paid to the government or government-approved entity; (c) fees, surcharges, or other charges for optional or elective goods or services which are not required in order to purchase or utilize the good or services; or (d) any mandatory gratuity imposed by a restaurant or hotel, as those terms are defined in § 35.1-1, that is paid to a tipped employee, as defined in § 40.1-28.9. Compliance by a person providing broadband Internet access service on its own or as part of a bundle, as defined in 47 C.F.R. § 8.1(b), with the broadband consumer label requirements adopted by the Federal Communications Commission in FCC 22-86 on November 13, 2022, codified in 47 C.F.R. § 8.1(a), shall be deemed compliant with this subdivision. It shall not be a violation of this subdivision for any supplier to (1) reduce the total price that was advertised or displayed or (2) advertise or display a price for goods and services in compliance with specific state or federal laws applicable to such supplier. The provisions of this subdivision shall be preempted by 49 U.S.C § 41713; and*

79. Failing to disclose the total cost of a good or continuous service, as defined in § 59.1-207.45, to a consumer, including any mandatory fees or charges, prior to entering into an agreement for the sale of any such good or provision of any such continuous service.

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.