ANTITRUST AND MONOPOLIES

REPORT OF THE

VIRGINIA ADVISORY LEGISLATIVE COUNCIL

To

THE GOVERNOR

And

THE GENERAL ASSEMBLY OF VIRGINIA

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Report

on

ANTITRUST AND MONOPOLIES

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VIRGINIA ADVISORY LEGISLATIVE COUNCIL

to the

GOVERNOR AND GENERAL ASSEMBLY

Richmond, Virginia
January, 1974

TO: THE HONORABLE MILLS E. GODWIN, JR., *Governor of Virginia*

and

THE GENERAL ASSEMBLY OF VIRGINIA

We in this country depend upon a free market system to make the economic decisions that every society requires. The virtue of our economic scheme is that in the main it relies for its operation upon the individual business decisions of our citizens, and government intervention is thus minimized. In such a system government's role is principally to ensure that the marketplace is permitted to function, free from restraint or distortion. To guide government in this crucial task and to preserve and enhance the disciplines of competitive free enterprise, the antitrust laws have been enacted at both the federal and state levels.

Virginia has on its books legislation that purports to apply in this area (9 Va. Code § 59.1-22—59.1-41) (1973 Repl. Vol.). In addition, the Virginia Fair Trade Act (9 Va. Code § 59.1-1—59.1-9) (1973 Repl. Vol.) relates to antitrust through its inhibition of price competition. The General Assembly was concerned that the passage of time and the evolution of the methods of doing business rendered these laws inadequate and might necessitate a fresh approach to the problem of safeguarding competition. Accordingly the General Assembly, in its 1972 Session, adopted House Joint Resolution No. 53, the text of which is as follows:

HOUSE JOINT RESOLUTION NO. 53

Directing the Virginia Advisory Legislative Council to make a study and report on the antitrust and monopolies laws of the Commonwealth.

Whereas, the Commonwealth has long had a policy preventing trusts, combinations and monopolies inimical to the public welfare, which policy has been applicable to services as well as commodities; and

Whereas, major recent significant developments have occurred in antitrust enforcement in federal courts, including class litigation, more viable state enforcement through private civil antitrust actions and recoveries for both Virginia citizens as well as localities; and

Whereas, for an effective state antitrust law there is a need for amendments to keep abreast of developments in this rapidly evolving field; and

Whereas, a study of existing competitive practices is necessary to determine what adverse effects, if any, anticompetitive conditions have had at the State level on free trade and competition and the adverse effects, if any, that monopolistic or anticompetitive practices have had on existing commercial

enterprises within the Commonwealth, and further to assess the adequacy of existing Virginia law to deal with these problems; and

Whereas, recent studies in the fields of organized crime, which is a threat to legitimate business, and of franchising, and proposed studies of fair trade laws, all point to a need for an effective state antitrust law; now, therefore, be it

Resolved by the House of Delegates, the Senate concurring, That the Virginia Advisory Legislative Council is hereby directed to make a study of competitive business conditions and practices in Virginia to the end that effective State antitrust enforcement may be achieved through the recommendation of legislation which the Council may deem desirable and proper to deal with such problems. In view of the deterrent effect that antitrust laws can have on organized crime it is recommended that the Council consider having on the membership of its study a representative of the Virginia State Crime Commission as well as the Attorney General of Virginia or his representative.

The Council shall conclude its study and make its report to the Governor and the General Assembly by September first, nineteen hundred seventy-three.

Pursuant to this directive, the Council appointed a committee to conduct an initial study and report to it.

Russell M. Carneal, of Williamsburg, an attorney-at-law, a member of the House of Delegates and of the Council, was selected as Chairman of the Committee to make the preliminary study and report to the Council. The following persons were chosen to serve as members of the Committee with Mr. Carneal: Anthony F. Troy, Washington, D.C., a former Assistant Attorney General with responsibilities in the area of antitrust, an attorney-at-law and Vice-Chairman of the Committee; Mary A. Marshall, Arlington, an economist with the Antitrust Division of the United States Department of Justice for four years and a member of the House of Delegates; J. Harry Michael, Jr., Charlottesville, an attorney-at-law and a member of the Senate; G. Harold Scarborough, Lorton, a gasoline dealer; John H. Shenefield, Richmond, an attorney specializing in the practice of antitrust law; James T. Wood, Williamsburg, an attorney specializing in consumer law; Benjamin H. Woodbridge, an attorney-at-law and a member of the House of Delegates; and Samuel H. Baker, Williamsburg, a professor of economics at the College of William and Mary.

The Committee received valuable assistance from the office of the Attorney General of Virginia, represented by Vann H. Lefcoe, William Lehner and Walter Marston; Roy L. Farmer, Director of the office of Consumer Affairs, Department of Agriculture and Commerce; Jean A. Benoy, Deputy Attorney General of the State of North Carolina; Ernest G. Barnes, Assistant Director, Bureau of Competition, Federal Trade Commission; Laurens H. Rhinelander, Professor of law at the University of Virginia; James W. Heizer, Executive Secretary of the Virginia Gasoline Retailers Association; and Eugene B. Sydnor, Jr., President of Southern Department Stores and a former member of the Senate. The Division of Legislative Services, represented by G. William White, Jr., and Howard P. Anderson, Jr., served as counsel and secretariat to the Committee.

Public hearings were held in Richmond, and testimony was received from invited witnesses on several occasions.

The Committee submitted its report to the Council and we have reviewed and studied it with care. We now submit the following report.

Preliminary Statement

The Council first considered whether existing law in Virginia was adequate. It reviewed Chapter 3 of Title 59.1 carefully, but concluded on balance that clarification and simplification of the statutory provisions was highly desirable, to the end of providing an effective influence on business behavior in the Commonwealth. The Council consulted the antitrust statutes of numerous other states, and from these sources, together with commentary from the academic and enforcement communities, constructed a proposed statute which is uniquely suited to Virginia and is characterized by a number of important and highly desirable attributes.

First, its substantive provisions are adapted largely from those provisions of the federal antitrust laws that rely principally upon the standard of reasonableness. As a result, with the exception of the traditional per se unlawful offenses generally well known to businessmen, business conduct that is reasonable in all of the relevant circumstances will be lawful under the proposed Act. This moderation is in contrast to the statutes of some other states which enlarge the area of business conduct subject to treatment as per se unlawful without the potential for business justification.

Second, the proposed Act provides for a fair and efficient scheme of enforcement as a responsibility of the Commonwealth, its political subdivisions or any public agency. The scheme is fair because it treats the sensitive areas of the rights of defendants or witnesses subject to enforcement discovery, provides for witness immunity and protects the confidentiality of information made available to enforcement authorities during the course of investigations. On the other hand, the proposal is efficient because it provides for a workable discovery mechanism. The Council was intent upon providing effective enforcement to accompany the substantive provisions, and the proposal reflects its concern.

Finally, as directed by the governing Resolution, the Council investigated a number of procedural devices that have been employed in the antitrust area in recent years, including the class action. The Council was generally of the view that class actions, if they were to be permitted in Virginia, should be provided for in a general class action statute rather than in the context of an antitrust statute. The Council was confirmed in its view by the fact that proposals governing class actions were being considered by other more appropriate study committees in a better position to make definitive recommendations. The Council, however, did propose a limited class action provision pursuant to which the Attorney General could act on behalf of the Commonwealth and any of its political subdivisions that might desire to be represented collectively in the context of a single suit. In general, however, the Council adheres to traditional procedural forms in providing the underlying structure through which the substantive provisions of a proposed Act could be enforced.

With this background, the Council now makes the following recommendations.

Recommendations

The present law on trusts, combinations and monopolies (Chapter 3, Title 59.1) should be replaced by the proposed Act which is affixed as an appendix to this report.

Section-by-Section Comments

Section 59.1-9.1. Short Title.

This section is included for the purposes of convenience and citation uniformity.

Section 59.1-9.2. Purpose.

Many state statutes do not include a purposes provision. The Council concluded that such a provision was desirable to assist judicial authorities in the interpretation through case-by-case application of the generalized provisions of the statute.

Section 59.1-9.3. Definitions.

This provision is included in the Act for the purpose of clarity. Further, the provision reflects the Committee's intention that the statute should be broadly applied. Thus, the definition of "person" maximizes individuals and organizations subject to the Act, and the terms "trade" and "commerce" are meant to maximize the area of economic activity subject to the Act.

Section 59.1-9.4. Exclusions and Exemptions.

The provision follows the basic pattern of the Uniform State Antitrust Act, the federal antitrust laws and the antitrust laws of other states. Labor organizations and their members, agricultural or horticultural cooperative organizations and their members, and organizations engaging in religious or charitable activities have traditionally been excluded from the coverage of antitrust laws, and the Committee deemed the policy justification for these exclusions adequate. Subparagraph (b) is designed to ensure that the state antitrust laws will not conflict unnecessarily with other statutes or regulatory schemes.

Section 59.1-9.5. Restraint of Trade or Commerce.

This provision enacts the basic prohibition against restraints of trade or commerce common to virtually every antitrust statute. This particular formulation was chosen mainly for its simplicity and breadth. Its terminology reflects the drafters' intention to provide the judiciary with the assistance of federal precedent based upon similar language of the federal provision, but also to permit the courts adequate flexibility in their determinations. The prohibition, except in the areas of traditional per se unlawfulness, relies upon the standard of the so-called "rule of reason," which is immutably established as a rule of judicial construction of the statutory words "restraint of trade" by a now-invincible line of precedent starting with *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911), and *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

In addition, Council preferred to rely upon this kind of generalized prohibition, as well as that contained in proposed § 59.1-9.6, to deal with the problems of exclusive dealing and mergers, proscribed in federal law by §§ 3 and 7, respectively, of the Clayton Act, 15 U.S.C. §§ 14 and 18.

Section 59.1-9.6. Monopolization.

This provision, together with the immediately preceding companion provision, closely follows the traditional formulations, including the federal provision in § 2 of the Sherman Act, 15 U.S.C. § 2. As such, the drafters intend to provide benefits of flexibility and the wealth of federal precedent on which to draw.

Section 59.1-9.7. Price Discrimination.

This provision closely parallels the federal statute governing price discrimination found in the Robinson-Patman Act, 15 U.S.C. § 13. Again, the Council felt it desirable to permit judges to avail themselves of the body of federal precedent in this area. The Council was mindful of the criticisms directed toward the Robinson-Patman Act, but felt nevertheless that it furnished the best available mechanism at this time to reach the problem of discrimination.

Section 59.1-9.8. Judicial Jurisdiction and Powers.

This provision gives the circuit courts jurisdiction of actions under the proposed Act, and empowers those courts to provide remedies including equitable relief, damages and civil penalties, as spelled out in §§ 59.1-9.11—9.13.

Section 59.1-9.9. Venue.

This provision permits the initiation of actions and proceedings for violation of the proposed Act in any one of several places chosen for the convenience of the parties.

Section 59.1-9.10. Official Investigative Powers.

This provision is designed to give the state law enforcement authorities maximum power of investigation and to provide sanctions against those failing to comply with proper requests of the enforcement authority. The Council felt these powers absolutely necessary in order to give effect to the substantive provisions of the proposed Act.

(a) General Power of Investigation

This provision gives the Attorney General broad discretion to initiate investigations and to compel testimony as well as the production of documentary or other relevant data.

(b) Civil Investigative Demand

This provision provides for the issuance of a civil investigative demand to compel a witness to appear, be examined under oath and to produce documentary material and answer written interrogatories. Requests for documentary materials are subject to the constraints applicable to a subpoena duces tecum issued by a court of this Commonwealth.

(c) Inspection of Documentary Evidence

Where pursuant to a civil investigative demand the production and compilation of business records can be as easily accomplished by the Attorney General, it is a sufficient response to the demand that the Attorney General is free to inspect the business records in question. This provision is adopted from Rule 33(c) of the Federal Rules of Civil Procedure.

The Attorney General is authorized under this subparagraph to require documentary production prior to testimony of any person pursuant to a civil investigative demand, and proscribes the method of making such documentary matter available for inspection and copying by the Attorney General.

(d) Contents of Civil Investigative Demand

This provision is included for purposes of fairness to a witness and certainty for those issuing the civil investigative demand.

(e) Service of Civil Investigative Demand

This provision prescribes permissible means for service of the civil investigative demand, and is included for the purposes of certainty.

(f) Motion to Quash

This provision provides the exclusive means for a witness to challenge a civil investigative demand issued pursuant to the proposed Act.

(g) Those Authorized to Examine

This provision defines those authorized to examine witnesses under this section and the method by which such examination is to be recorded.

(h) Rights of Witnesses

This provision permits a witness to obtain right of access to a copy of his own testimony and provides that he may be accompanied by an attorney.

(i) Witness Expenses

The provision is self-explanatory.

(j) Refusal of Witness to Testify or Produce Requested Documents

This provision subjects those failing to comply with a valid civil investigative demand to heavy sanctions.

(k) Duty to Testify: Immunity

Under this provision no person may refuse to testify on the grounds of self-incrimination. However, compelled testimony that would otherwise have been privileged may not be used in the prosecution for a crime or offense under the proposed Act. It should be noted that since only use immunity is granted, the compulsion of incriminating testimony does not prevent a subsequent criminal proceeding concerning the matter about which testimony was given, if that prosecution in no way uses the testimony for which immunity was granted.

(l) Duty of Public Officials

This provision is intended to assure the cooperation of state and local officials in investigations pursuant to the Act.

(m) Rules and Regulations

The Council intends that the Attorney General shall issue rules and regulations explaining in full the precise methods of complying with the provisions of this section, both because it is intended that witnesses who are subject to heavy sanctions should be given the protection of detailed advance notice of the appropriate methods of compliance.

(n) Confidentiality

The Council was concerned that information received during the course of investigations pursuant to this section should be kept confidential. However, the Attorney General is permitted to pass on relevant information to other law enforcement authorities at the federal and state level to the extent that such authorities have restrictions governing confidentiality similar to those contained in this subparagraph.

Section 59.1-9.11. Civil Penalty.

To insure an effective deterrent this provision allows the assessment of a civil penalty. Imposition of such penalty is not mandatory and the court is allowed flexibility. The court can consider the factors of willfulness as well as ability to pay prior to assessing the penalty. The penalty is cumulative for *each* violation and is applicable only when the Attorney General or legal officer of a county or city is seeking injunctive action. It could also be applicable if such legal officer intervened in a private action thus adding a deterrent factor.

Section 59.1-9.12. Private Enforcement.

This provision follows applicable federal law and it thus allows questions of standing and causation to be resolved in conformity with federal precedent. It allows injunctive actions when any person is threatened with injury or damage to business *or* property. The concept of injury, however, is retained before any individual can sue for damages.

Treble damages are not mandatory but may be imposed by the trier of facts if it finds the violation intentional enough to justify imposition of an additional penalty.

The Council rejected a mandatory application of a treble damage rule. It was felt that in some cases application of such a rule may be too severe resulting in a jury finding no liability, rather than imposing a harsh damage award. Allowing such defendants to escape any liability could set a dangerous penalty allowing future more culpable defendants to circumvent the intended prohibitions of the Act.

The words "willful" or "flagrant" are used in their ordinary sense and can vary in degree. Consequently the trier of fact does not, if it is determined an additional penalty is appropriate, have to award *only* treble damage but can award any amount not to exceed three times the actual damage — thus the additional penalty can correspond to the degree of willfulness.

Section 59.1-9.13. Judgment in Favor of State as Prima Facie Evidence.

This provision is virtually identical to § 5 of the Clayton Act. It allows any party suing for damages, including the Commonwealth or a political subdivision and any private individual suing for injunctive relief to benefit from a finding of liability in any action brought by the Commonwealth for injunctive relief and civil penalties. Any such plaintiff could then have only the burden of demonstrating standing and damages. The federal provision for avoidance of the *prima facie* effect of a judgment is preserved; the consent decree exception is included as a means for securing immediate compliance with the Act.

Section 59.1-9.14. Limitations of Actions.

This provision is virtually identical to § 4B of the Clayton Act. It is also consistent with the time period prescribed by most other state antitrust acts. The Council intends, as provided in judicial interpretation of federal law, that in instances of conspiratorial actions the cause of action could accrue only when discovered or by the exercise of reasonable diligence, should have been discovered.

Section 59.1-9.15. Enforcement by State or Other Government Bodies.

The Attorney General or Commonwealth or county or city attorney is authorized to enjoin and seek a civil penalty for any violation of the Act occurring in their respective jurisdictions. Since a violation of the Act incurs civil not criminal penalty the county and city attorneys are authorized to bring actions.

Additionally such officers may seek damages in a suit on behalf of their respective jurisdictions. Again the imposition of treble damage is not mandatory in such cases. This is for the same reasons previously stated.

The Attorney General may also bring suit on behalf of political subdivisions as well as on behalf of the general economy of the Commonwealth as *parens patriae.*

Parens patriae suits are traditionally within the common law powers of an Attorney General. Unlike federal law, the Attorney General is empowered to seek both damages and/or injunctive relief in a *parens patriae* capacity.

The Council recommends a class action statute be considered in the revision of Title 8 of the Code of Virginia. Such a statute, though frequently used in antitrust actions, should not be limited only to such actions. It is, however, appropriate that the Attorney General be authorized to institute suit on behalf of political subdivisions.

This: (1) allows those counties and cities to benefit who could not for numerous practical reasons maintain an action of their own; (2) coincides with purchasing practices in the Commonwealth where counties and cities, in instances, "piggyback" state contracts; and (3) is consistent with current practice of the Commonwealth in federal actions.

Section 59.1-9.16. Remedies Cumulative.

This provision insures that a violator is subject to all sanctions prescribed by the Act. The policy of the Act is thus enhanced and a deterrent established. An individual or corporation could simultaneously be subject to a civil penalty, injunctive measures, and civil damages all for one violation. The Council also intends in no way to limit actions brought by private parties if a simultaneous injunctive action is being brought by the Attorney General, nor to limit any actions that might also arise under, for example, the Unfair Sales Act.

Section 59.1-9.17. Uniformity of Application and Construction.

There have been few cases reported interpreting provisions of the states present antitrust laws. Basically little if any antitrust litigation has been instituted in the state forum. This section aids courts by directing them to the extent possible to the body of federal law as interpreted by the federal judiciary. Such provision allows: (1) broad interpretation by courts consistent with federal judiciary interpretations thereby discouraging forum shopping; (2) consistence and uniformity among state court decisions applying the Act since there is a body of law that can be utilized; (3) individuals and corporations are more informed and are on notice of the antitrust implications of their behavior.

Section 59.1-9.18. Severability.

This is a standard, self-explanatory provision intended to preserve the provisions of the Act to the extent possible should any provision be declared unconstitutional.

Repeal

Repeal is recommended of Chapter 3

(Antitrust Laws) of Title 59.1.

There has been little use of the present antitrust law. It is outmoded and contains numerous gaps. For example the law sets forth exceptions to acts of price discrimination but never declares price discrimination illegal in the first instance. Rather than a piecework approach an entire new act with the above explanations is recommended. Much of the source for the Act is from the tentative drafts of the Uniform State Antitrust Law and proposals made by the Antitrust Committee of the National Association of Attorneys General.

The Council recommends additional appropriation for the Attorney General in the Appropriation Act in order that these antitrust responsibilities

may be effectively administered. Though not proposing a specific provision in the Act, such additional appropriation should be in a sum sufficient.

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Respectfully submitted,

Lewis A. McMurran, Jr., Chairman

Willard J. Moody, Vice-Chairman

Russell M. Carneal

Joseph V. Gartlan, Jr.

Jerry H. Geisler

Arthur R. Giesen, Jr.

Edward E. Lane

C. Hardaway Marks

Stanley A. Owens

William V. Rawlings

D. French Slaughter, Jr.

James M. Thomson

Lawrence Douglas Wilder

Edward E. Willey

A B I L L to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 1.1, containing sections numbered 59.1-9.1 through 59.1-9.18, so as to create the Virginia Antitrust Act; to prohibit monopolistic conduct, and price discrimination; to grant to the Attorney General powers of investigation and enforcement; to provide penalties for violations; to prescribe duties for public officials; to authorize individuals to institute certain actions; to require confidentiality; and to authorize enforcement by the State or its political subdivisions; and to repeal Chapter 3 of Title 59.1, containing sections numbered 59.1-22 through 59.1-41, relating to the Trusts, combinations and monopolies.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 1.1, containing sections numbered 59.1-9.1 through 59.1-9.18, as follows:

Chapter 1.1.

§ 59.1-9.1. This chapter may be known and cited as the "Virginia Antitrust Act."

§ 59.1-9.2. The purpose of this chapter is to promote the free market system in the economy of this State by prohibiting restraints of trade and monopolistic practices that act or tend to act to decrease competition. This chapter shall be construed in accordance with the legislative purpose to implement fully the State's police power to regulate commerce.

§ 59.1-9.3. Definitions.—When used in this chapter:

(a) The term "person" includes, unless the context otherwise requires, any natural person, any trust or association of persons, formal or otherwise, or any corporation, partnership, company, or other legal or commercial entity.

(b) The terms "trade or commerce," "trade," and "commerce," include all economic activity involving or relating to any commodity, service or business activity.

(c) The term "commodity" includes any kind of real or personal property.

(d) The term "service" includes any activity that is performed in whole or in part for the purpose of financial gain, including but not limited to personal service, rental, leasing or licensing for use.

§ 59.1-9.4. (a) No provision of this chapter shall be construed to make illegal:

(1) The activities of any labor organization or of individual members thereof that are directed solely to labor objectives legitimate under the laws of this State or the United States.

(2) The activities of any agricultural or horticultural cooperative organization, or of individual members thereof, to the extent necessary to achieve the aims of the enacted laws of either this State or the United States.

(3) The bona fide religious and charitable activities of any nonprofit corporation, trust or organization established exclusively for religious or charitable purposes.

(b) Nothing contained in this chapter shall make unlawful conduct that is

authorized, regulated or approved (1) by a statute of this State or of the United States, or (2) by an administrative agency of this State or of the United States having jurisdiction of the subject matter, if the anticompetitive effect, if any, of the conduct has been considered by the agency in connection with its authorization, regulation or approval.

§ 59.1-9.5. Every contract, combination, or conspiracy in restraint of trade or commerce of this State is unlawful.

§ 59.1-9.6. Every conspiracy, combination, or attempt to monopolize, or monopolization of, trade or commerce of this State is unlawful.

§ 59.1-9.7. (a) It is unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities or services of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities or services are sold for use, consumption or resale within the State and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the different methods or quantities in which such commodities or services are to such purchasers sold or delivered; and provided further, that nothing herein contained shall prevent persons engaged in selling commodities or services in commerce from selecting their own customers in bona fide transactions and not in restraint of trade; and provided further, that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as, but not limited to, actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any suit on a complaint under this section, that there has been discrimination in price or services or facilities furnished or in payment for services or facilities to be rendered, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section; provided, however, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It is unlawful for any person engaged in commerce in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for and not exceeding the actual cost of such services rendered in connection with the sale or purchase of goods, wares or merchandise.

(d) It is unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products, commodities or services manufactured, sold or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products, commodities or services.

(e) It is unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It is unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price that is prohibited by this section.

§ 59.1-9.8. Actions and proceedings for violations of this chapter shall be brought in the circuit courts of this State. Those courts may issue temporary restraining orders and injunctions to prevent and restrain violations of this chapter, and may award the damages and impose the civil penalties provided herein. They may also grant mandatory injunctions reasonably necessary to eliminate violations of this chapter.

§ 59.1-9.9. Actions and proceedings for violations of this chapter shall be brought in the county or city in which said violations occurred or in which either party resides or has its principal place of business, or in the city of Richmond.

§ 59.1-9.10. (a) Whenever it shall appear to the Attorney General, either upon complaint or otherwise, that any person has engaged in, or is engaging in, or is about to engage in any act or practice prohibited by this chapter, the Attorney General may in his discretion either require or permit such person to file with him a statement in writing or otherwise, under oath, as to all facts and circumstances concerning the subject matter. The Attorney General may also require such other data and information as he may deem relevant to the subject matter of an investigation of a possible violation of this chapter and may make such special and independent investigations as he may deem necessary in connection with such matter.

(b) In connection with any such investigation, the Attorney General, or his designee, is empowered to issue a civil investigative demand to witnesses by which he may (i) compel the attendance of such witnesses; (ii) examine such witnesses under oath before himself or a court of record; (iii) subject to subsection (c) of this section, require the production of any books or papers that he deems relevant or material to the inquiry; and (iv) issue written interrogatories to be answered by the witness served or, if the witness served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the witness. The above investigative powers shall not abate or terminate by reason of any action or proceeding brought by the Attorney General under this chapter. When documentary material is demanded by a civil investigative demand, said demand shall not: (1) contain any requirement that would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this State; or (2) require the disclosure of any documentary material that would be privileged, or production of which for any other reason would not be required by a subpoena duces tecum issued by a court of this State.

(c) Where the information requested pursuant to a civil investigative demand may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based therein, and the burden of deriving or ascertaining the answer is substantially the same for the Attorney General as for the party from whom such information is requested, it is sufficient for that party to specify the records from which the answer may be derived or ascertained and to afford the Attorney General, or other individuals properly designated by the Attorney

General, reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. Further the Attorney General is hereby authorized, and may so elect, to require the production pursuant to this section, of documentary material before or after the taking of any testimony of the person summoned pursuant to a civil investigative demand, in which event, said documentary matter shall be made available for inspection and copying during normal business hours at the principal place of business of the person served, or at such other time and place, as may be agreed upon by the person served and the Attorney General.

(d) Any civil investigative demand issued by the Attorney General shall contain the following information:

(1) The statute and section hereof, the alleged violation of which is under investigation and the subject matter of the investigation;

(2) The date and place at which time the person is required to appear to produce documentary material in his possession, custody or control in the office of the Attorney General located in Richmond, Virginia. Such date shall not be less than twenty days from the date of the civil investigative demand.

(3) Where documentary material is required to be produced, the same shall be described by class so as to clearly indicate the material demanded.

(e) Service of civil investigative demand of the Attorney General as provided herein may be made by

(1) delivery of a duly executed copy thereof to the person served, or if a person is not a natural person, to the principal place of business of the person to be served, or

(2) mailing by certified mail, return receipt requested, a duly executed copy thereof addressed to the person to be served at his principal place of business in this State, or if said person has no place of business in this State, to his principal office.

(f) Within twenty days after the service of any such demand upon any person or enterprise, or at any time before the return date specified in the demand, whichever period is shorter, such party may file, in the Circuit Court of the city of Richmond and serve upon the Attorney General a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this chapter or upon any constitutional or other legal right or privilege of such party. The provisions of this subsection shall be the exclusive means for a witness summoned pursuant to a civil investigative demand under this section to challenge a civil investigative demand issued pursuant to subsection (b).

(g) The examination of all witnesses under this section shall be conducted by the Attorney General, or his designee, before an officer authorized to administer oaths in this Commonwealth. The testimony shall be taken stenographically or by a sound recording device and shall be transcribed.

(h) Any person required to testify or to submit documentary evidence shall be entitled, on payment of lawfully prescribed cost, to procure a copy of any document produced by such person and of his own testimony as stenographically reported or, in the case of depositions, as reduced to writing by or under the direction of a person taking the deposition. Any party compelled to testify or to produce documentary evidence may be accompanied and advised by counsel, but counsel may not, as a matter of right, otherwise participate in the investigation.

(i) All persons served with a civil investigative demand by the Attorney General under this chapter, other than any person or persons whose conduct or practices are being investigated or any officer, director or person in the employ of such person under investigation, shall be paid the same fees and mileage as paid witnesses in the courts of this State. No person shall be excused from attending such inquiry pursuant to the mandate of a civil investigative demand, or from producing a paper or from being examined or required to answer questions on the ground of failure to tender or pay a witness fee or mileage unless demand therefor is made at the time testimony is about to be taken and as a condition precedent to offering such production or testimony and unless payment thereof is not thereupon made.

(j) Any natural person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience of a civil investigative demand or lawful request of the Attorney General or those properly authorized by the Attorney General, pursuant to this section, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not more than five thousand dollars, or by imprisonment in jail for not more than one year, or both such fine and imprisonment.

Any natural person who commits perjury or false swearing or contempt in answering, or failing to answer, or in producing evidence or failing to do so in accordance with a civil investigative demand or lawful request by the Attorney General, pursuant to this section, shall be guilty of a misdemeanor and upon conviction therefor by a court of competent jurisdiction shall be punished by a fine of not more than five thousand dollars, or by imprisonment in jail for not more than one year, or both such fine and imprisonment.

(k) In any investigation brought by the Attorney General pursuant to this chapter, no individual shall be excused from attending, testifying or producing documentary material, objects or intangible things in obedience to a civil investigative demand or under order of the court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty. Any evidence so compelled may not be used against that person in any prosecution for a crime or offense concerning which he gave answer or produced evidence or submitted a written statement under the order of the Attorney General. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing evidence or failing to do so in accordance with the order. If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in civil contempt by a court of competent jurisdiction and committed to the county jail until such time as he purges himself of contempt by testifying, producing evidence or presenting a written statement as ordered. The foregoing shall not prevent the Attorney General from instituting other appropriate contempt proceedings against any person who violates any of the above provisions.

(l) It shall be the duty of all public officials, both State and local, their deputies, assistants, clerks, subordinates or employees, and all other persons to render and furnish to the Attorney General, his deputy or other designated representative, when so requested, all information and assistance in their possession or within their power. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any such person other than the Attorney General the name of any witness examined or any other information obtained upon such inquiry, except as so directed by the Attorney General, shall be guilty of a misdemeanor as subject to the sanctions prescribed in subsection (j). Such inquiry may upon written authorization of the Attorney General be made public.

(m) The Attorney General may promulgate rules and regulations to implement and carry out the provisions of this section.

(n) It shall be the duty of the Attorney General, or his designees, to maintain the secrecy of all evidence, testimony, documents or other results of such investigations. Violation of this subsection shall be a misdemeanor. Nothing herein contained shall be construed to prevent the disclosure of any such investigative evidence by the Attorney General in his discretion to any federal or State law enforcement authority that has restrictions governing confidentiality similar to those contained in this subsection.

§ 59.1-9.11. In any action or proceeding brought under § 59.1-11(a) the court may assess for the benefit of the State a civil penalty of not more than one hundred thousand dollars for each willful or glarant violation of this chapter.

§ 59.1-9.12. (a) Any person threatened with injury or damage to his business or property by reason of a violation of this chapter may institute an action or proceeding for injunctive relief when and under the same conditions and principles as injunctive relief is granted in other cases.

(b) Any person injured in his business or property by reason of a violation of this chapter may recover the actual damages sustained, and, as determined by the court, the costs of suit and reasonable attorney's fees. If the trier of facts finds that the violation is willful or flagrant, it may increase damages to an amount not in excess of three times the actual damages sustained.

§ 59.1-9.13. A final judgment or decree to the effect that a defendant has violated this chapter, other than a consent judgment or decree entered before any testimony has been taken, in an action or proceeding brought under § 59.1-11(a) is prima facie evidence against that defendant in any other action or proceeding against him brought under § 59.1-11(b) or § 59.1-13 as to all matters with respect to which the judgment or decree would be an estoppel between the parties thereto.

§ 59.1-9.14. (a) An action under § 59.1-9.11(a) to recover a civil penalty is barred if it is not commenced within four years after the cause of action accrues.

(b) An action under §§ 59.1-9.11(b) or 59.1-9.13(b) to recover damages is barred if it is not commenced within four years after the cause of action accrues, or within one year after the conclusion of any action or proceeding under § 59.1-9.11(a) commenced within or before that time based in whole or in part on any matter complained of in the action for damages, whichever is later.

§ 59.1-9.15. (a) The Attorney General on behalf of the Commonwealth, or the Commonwealth's attorney or county attorney on behalf of a county, or the city attorney on behalf of a city, may institute actions and proceedings for injunctive relief and civil penalties for violations of this chapter.

(b) The State, a political subdivision thereof, or any public agency injured in its business or property by reason of a violation of this chapter, may recover the actual damages sustained, reasonable attorney's fees and the costs of suit. If the trier of facts finds that the violation is willful or flagrant, it may increase damages to an amount not in excess of three times the actual damages sustained.

(c) The Attorney General in acting under subsection (a) or (b) hereof may also bring such action on behalf of any political subdivision of the Commonwealth, provided that the Attorney General shall notify each such subdivision of the pendency of the action and give such subdivision the option of exclusion from the action.

(d) The Attorney General may bring a civil action to recover damages and secure other relief as provided by this chapter as *parens patriae* respecting injury to the general economy of the Commonwealth.

§ 59.1-9.16. The remedies in this chapter are cumulative.

§ 59.1-9.17. This chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions.

§ 59.1-9.18. If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

2. That Chapter 3 of Title 59.1 of the Code of Virginia, containing sections numbered 59.1-22 through 59.1-41 is repealed.

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