

**FINAL REPORT OF THE  
JOINT SUBCOMMITTEE STUDYING**

**THE VIRGINIA CONSUMER  
PROTECTION ACT**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



**HOUSE DOCUMENT NO. 34**

**COMMONWEALTH OF VIRGINIA  
RICHMOND  
1995**

# Members of the Joint Subcommittee

Delegate Mitchell Van Yahres, *CHAIRMAN*  
Senator Thomas K. Norment, Jr., *VICE CHAIRMAN*  
Delegate Dwight C. Jones  
Delegate Gladys B. Keating  
Delegate Robert D. Orrock, Sr.  
Senator Robert L. Calhoun  
Senator W. Henry Maxwell

---

## Staff

### **DIVISION OF LEGISLATIVE SERVICES**

Diane E. Horvath, Staff Attorney  
Arlen K. Bolstad, Senior Attorney  
Michelle L. Browning, Senior Operations Staff Assistant  
Jane C. Lewis, Senior Operations Staff Assistant

### **HOUSE COMMITTEE OPERATIONS**

Sharon A. Woodson, Clerk

# Table of Contents

I.	STUDY AUTHORITY AND SCOPE .....	1
II.	VCPA'S LEGISLATIVE HISTORY AND CURRENT STATUTORY SCHEME .....	1
	A. Coverage .....	2
	B. Exclusions.....	2
	C. Prohibited Practices .....	2
	D. Investigation and Enforcement.....	3
	1. Government Actions .....	3
	2. Private Actions .....	3
III.	INTERACTION BETWEEN VCPA AND OTHER ACTS RELATED TO CONSUMER PROTECTION.....	4
	A. When VCPA is Incorporated into Other Acts .....	4
	1. Relief Authorized Only Under VCPA .....	4
	2. VCPA Plus Additional Relief .....	5
	B. When VCPA is Not Incorporated into Other Acts .....	5
	1. Civil Relief Only .....	5
	2. Civil Relief Plus Criminal Prosecution .....	6
	3. Criminal Prosecution Only .....	6
IV.	WORK OF THE SUBCOMMITTEE .....	6
V.	FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS .....	9
	A. Coverage .....	9
	B. Public Investigation and Enforcement.....	11
	C. Funding .....	16
	D. Private Rights of Action.....	21
VI.	CONCLUSION .....	23
VII.	RESOURCE MATERIAL .....	24
VIII.	APPENDICES .....	25
	A. House Joint Resolution No. 143 (1994)	
	B. Proposed Legislation	

**Final Report of the Joint Subcommittee  
Studying the  
Virginia Consumer Protection Act**

**To  
The Governor and the General Assembly of Virginia**

**Richmond, Virginia  
January 1995**

TO: The Honorable George F. Allen, Governor of Virginia,  
and  
the General Assembly of Virginia

## **I. Study Authority And Scope**

House Joint Resolution No. 143 (1994) (attached as Appendix A), established a joint subcommittee to study issues related to the Virginia Consumer Protection Act (hereinafter "VCPA"), specifically, investigation, enforcement, funding, coverage, and private rights of action. The subcommittee was comprised of seven legislative members: Delegates Gladys Keating, Dwight Jones, Robert Orrock, and Mitchell Van Yahres (chairman), and Senators Henry Maxwell, Robert Calhoun, and Thomas Norment (vice chairman).

## **II. VCPA's Legislative History And Current Statutory Scheme**

VCPA was enacted in 1977 (Acts of Assembly, Chapter 635). Consisting of §§ 59.1-196 through 59.1-207, VCPA forms Chapter 17 of Title 59.1 of the Code of Virginia ("Trade and Commerce"). Except for 1978, 1984, and 1985, VCPA has been amended by the General Assembly in some fashion every year since its passage. Most amendments occurred in 1981, 1982, 1987, and 1988. During the 1994 Session, Code sections were amended that dealt with exclusions and prohibited practices.

VCPA's basic statutory scheme is to define terms, set forth exclusions, enumerate prohibited practices, provide mechanisms for investigation and enforcement, and authorize civil penalties and relief.

## **A. Coverage**

VCPA attacks misrepresentation--both intentional and unintentional--used as an inducement to contract in "consumer transactions." Consumer transactions include (i) the advertisement, sale, lease, or offering for sale or lease of goods, land, intangibles or services to be used primarily for "personal, family or household" purposes; (ii) business opportunities to be conducted from a residence by an individual; and (iii) services related to finding a job.

The rules governing consumer transactions apply to "suppliers." Suppliers are (i) sellers or lessors who advertise, solicit or engage in consumer transactions or (ii) manufacturers or distributors who advertise and sell or lease goods or services to be resold or leased by other persons in consumer transactions.

## **B. Exclusions**

Conduct excluded from VCPA includes any aspect of a consumer transaction (i) authorized by state or federal law or regulation, (ii) regulated by the Federal Consumer Credit Protection Act (popularly known as the "Truth in Lending Act"), or (iii) subject to the Landlord and Tenant Act or the Virginia Residential Landlord and Tenant Act, unless the act or practice constitutes a misrepresentation or fraudulent act or practice under VCPA. (This is a 1994 amendment.) Innocent acts by publishers or other advertising media in publishing or disseminating an advertisement that violates VCPA are also excluded.

Businesses excluded from VCPA include (i) banks, savings and loan associations, credit unions, small loan companies, public service corporations and insurance companies regulated and supervised by the State Corporation Commission or a comparable federal regulating body and (ii) employment agencies licensed under Chapter 13 of Title 54.1.

## **C. Prohibited Practices**

In a consumer transaction, VCPA prohibits suppliers from committing (i) a violation of any statute which incorporates VCPA into its provisions (discussed in IV below), (ii) any listed "prohibited practice" under VCPA, or (iii) any other deceptive practice. The true substance of VCPA is its prohibited practices, which currently comprise 32 enumerated practices. Examples include misrepresenting goods or services as those of another; misrepresenting the source, sponsorship, approval, certification, quantities, characteristics, ingredients, uses, benefits,

standard, quality, grade, style, model, or origin; advertising or offering used, repossessed, blemished, deteriorated, irregular, imperfect, or reconditioned goods for sale "without clearly and unequivocally" disclosing such in the advertisement or offer; advertising goods or services with the intent not to sell as advertised or at prices or upon terms advertised; making false or misleading statements about the reasons for, the existence of, or the amount of price reductions; using, in a contract, any liquidated damage clause, penalty clause, or waiver of defense which, under some other substantive law, is unenforceable; attempting to collect such damages or penalties; or using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction.

## **D. Investigation And Enforcement**

### **1. Government Actions**

If requests for information or documents are unproductive, investigative orders may be issued by the circuit courts when the Office of the Attorney General, Commonwealth's attorneys, or attorneys for any county, city or town have reasonable cause to believe that a supplier has violated, is violating, or is about to violate VCPA. Reasonable cause requires less of a showing than probable cause--the standard for obtaining a criminal search warrant--and may, for example, be found in a supplier's newspaper advertisement or promotional materials.

Government attorneys may sue under VCPA for injunctions, civil penalties, costs, and restitution for individuals. In actions brought by government attorneys, the court may award relief for an entire class of victims, including those who are not identified until after trial. For willful violations of VCPA, the court may impose additional civil penalties and costs. Government attorneys may also enter into a written assurance of compliance with any supplier covered by VCPA.

### **2. Private Actions**

Any person who suffers loss for an unintentional violation of VCPA may file a private civil action for actual damages or \$100, whichever is greater, plus reasonable attorney's fees. "Person" includes individuals and corporations.

### **III. Interaction Between VCPA And Other Acts Related To Consumer Protection**

#### **A. When VCPA Is Incorporated Into Other Acts**

##### **1. Relief Authorized Only Under VCPA**

Numerous acts related to consumer protection currently exist on the books of the Commonwealth, primarily in Title 59.1. Typically, these other acts cover specific types of businesses and then incorporate VCPA by providing that any violation of that act constitutes a prohibited practice under VCPA and is subject to VCPA's enforcement and other provisions. Examples of such acts include the following:

- ◆ Virginia Home Solicitation Sales Act (Chapter 2.1, §§ 59.1-21.1 through 59.1-21.7:1)
- ◆ Automobile Repair Facilities Act (Chapter 17.1, §§ 59.1-207.1 through 59.1-207.6)
- ◆ Virginia Lease-Purchase Agreement Act (Chapter 17.4, §§ 59.1-207.17 through 59.1-207.27)
- ◆ Collision Damage Waiver Act (Chapter 17.5, §§ 59.1-207.28 through 59.1-207.33)
- ◆ Motor Vehicle Manufacturers' Warranty Adjustment Act (Chapter 17.6, §§ 59.1-207.34 through 59.1-207.39)
- ◆ Comparison Price Advertising Act (Chapter 17.7, §§ 59.1-207.40 through 59.1-207.44)
- ◆ Virginia Health Spa Act (Chapter 24, §§ 59.1-294 through 59.1-310)
- ◆ Virginia Credit Services Businesses Act (Chapter 25.1, §§ 59.1-335.1 through 59.1-335.12)
- ◆ Prizes and Gifts Act (Chapter 31, §§ 59.1-415 through 59.1-423)

- ◆ Virginia Public Telephone Information Act (Chapter 32, §§ 59.1-424 through 59.1-428)
- ◆ Pay-Per-Call Services Act (Chapter 33, §§ 59.1-429 through 59.1-434)
- ◆ Virginia Travel Club Act (Chapter 36, §§ 59.1-445 through 59.1-454)

## **2. VCPA Plus Additional Relief**

A few acts related to consumer protection combine VCPA with additional mechanisms of relief. For example, violations of the Virginia Membership Camping Act (Chapter 25, §§ 59.1-311 through 59.1-335) constitute prohibited practices under VCPA and are subject to VCPA's enforcement and other provisions. An aggrieved purchaser also has the right to cancel the contract--within certain time limits and notice requirements--and to receive a refund from the membership camping operator of all moneys paid under the contract. Moreover, certain enumerated violations subject membership camping operators to criminal prosecution for Class 1 or 3 misdemeanors.

Violations of the Extended Service Contract Act (Chapter 34, §§ 59.1-435 through 59.1-441) constitute prohibited practices under VCPA and are subject to VCPA's enforcement and other provisions. In addition, knowing and willful violations of that act are punishable as Class 3 misdemeanors.

## **B. When VCPA Is Not Incorporated Into Other Acts**

### **1. Civil Relief Only**

Several acts related to consumer protection do not incorporate VCPA at all. Agricultural Equipment Warranties (Chapter 17.2, §§ 59.1-207.7 through 59.1-207.8), the Motor Vehicle Warranty Enforcement Act (Chapter 17.3, §§ 59.1-207.9 through 59.1-207.16, popularly known as the "Lemon Law"), the Virginia Motion Picture Fair Competition Act (Chapter 20, §§ 59.1-255 through 59.1-261), and the Virginia Residential Property Disclosure Act (Chapter 27 of Title 55, "Property and Conveyances," §§ 55-517 through 55-525) all create their own private rights of civil action upon violation and make no reference to VCPA. In fact, each of these acts is enforceable only by private parties and not by any agency of state or local government.

Regulation of Invention Development Services (Chapter 18, §§ 59.1-208 through 59.1-215) also makes no reference to VCPA; however, only the Attorney General is authorized to enforce this act and to seek civil penalties and relief.



## **2. Civil Relief Plus Criminal Prosecution**

As illustrated by the Virginia Membership Camping Act (discussed in IIIA above), criminal penalties are sometimes authorized for violations of acts related to consumer protection. For example, the Business Opportunity Sales Act (Chapter 21, §§ 59.1-262 through 59.1-269) combines a purchaser's private right of civil action with criminal prosecution for a Class 4 felony or a Class 1 misdemeanor for certain knowing and willful violations. VCPA is not incorporated into this act.

## **3. Criminal Prosecution Only**

Occasionally, no right of civil action--either by the government or a private citizen--is afforded under the provisions of an act related to consumer protection. For example, a knowing and willful violation of Tanning Facilities (Chapter 24.1, §§ 59.1-310.1 through 59.1-310.6) is punishable as a Class 3 misdemeanor. The act does not specify any other remedy or relief.

And, of course, Title 18.2 ("Crimes and Offenses Generally") prohibits certain types of conduct related to consumer protection. Examples include untrue, deceptive or misleading advertising (§ 18.2-216) and pyramid promotional schemes (§ 18.2-240), both of which are punishable as Class 1 misdemeanors.

# **IV. Work Of The Subcommittee**

At its initial meeting on July 22, 1994, the subcommittee took testimony from Jean Ann Fox, president of the Virginia Citizens Consumer Council (hereinafter "VCCC"); Betty Blakemore Sulzbach, director of the Consumer Affairs Division of the Virginia Department of Agriculture and Consumer Services (hereinafter "VDACS"); Frank Seales, Jr., chief of the Antitrust and Consumer Section of the Office of the Attorney General (hereinafter "OAG"); Evan Lewis, staff attorney from the Virginia Poverty Law Center; and Cathy Parks, director of the Consumer Affairs Division in Virginia Beach and president of the Virginia Association of Consumer Affairs Administrators.

At the initial meeting, VCCC proposed that the subcommittee make the following changes to VCPA:

1. Tighten and clarify the language in § 59.1-199 A that excludes from VCPA those aspects of consumer transactions "authorized" by state or federal law or regulation.

2. Strike the exclusion from VCPA in § 59.1-199 D for certain regulated industries, such as banks, savings and loan associations, credit unions, small loan companies, and public service companies and insurance companies regulated by the State Corporation Commission or a comparable federal agency.
3. Expand the scope of VCPA's unlawful acts or practices from "fraudulent" acts or practices to "fraudulent or unfair" or "fraudulent or unconscionable" acts or practices.
4. Authorize the Attorney General to issue civil investigative demands.
5. Create, within the Office of the Attorney General, a revolving fund to receive moneys generated by VCPA cases for the purpose of increasing public investigation and enforcement at the state and local levels.
6. Expand the powers of the Commissioner of the Department of Agriculture and Consumer Services by enhancing the Commissioner's investigatory authority and by authorizing the Commissioner to issue cease and desist orders and to publish warnings to the public in the newspaper.
7. Authorize the Board of the Department of Agriculture and Consumer Services to promulgate regulations under VCPA for industry-wide practices.
8. Continue to fund the Department of Agriculture and Consumer Services' toll-free consumer hotline through annual budget amendments.
9. Increase statutory damages to double or triple damages and increase statutory minimum damages to \$500.
10. Authorize additional civil remedies, including injunctive relief and restitution, in private actions brought under VCPA.
11. Resolve an arguable conflict between §§ 59.1-204 B and 59.1-207 with regard to attorney's fees by mandating an award of attorney's fees to: (i) successful private plaintiffs for both intentional and unintentional violations; (ii) successful private plaintiffs for intentional violations and in the discretion of the court for unintentional violations; or (iii) successful private plaintiffs for both intentional and unintentional violations and defendants in any frivolous action.
12. Establish a clear statute of limitations for filing a private action under VCPA and adopt the standards found in Title 8.01.
13. Authorize enhanced penalties when "vulnerable" consumers, such as the elderly or disabled, successfully establish a violation of VCPA.

## V. Findings, Conclusions, and Recommendations

Based on the testimony presented during the subcommittee's meetings and upon comment received throughout the study period, the subcommittee finds and concludes the following with regard to VCPA:

### A. Coverage

1. The language of the exclusion in § 59.1-199 A for those aspects of consumer transactions "authorized" by state or federal law, regulation, order, or formal advisory opinion should be clarified.

2. The exclusion in § 59.1-199 D for certain regulated industries, such as banks, savings and loan associations, credit unions, small loan companies, public service companies and insurance companies regulated by the SCC or a comparable federal agency should be narrowed.

To implement these findings and conclusions, the subcommittee recommends that VCPA be amended as follows:

§ 59.1-199. Exclusions.

Nothing in this chapter shall apply to:

A. Any aspect of a consumer transaction which aspect is authorized ~~under laws or regulations by any~~ (i) law or regulation of this Commonwealth or the United States; or ~~the formal advisory opinions~~ (ii) order or formal advisory opinion of any regulatory body or official of this Commonwealth or the United States.

B. Acts done by the publisher, owner, agent or employee of a newspaper, periodical, or radio or television station, or other advertising media such as outdoor advertising and advertising agencies, in the publication or dissemination of an advertisement in violation of § 59.1-200, unless it be proved that such person knew that the advertisement was of a character prohibited by § 59.1-200.

C. Those aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq.

D. ~~Banks~~ Those practices and services of banks, savings and loan associations, credit unions, small loan companies, public service corporations and insurance companies regulated and supervised by the State Corporation Commission or a comparable federal regulating body.

E. Employment agencies licensed under Chapter 13 (§ 54.1-1300 et seq.) of Title 54.1.

F. Any aspect of a consumer transaction which is subject to the Landlord and Tenant Act, ~~Chapter 13~~ (§ 55-217 et seq.) ~~of Title 55~~ or the Virginia Residential Landlord and Tenant Act, ~~Chapter 13.2~~ (§ 55-248.2 et seq.) ~~of Title 55~~, unless the act or practice of a landlord constitutes a misrepresentation or fraudulent act or practice under § 59.1-200.

The subcommittee's intent with regard to subsection A is to clarify existing Code language; the subcommittee's recommended language does not "tighten" the existing exclusion in subsection A, a proposal earlier made by VCCC. The recommended language is intended to maintain current practice with regard to subsection A in that the words "authorized" and "aspect" are retained.

The subcommittee considered draft language for subsection A as follows:

Any aspect of a consumer transaction which ~~aspect~~ is authorized ~~under laws or regulations~~ or regulated by (i) a law or regulation of this Commonwealth or the United States, or the formal advisory opinions (ii) an order or formal advisory opinion of any regulatory body or official of this Commonwealth or the United States.

The OAG and others testified that the draft language above may create a broader exclusion than existing Code language, thus negating the subcommittee's intent to exclude from VCPA (in subsection A) only those aspects of consumer transactions which are expressly and affirmatively authorized by a state or federal law, regulation, order, or formal advisory opinion. The draft language above strikes the word "aspect," which the subcommittee initially struck in an attempt to make the sentence more grammatically correct. However, if "aspect" is stricken, a substantive change would result in that the word "authorized" would modify "consumer transaction" rather than "any aspect" of a consumer transaction.

Additionally, the words "or regulated by" are much broader than "authorized by." Support for that argument is found in current subsection D, which excludes from VCPA all the industries "regulated and supervised by" the SCC or a comparable federal agency. The words "or regulated by" in the draft language above also reintroduces the blanket exclusion from VCPA for all the industries regulated and supervised by the SCC, or a comparable federal agency, that the subcommittee intended to narrow in subsection D. The subcommittee's recommended language above captures its intent with regard to subsection A without negating its intent with regard to subsection D.

The subcommittee's intent with regard to subsection D is to exclude from VCPA only those practices and services of banks, savings and loan associations, credit unions, small loan companies, public service corporations and insurance companies that are regulated and supervised by the SCC or a comparable federal regulating body, rather than the entire industry. This recommendation would subject only the unregulated, unsupervised practices of the listed industries to VCPA.

In making this recommendation, the subcommittee compromised between the existing blanket exclusion for all SCC-regulated entities and VCCC's proposal to strike the exclusion in subsection D entirely. The subcommittee expressly rejected VCCC's proposal to repeal subsection D.

## **B. Public Investigation and Enforcement**

3. The authority of the Commissioner of VDACS to investigate alleged violations of VCPA should be expanded.

To implement this finding and conclusion, the subcommittee recommends that a new Code section be added to VCPA as follows:

### § 59.1-200.1. Investigations by the Commissioner of the Virginia Department of Agriculture and Consumer Services.

A. Upon reasonable cause to believe that a violation of this chapter has occurred or is about to occur and upon his own motion or the complaint of any person, the Commissioner of the Department of Agriculture and Consumer Services, or his designee, may:

1. Make necessary investigations within or without this Commonwealth to determine whether any person has violated, or is about to violate, the provisions of this chapter or any rule, regulation, or order issued pursuant to this chapter or any chapter incorporated by reference into this chapter;

2. Require or permit any person to file a statement in writing, under oath or otherwise as the Commissioner determines, as to all facts and circumstances concerning the matter under investigation; and

3. Administer oaths or affirmations and, upon motion or request of any party, subpoena witnesses, compel their attendance, take evidence, and require the production of any matter that is relevant to the investigation, including (i) the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things; (ii) the identity and location of persons having

knowledge of relevant facts; or (iii) any other matter reasonably calculated to lead to the discovery of material evidence.

B. Any proceeding or hearing of the Commissioner, or his designee, pursuant to this section in which witnesses are subpoenaed and their attendance is required for evidence to be taken or any matter produced to ascertain material evidence may take place within the City of Richmond or any forum convenient to the parties under the provisions of §§ 8.01-261 and 8.01-262.

C. If any person fails to obey a subpoena or to answer questions propounded by the Commissioner, or his designee, and upon reasonable notice to all persons affected thereby, the Commissioner, or his designee, may apply to the circuit court of the City of Richmond or any circuit court convenient to the parties under the provisions of §§ 8.01-261 and 8.01-262 for an order compelling compliance.

The subcommittee's intent with regard to new § 59.1-200.1 is to authorize the Commissioner of VDACS to investigate VCPA complaints in the same manner as that which is currently exercised in § 59.1-451 of the Virginia Travel Club Act and § 57-59 B of Solicitation of Contributions, upon both of which the recommended language is substantially modeled. The subcommittee declined to extend such investigatory authority to local offices of consumer affairs; however, civil investigative demand (CID) authority is extended to Commonwealth's attorneys and attorneys for a county, city, or town. (See Recommendation 5 below.) Thus, although local offices of consumer affairs are not provided authority parallel to the Commissioner of VDACS as set out in the draft language, they could, under existing § 15.1-23.2, request that their Commonwealth's attorney or county, city, or town attorney to exercise his authority.

4. It should be clarified that those industries regulated and supervised by the SCC are not included within the exercise of powers and the performance of duties by the Commissioner of VDACS pursuant to VCPA.

To implement this finding and conclusion, the subcommittee recommends that the Code be amended as follows:

§ 3.1-18.2. Powers and duties.

A. The Administrator of Consumer Affairs shall have only such powers as may be necessary to perform the following duties:

~~(a) To promote~~ 1. Promote consumer education in cooperation with the Department of Education and inform the public of policies, decisions and legislation affecting consumers.

14. Authorize class action lawsuits against a single supplier who commits repeated or ongoing violations of VCPA.

15. Criminalize (certain) violations of VCPA.

At its second meeting on September 1, 1994, the subcommittee took testimony on these proposals from Anthony Gambardella, general counsel of the State Corporation Commission (hereinafter "SCC"); William Coiner, president of the Virginia Retail Merchants Association; Thomas Gallagher, president of the Better Business Bureau of Central Virginia; William Young of the American Association of Retired Persons; Steve Gannon of the Virginia Trial Lawyers Association; and Gail Marshall, former deputy attorney general of the Commonwealth.

After the prepared agenda, a public hearing was conducted. Speakers included citizens aggrieved by health insurance costs, life insurance contracts, and medical billing practices in the Richmond area; legal aid and private attorneys involved in consumer protection litigation; and an industry group currently excluded from VCPA.

On October 20, 1994, the subcommittee held a work session for its third and final meeting of the interim in lieu of a prepared agenda to consider and tentatively approve draft language for the its legislative recommendations. After the meeting, a staff memorandum which summarized the subcommittee's recommendations was sent to more than fifty interested persons and entities for their review and comment.

~~(b) To serve 2. Serve as a central coordinating agency and clearinghouse for receiving and investigating complaints by Virginia consumers of illegal, fraudulent, deceptive or dangerous practices and referring such appropriate complaints to the federal, state and local departments or agencies charged with enforcement of consumer laws.~~

~~(c) If the department or agency to which a complaint is referred determines that the matter cannot be settled at an administrative level, but requires either civil or criminal legal action, then the complaint together with all supporting evidence shall be transmitted to the appropriate enforcement officer for such legal action as may be necessary.~~

~~(d) To maintain 3. Maintain records of consumer complaints and their eventual disposition, which records shall be open for public inspection, provided that information disclosing the business interests of any person, trade secrets, or the names of customers shall be held confidential except to the extent that disclosure of such matters may be necessary for the enforcement of laws.~~

~~(e) To enter 4. Enter into agreements or to accept commissions from federal agencies.~~

5. Except for banks, savings and loan associations, credit unions, small loan companies, public service corporations and insurance companies regulated and supervised by the State Corporation Commission, exercise such powers and perform such duties requested by the Commissioner of the Department of Agriculture and Consumer Services, as his designee, under the Virginia Consumer Protection Act (§ 59.1-196 et seq.).

B. If the department or agency to which a complaint is referred pursuant to subdivision A 2 determines that the matter cannot be settled at an administrative level, the complaint together with all supporting evidence may be transmitted to the appropriate enforcement officer for such legal action as may be necessary.

C. The responsibility of the Administrator in these matters shall not be limited to those areas of peculiar interest to the Department of Agriculture and Consumer Services, but shall embrace the consumer programs and responsibilities of all the departments and agencies of the Commonwealth.

The draft language of new § 3.1-18.2 A 5 is an attempt to address concerns that VDACS not become involved in VCPA complaints made against industries regulated and supervised by the SCC. The testimony before the subcommittee was that when VDACS receives a consumer complaint about an SCC-regulated entity, the consumer is referred to the SCC, which then receives and investigates the complaint. Thus, the recommended language is an attempt to codify current practice.



The draft language in new subsection B, drawn substantially from stricken subsection (c), deletes the existing requirement that the agency to which a consumer complaint is referred make an affirmative finding that some further legal action, civil or criminal, is "required" when such complaint cannot be resolved by the agency at the administrative level. The decision to pursue or not to pursue public legal action should rest with "the appropriate enforcement officer"; in subdivision A 2, "officer" includes attorneys for the federal (e.g., district attorney), state (e.g., the Attorney General), and local (e.g., Commonwealth's attorneys and county, city, or town attorneys) governments.

5. The Attorney General, Commonwealth's attorneys, and attorneys for a county, city or town should be authorized to issue civil investigative demands.

To implement this finding and conclusion, the subcommittee recommends that VCPA be amended as follows:

§ 59.1-201. Civil investigative demands.

A. Whenever the Attorney General, the attorney for the Commonwealth, or the attorney for a county, city, or town has reasonable cause to believe that any person has engaged in, or is engaging in, or is about to engage in, any violation of ~~§ 59.1-200~~ this chapter, the Attorney General, the attorney for the Commonwealth, or the attorney for a county, city or town ~~if, after making a good faith effort to obtain such information, is unable to obtain the data and information necessary to determine whether such violation has occurred, or that it is impractical for him to do so, he may apply to the circuit court within whose jurisdiction the person having information resides, or has its principal place of business, for an investigative order requiring such person to furnish to the Attorney General, attorney for the Commonwealth, or attorney for a county, city, or town such data and information as is relevant to the subject matter of the investigation.~~

B. ~~The circuit courts are empowered to issue investigative orders, authorizing discovery by the same methods and procedures as set forth for civil actions in the Rules of the Supreme Court of Virginia, in connection with investigations of violations of § 59.1-200 by the Attorney General, the attorney for the Commonwealth, or the attorney for a county, city, or town. An application for an investigative order shall identify:~~

~~1. The specific act or practice alleged to be in violation of § 59.1-200;~~

~~2. The grounds which shall demonstrate reasonable cause to believe that a violation of § 59.1-200 may have occurred, may be occurring or may be about to occur;~~

~~3. The category or class of data or information requested in the investigative order; and~~

~~4. The reasons why the Attorney General, attorney for the Commonwealth, or attorney for a county, city, or town is unable to obtain such data and information, or the reason why it is impractical to do so, without a court order.~~

~~C. Within twenty-one days after the service upon a person of an investigative order, or at any time before the return date specified in such order, whichever is later, such person may file a motion to modify or set aside such investigative order or to seek a protective order as provided by the Rules of the Supreme Court of Virginia. Such motion shall specify the grounds for modifying or setting aside the order, and may be based upon the failure of the application or the order to comply with the requirements of this section, or upon any constitutional or other legal basis or privilege of such person.~~

~~D. Where the information requested by an investigative order may be derived or ascertained from the business records of the person upon whom the order is served, or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the information is substantially the same for the Attorney General, attorney for the Commonwealth, or attorney for a county, city, or town as for the person from whom such information is requested, it shall be sufficient for that person to specify the records from which the requested information may be derived or ascertained, and to afford the Attorney General, attorney for the Commonwealth, or attorney for the county, city, or town reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries thereof.~~

~~E. It shall be the duty of the Attorney General, attorney for the Commonwealth, or attorney for a county, city, or town, his assistants, employees and agents, to maintain the secrecy of all evidence, documents, data and information obtained through the use of investigative orders or obtained as a result of the voluntary act of the person under investigation and it shall be unlawful for any person participating in such investigations to disclose to any other person not participating in such investigations to disclose to any other person not participating in such investigation any information so obtained. Any person violating this subsection shall be guilty of a Class 2 misdemeanor and shall be punished in accordance with § 18.2-11. Notwithstanding the foregoing, this section shall not preclude the presentation and disclosure of any information obtained pursuant to this section in any suit or action in any court of this Commonwealth wherein it is alleged that a violation of § 59.1-200 has occurred, is occurring or may occur, nor shall this section prevent the disclosure of any such information by the Attorney General, attorney for the Commonwealth, or attorney for a county, city, or town to any federal or state law enforcement authority that has restrictions governing confidentiality and the~~

~~use of such information similar to those contained in this subsection; however, such disclosures may only be made as to information obtained after July 1, 1979.~~

~~F. Upon the failure of a person without lawful excuse to obey an investigative order under this section, the Attorney General, attorney for the Commonwealth, or attorney for the county, city, or town may initiate contempt proceedings in the circuit court that issued the order to hold such person in contempt.~~

~~G. No information, facts or data obtained through an investigative order shall be admissible in any civil or criminal proceeding other than for the enforcement of this chapter and the remedies provided herein. is empowered to issue civil investigative demands in accordance with § 59.1-9.10.~~

The intent of the recommended language is to provide civil investigative demand (CID) authority to the Attorney General, Commonwealth's attorneys, and attorneys for a county, city, or town in VCPA cases. This is achieved by cross-referencing the current CID authority vested in the Attorney General for alleged violations of the Virginia Antitrust Act in § 59.1-9.10. Unlike § 59.1-9.10, the draft language of § 59.1-201 extends CID authority to Commonwealth's attorneys and attorneys for a county, city, or town. The OAG advises that if CID authority is provided as recommended, the remainder of § 59.1-201 may be stricken.

## C. Funding

6. A revolving trust fund to receive certain moneys generated by VCPA and antitrust cases should be created, within the OAG, to fund increased public investigation, enforcement, and resolution of consumer complaints at state and local levels.

7. VDAC's toll-free consumer hotline should be funded through annual budget amendments or the statutory fund referred to in Recommendation 6.

To implement these findings and conclusions, the subcommittee recommends that a new Code section be added as follows:

§ 2.1-133.5. Regulatory and Consumer Advocacy Revolving Trust Fund; administration; sources of funds; distribution; purposes.

A. The Regulatory and Consumer Advocacy Revolving Trust Fund (the "Fund"), created in Item 48 of § 1-17 of Chapter 966 of the 1994 Acts of Assembly, shall be administered and distributed by the Attorney General in accordance with this section. The Fund shall consist of:

1. Such sums as have been or may be appropriated from time to time by the General Assembly and designated for the Fund;

2. Notwithstanding any other provision of law, ten percent of any amounts recovered by or on behalf of the Commonwealth, at trial or by settlement, from any case brought pursuant to the Virginia Antitrust Act (§ 59.1-9.1 et seq.) or the Virginia Consumer Protection Act (§ 59.1-196 et seq.); however, civil penalties imposed by the court shall be deposited into the Literary Fund;

3. Any moneys, gifts, endowments, or grants (i) donated or devised by individuals; (ii) donated by associations, corporations, or partnerships, whether public or private; or (iii) obtained from the United States government, its agencies or instrumentalities, and designated for the Fund; and

4. All interest, dividends, and appreciation which may accrue to the Fund.

B. Moneys in the Fund shall be made available by the Attorney General to the Office of the Attorney General; the Virginia Department of Agriculture and Consumer Affairs; if a local office of consumer affairs has been established pursuant to § 15.1-23.2 in any part of their jurisdiction, the attorney for the Commonwealth and the attorney for a county, city, or town; and the local offices of consumer affairs established pursuant to § 15.1-23.2. The moneys shall be used for the following purposes and in the order indicated: (i) operation of a statewide, toll-free consumer telephone hotline by the Virginia Department of Agriculture and Consumer Services in an amount not to exceed \$200,000 per biennium; (ii) expenditures for and reimbursements of reasonable costs and expenses associated with litigation or investigation of alleged violations of the Virginia Antitrust Act (§ 59.1-9.1 et seq.) or the Virginia Consumer Protection Act (§ 59.1-196 et seq.), including, but not limited to, attorney's and expert-witness fees, investigation expenses, and costs; and (iii) establishment of new or maintenance of existing alternative dispute resolution programs for consumer complaints involving the Virginia Antitrust Act or the Virginia Consumer Protection Act within the Virginia Department of Agriculture and Consumer Services or the local offices of consumer affairs established pursuant to § 15.1-23.2.

C. Prior to the distribution of any moneys for purposes (ii) and (iii) of subsection B, the Attorney General shall promulgate rules and regulations pursuant to the Administrative Process Act (§ 9-6.14:1 et seq.) which shall specify the criteria for distributing moneys for such purposes.

Structurally, the Fund is modeled, in part, on § 19.2-386.14, "Sharing of forfeited drug assets," which creates a program to share forfeited drug assets between federal, state, and local agencies for the purposes stated. That fund is administered and distributed by the Department of Criminal Justice Services pursuant to regulations adopted by the Criminal Justice Services Board. Note that

unlike an earlier draft of the Fund, the recommended language includes promulgation of regulations by the Attorney General that specify the criteria for distributing moneys from the Fund. Also, the recommended language raises the percentage to be placed into the Fund to ten percent from an earlier draft's five percent.

The basic premise of the Fund--that those who pay into it can collect from it--is also drawn from § 19.2-386.14. Like the drug-asset fund, the creation of a shared pool of resources in the context of regulatory and consumer advocacy cases is intended to address the universal concern of the public sector that more resources are needed to achieve their investigatory and enforcement objectives.

Substantively, the Fund is modeled, in part, on Item 48 of § 1-17 of Chapter 966 of the 1994 Acts of Assembly (the budget bill). Incorporating the name of the budget fund, which came into existence on July 1, 1994, into the recommended language of the statutory Fund, codifies the name of the budget fund and transfers its initial appropriation of \$500,000 into the statutory Fund. In this way, a "new" fund is not technically created and administration and distribution of the Fund remains where it currently exists in the budget bill, i.e., with the Attorney General. A second enactment clause in the subcommittee's legislation preserves the use of moneys placed into the budget fund prior to July 1, 1995, for antitrust purposes.

8. In public cases brought pursuant to VCPA, the court should be authorized to award a civil penalty, not to exceed \$15,000, when "vulnerable" consumers, such as the elderly or disabled, are victimized by a continuing series or pattern of VCPA violations.

To implement this finding and conclusion, the subcommittee recommends that VCPA be amended as follows:

§ 59.1-206. Civil penalties; attorney's fees.

A. In any action brought under this chapter, if the court finds that a person has willfully engaged in an act or practice in violation of § 59.1-200, or has willfully violated the terms of any assurance of voluntary compliance, the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover for the ~~literary fund~~ Literary Fund, upon petition to the court, a civil penalty of not more than \$1,000 per violation. ~~Such attorney may also recover, upon petition to the court, court costs, reasonable expenses incurred by the state or local agency in investigating and preparing the case not to exceed \$200 per violation, and attorney's fees. Such expenses and attorney's fees shall be paid into the general fund of the Commonwealth or of the county, city, or town which such attorney represented.~~ For purposes of this section, prima facie evidence of a willful violation may be shown when the Attorney General, the attorney for the Commonwealth, or

the attorney for the county, city, or town notifies the alleged violator by certified mail that an act or practice is a violation of § 59.1-200, and the alleged violator, after receipt of said notice, continues to engage in the act or practice.

B. Any person who willfully violates the terms of an injunction issued under § 59.1-203 shall forfeit and pay to the ~~literary fund~~ Literary Fund a civil penalty of not more than \$5,000 per violation. For purposes of this section, the circuit court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may petition for recovery of civil penalties; ~~attorney's fees, court costs for the Commonwealth, and reasonable expenses incurred by the state or local agency in investigating and preparing the case for the Commonwealth or for the county, city, or town represented. Such expenses shall not exceed the sum of \$200 per violation. Such expenses and attorney's fees shall be paid into the appropriate general fund as provided in subsection A of this section.~~

C. In any action brought under this chapter, if the court finds that a person has willfully engaged in a continuing series or pattern of violations of this chapter against consumers who cannot reasonably protect their interests because of age, physical or mental infirmity, ignorance, illiteracy, or inability to understand the language of the consumer transaction, the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover for the Literary Fund, upon petition to the court, a civil penalty of not more than \$15,000 from any person who has obtained substantial income or resources as a result of such violations.

D. In any action pursuant to subsections A, B, or C, the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover, in addition to any applicable civil penalty, costs, reasonable expenses incurred by the state or local agency in investigating and preparing the case not to exceed \$200 per violation, and attorney's fees. Ten percent of such expenses and attorney's fees recovered shall be paid into the Regulatory and Consumer Advocacy Revolving Trust Fund established in § 2.1-133.5, and the remainder shall be paid into the general fund of the Commonwealth or of the county, city, or town which such attorney represented.

~~E.~~ E. Nothing in this section shall be construed as limiting the power of the court to punish as contempt the violation of any order issued by the court, or as limiting the power of the court to enter other orders under § 59.1-203 or § 59.1-205.

~~F.~~ F. The right of trial by jury as provided by law shall be preserved in actions brought under this section.

The recommended language of new subsection C is borrowed, in part, from subsection I of § 18.2-248, Virginia's drug kingpin statute, and § 1345.03,

"Unconscionable consumer sales practices," of Title 13 of Ohio's Revised Code. The drug kingpin statute provides language to capture the concepts of a "series or pattern" of violations and of recovering the civil penalty from the person or persons who economically benefited from the violations, rather than from an underling. The Ohio statute provides language to capture some of those characteristics which make a consumer "vulnerable" for purposes of this section.

Some of the public comments received by the subcommittee regarding new subsection C did not support the concept of a "series or pattern" of violations. However, the subcommittee balanced that requirement with an extensive, inclusive listing of "vulnerable" characteristics. In other words, although a series or pattern of violations must be proven, the types of potential "vulnerable" victims specified in subsection C are many. Moreover, judicial interpretation of the drug kingpin statute indicates that a "series or pattern" means--simply--more than one violation. Thus, the recommended language would address a concern voiced in testimony before the subcommittee, i.e., an increase in fraudulent telemarketing schemes that prey on the homebound, particularly the elderly and disabled.

Note that the recommended language of new subsection C places any civil penalty recovered into the Literary Fund, as is required in current subsections A and B. Although reasonable minds differ on the point, the subcommittee is of the opinion that Section 8 of Article VIII of the Virginia Constitution requires that any civil penalty recovered as a result of VCPA violations must be placed into the Literary Fund. Although the subcommittee believes that such civil penalties cannot constitutionally be placed into the Regulatory and Consumer Advocacy Revolving Trust Fund discussed in Recommendation 6, the recommended language amends existing § 59.1-206 to implement the subcommittee's intent to place ten percent of "all amounts recovered by or on behalf of the Commonwealth" into the Fund. The recommended language of new subsection D requires that ten percent of the "costs, reasonable expenses incurred by the state or local agency in investigating and preparing the case not to exceed \$200 per violation, and attorney's fees" be placed into the Fund.

## D. Private Rights of Action

9. In private actions brought pursuant to VCPA, the court should be authorized to award triple damages for willful violations of VCPA and statutory minimum damages should be increased to \$500 from \$100.

10. With regard to attorney's fees, an arguable conflict between §§ 59.1-204 B and 59.1-207 should be resolved; plaintiffs should be entitled to recover reasonable attorney's fees and costs for willful violations of VCPA and for unintentional violations, should be authorized to recover such fees and costs in the discretion of the court. It should be clarified that defendants in any frivolous action shall recover reasonable expenses pursuant to the "frivolous claims statute" in Title 8.01.

To implement these findings and conclusions, the subcommittee recommends that VCPA be amended as follows:

§ 59.1-204. Individual action for damages or penalty.

A. Any person who suffers loss as the result of a violation of ~~§ 59.1-200 shall be entitled to this chapter may~~ initiate an action to recover (i) actual damages, or in the case of a willful violation, three times the actual damages incurred, or ~~\$100~~ (ii) \$500, whichever is greater.

B. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded, such person ~~also may, or in the case of a willful violation, shall, be awarded~~ entitled to an award of reasonable attorney's fees and court costs.

C. If the court finds, upon motion or its own initiative, that an action was brought pursuant to this chapter in violation of § 8.01-271.1, it shall impose sanctions as authorized by that section.

§ 59.1-207. Unintentional violations.

In any case arising under this chapter, no liability shall be imposed upon a supplier who shows by a preponderance of the evidence ~~(+)~~ that (i) the act or practice alleged to be in violation of § 59.1-200 was an act or practice of the manufacturer or distributor to the supplier over which the supplier had no control; or (ii) ~~that~~ the alleged violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid a violation; ~~provided, however, that~~ nothing in this section shall prevent the court from ordering restitution and payment of reasonable attorney's fees and costs pursuant to § 59.1-204 B to



individuals aggrieved as a result of an unintentional violation of ~~§ 59.1-200~~ this chapter.

The recommended language of § 59.1-204 attempts to capture the subcommittee's intent to provide greater pecuniary relief to plaintiffs who prove intentional ("willful") violations of VCPA. In subsection A, a plaintiff is entitled to recover the greater of three times actual damages or \$500 for willful violations. Treble damages are similarly authorized in current § 59.1-9.12 (b) of the Virginia Antitrust Act. For unintentional violations, a plaintiff is entitled to recover the greater of actual damages or \$500.

The recommended language of subsection B provides that for willful violations, a plaintiff shall be entitled to recover reasonable attorney's fees and costs; for unintentional violations, the court may award such fees and costs. The amendments to § 59.1-207 clarify the intent of § 59.1-204 to award reasonable attorney's fees and costs in cases of unintentional violations of VCPA in the discretion of the court.

New subsection C of § 59.1-204 makes it clear that--as is provided for in any civil case--the court shall impose sanctions pursuant to § 8.01-271.1 for defending a "frivolous" lawsuit. Because "frivolous" is an undefined term in VCPA and in § 8.01-271.1, it is not included in the recommended language. The intent of the subsection is to preserve existing § 8.01-271.1 without change when applied in VCPA cases.

11. A clear statute of limitations for filing a private action under VCPA should be adopted, using the existing standards in Title 8.01.
--

§ 59.1-204.1 Statute of limitation; tolling of limitation.

A. Any individual action pursuant to this chapter accruing on or after July 1, 1995, shall be commenced within two years after the cause of action has accrued. The cause of action shall accrue as provided in § 8.01-230.

B. When any of the authorized government agencies files suit under this chapter, the time during which such governmental suit and all appeals therefrom is pending shall not be counted as any part of the period within which an action under § 59.1-204 shall be brought.

The recommended language includes a cross-reference to when causes of action generally "accrue" pursuant to § 8.01-230. Section 8.01-230 excepts from its provisions certain other statutes, such as § 8.01-249, which provides that for actions involving fraud or mistake, the cause of action accrues when it is discovered or, by the exercise of due diligence, reasonably should have been discovered. By this

method of cross-referencing, the body of statutory and case law that has developed regarding Virginia's statutes of limitation can be applied to VCPA where appropriate.

12. At this time, the subcommittee recommends that no action be taken on VCCC proposals to:

- a) Expand the scope of VCPA's unlawful acts or practices from "fraudulent" acts or practices to "fraudulent or unfair" or "fraudulent or unconscionable" acts or practices;
- b) Authorize class action lawsuits against a single supplier who commits repeated or ongoing violations of VCPA;
- c) Criminalize (certain) violations of VCPA;
- d) Authorize the Commissioner of VDACS to issue cease and desist orders and to publish warnings to the public in the newspaper;
- e) Authorize the Board of VDACS to promulgate regulations under VCPA for industry-wide practices; and
- f) Authorize additional civil remedies, including injunctive relief and restitution, in private actions brought under VCPA.

## **VI. Conclusion**

The subcommittee recognizes that neither our final report nor our legislative recommendations will address all the concerns of those persons and entities interested in and involved with the Virginia Consumer Protection Act in a manner that is completely satisfactory to them. Indeed, the fact that the subcommittee has chosen not to act at this time on several proposals will dissatisfy some. If adopted by the 1995 General Assembly, however, the subcommittee's legislative recommendations will produce some changes in issues related to coverage, public investigation and enforcement, funding, and private rights of action under VCPA.

To assist in the ongoing effort to improve and refine VCPA on behalf of Virginia's consumers and businesses, the subcommittee encourages the OAG, VDACS, SCC, and other interested persons or entities to track your experiences with this year's legislative changes to VCPA and to report the information you learn to the Chairmen of the House Committee on Agriculture and the Senate Committee on Agriculture, Conservation, and Natural Resources during the 1994-96 biennium. Examples of relevant facts, data, and records include reports on the moneys

received and distributed by the Attorney General through the Regulatory and Consumer Advocacy Trust Fund; the types, numbers, and outcomes of telephone calls fielded by VDACS on its statewide, toll-free consumer hotline; and the experience of the SCC in determining the "practices and services" of its regulants that are unregulated and therefore subject to VCPA.

The subcommittee extends its sincerest thanks to the representatives of the state and local governmental agencies, the nonprofit and advocacy organizations, the private and public bar, and the citizens of the Commonwealth for their participation in and contributions to what the subcommittee hopes was a thorough and thoughtful study of Virginia's primary consumer protection statute.

## VII. Resource Material

Nolde, Edward P., "Annual Survey of Virginia Law: Consumer Protection Law," 27 University of Richmond Law Review 725 (Summer, 1993).

Respectfully submitted,

Delegate Mitchell Van Yahres, **CHAIRMAN**  
Senator Thomas K. Norment, Jr., **VICE CHAIRMAN\***  
Delegate Dwight C. Jones  
Delegate Gladys B. Keating  
Delegate Robert D. Orrock, Sr.  
Senator Robert L. Calhoun  
Senator W. Henry Maxwell

\*Did not vote on final report by publication deadline

## **VIII. Appendices**

**Appendix A: House Joint Resolution No. 143 (1994)**

**Appendix B: Proposed Legislation**

# **Appendix A**

**House Joint Resolution No. 143 (1994)**

# GENERAL ASSEMBLY OF VIRGINIA -- 1994 SESSION

## HOUSE JOINT RESOLUTION NO. 143

*Establishing a joint subcommittee to study the investigative and enforcement tools, funding mechanism, uniform coverage, and private right of action of the Virginia Consumer Protection Act.*

Agreed to by the House of Delegates, February 8, 1994

Agreed to by the Senate, February 28, 1994

WHEREAS, protecting consumers from deceptive advertising and sales practices prevents fraud, ensures fair competition, and fosters confidence in the economy of Virginia; and

WHEREAS, the Virginia Consumer Protection Act is the core statute regulating the marketplace in the Commonwealth and provides the enforcement tools for fourteen additional Acts, including the Virginia Home Solicitations Sales Act, the Virginia Health Spa Act, the Virginia Public Telephone Information Act, and the Comparison Price Advertising Act; and

WHEREAS, the Act excludes companies supervised by the State Corporation Commission from the requirements of the Act without a comparable set of regulations applied by the Commission; and

WHEREAS, the Act is enforced by the Attorney General, attorneys for the Commonwealth and attorneys for counties, cities and towns as well as by private right of action on behalf of aggrieved consumers; and

WHEREAS, the public and private investigative and enforcement tools should be reexamined for effectiveness and efficiency and the funding mechanisms for enforcing the Act should be reviewed; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study the investigative and enforcement tools, funding mechanism, uniform coverage, and private right of action of the Virginia Consumer Protection Act.

The joint subcommittee shall consist of seven members to be appointed as follows: four members of the House of Delegates to be appointed by the Speaker of the House; and three members of the Senate to be appointed by the Senate Committee on Privileges and Elections.

The joint subcommittee shall hold public hearings and consult with the Attorney General, the Commissioner of Agriculture and Consumer Services, attorneys for the Commonwealth, local government consumer protection officials and members of the public.

The direct costs of this study shall not exceed \$4,200.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1995 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

## **Appendix B**

### **Proposed Legislation**

<b>Senate Bill 751</b>	<b><i>Incorporating Subcommittee Recommendations 1 - 5</i></b>
<b>House Bill 1628</b>	<b><i>Incorporating Subcommittee Recommendations 6 - 8</i></b>
<b>House Bill 1623</b>	<b><i>Incorporating Subcommittee Recommendations 9 - 11</i></b>

1995 SESSION

LD3618480

SENATE BILL NO. 751

Offered January 13, 1995

A BILL to amend and reenact §§ 3.1-18.2, 59.1-199, and 59.1-201 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 59.1-200.1, relating to the Virginia Consumer Protection Act; coverage, public investigation and enforcement.

Patrons—Calhoun, Norment and Woods; Delegates: Jones, D.C., Keating, Orrock and Van Yahres

Referred to the Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 3.1-18.2, 59.1-199, and 59.1-201 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 59.1-200.1 as follows:

§ 3.1-18.2. Powers and duties.

A. The Administrator of Consumer Affairs shall have only such powers as may be necessary to perform the following duties:

(a) ~~To promote~~ 1. Promote consumer education in cooperation with the Department of Education and inform the public of policies, decisions and legislation affecting consumers.

(b) ~~To serve~~ 2. Serve as a central coordinating agency and clearinghouse for receiving and investigating complaints by Virginia consumers of illegal, fraudulent, deceptive or dangerous practices and referring such appropriate complaints to the federal, state and local departments or agencies charged with enforcement of consumer laws.

(c) ~~If the department or agency to which a complaint is referred determines that the matter cannot be settled at an administrative level, but requires either civil or criminal legal action, then the complaint together with all supporting evidence shall be transmitted to the appropriate enforcement officer for such legal action as may be necessary.~~

(d) ~~To maintain~~ 3. Maintain records of consumer complaints and their eventual disposition, which records shall be open for public inspection, provided that information disclosing the business interests of any person, trade secrets, or the names of customers shall be held confidential except to the extent that disclosure of such matters may be necessary for the enforcement of laws.

(e) ~~To enter~~ 4. Enter into agreements or to accept commissions from federal agencies.

5. Except for banks, savings and loan associations, credit unions, small loan companies, public service corporations and insurance companies regulated and supervised by the State Corporation Commission, exercise such powers and perform such duties requested by the Commissioner of the Department of Agriculture and Consumer Services, as his designee, under the Virginia Consumer Protection Act (§ 59.1-196 et seq.).

B. If the department or agency to which a complaint is referred pursuant to subdivision A 2 determines that the matter cannot be settled at an administrative level, the complaint together with all supporting evidence may be transmitted to the appropriate enforcement officer for such legal action as may be necessary.

C. The responsibility of the Administrator in these matters shall not be limited to those areas of peculiar interest to the Department of Agriculture and Consumer Services, but shall embrace the consumer programs and responsibilities of all the departments and agencies of the Commonwealth.

§ 59.1-199. Exclusions.

Nothing in this chapter shall apply to:

A. Any aspect of a consumer transaction which aspect is authorized under laws or regulations by any (i) law or regulation of this Commonwealth or the United States; or the formal advisory opinions (ii) order or formal advisory opinion of any regulatory body or official of this Commonwealth or the United States.

B. Acts done by the publisher, owner, agent or employee of a newspaper, periodical, or radio or television station, or other advertising media such as outdoor advertising and advertising agencies, in the publication or dissemination of an advertisement in violation of § 59.1-200, unless it be proved that such person knew that the advertisement was of a character prohibited by § 59.1-200.



1 C. Those aspects of a consumer transaction which are regulated by the Federal Consumer Credit  
2 Protection Act, 15 U.S.C. § 1601 et seq.

3 D. ~~Banks~~ *Those practices and services of banks, savings and loan associations, credit unions,*  
4 *small loan companies, public service corporations and insurance companies regulated and supervised*  
5 *by the State Corporation Commission or a comparable federal regulating body.*

6 E. Employment agencies licensed under Chapter 13 (§ 54.1-1300 et seq.) of Title 54.1.

7 F. Any aspect of a consumer transaction which is subject to the Landlord and Tenant Act, ~~Chapter~~  
8 ~~13~~ (§ 55-217 et seq.) ~~of Title 55~~ or the Virginia Residential Landlord and Tenant Act, ~~Chapter 13-2~~  
9 (§ 55-248.2 et seq.) ~~of Title 55~~, unless the act or practice of a landlord constitutes a misrepresentation  
10 or fraudulent act or practice under § 59.1-200.

11 § 59.1-201. Investigative orders.

12 A. Whenever the Attorney General, the attorney for the Commonwealth, or the attorney for a  
13 county, city, or town has reasonable cause to believe that any person has engaged in, or is engaging  
14 in, or is about to engage in, any violation of ~~§ 59.1-200 this chapter~~, the Attorney General, the  
15 attorney for the Commonwealth, or the attorney for a county, city or town ~~if, after making a good~~  
16 ~~faith effort to obtain such information, is unable to obtain the data and information necessary to~~  
17 ~~determine whether such violation has occurred, or that it is impractical for him to do so, he may~~  
18 ~~apply to the circuit court within whose jurisdiction the person having information resides, or has its~~  
19 ~~principal place of business, for an investigative order requiring such person to furnish to the Attorney~~  
20 ~~General, attorney for the Commonwealth, or attorney for a county, city, or town such data and~~  
21 ~~information as is relevant to the subject matter of the investigation.~~

22 B. The circuit courts are empowered to issue investigative orders, authorizing discovery by the  
23 same methods and procedures as set forth for civil actions in the Rules of the Supreme Court of  
24 Virginia, in connection with investigations of violations of ~~§ 59.1-200~~ by the Attorney General, the  
25 attorney for the Commonwealth, or the attorney for a county, city, or town. An application for an  
26 investigative order shall identify:

27 1. The specific act or practice alleged to be in violation of ~~§ 59.1-200~~;

28 2. The grounds which shall demonstrate reasonable cause to believe that a violation of ~~§ 59.1-200~~  
29 may have occurred, may be occurring or may be about to occur;

30 3. The category or class of data or information requested in the investigative order; and

31 4. The reasons why the Attorney General, attorney for the Commonwealth, or attorney for a  
32 county, city, or town is unable to obtain such data and information, or the reason why it is  
33 impractical to do so, without a court order.

34 C. ~~Within twenty-one days after the service upon a person of an investigative order, or at any time~~  
35 ~~before the return date specified in such order, whichever is later, such person may file a motion to~~  
36 ~~modify or set aside such investigative order or to seek a protective order as provided by the Rules of~~  
37 ~~the Supreme Court of Virginia. Such motion shall specify the grounds for modifying or setting aside~~  
38 ~~the order, and may be based upon the failure of the application or the order to comply with the~~  
39 ~~requirements of this section, or upon any constitutional or other legal basis or privilege of such~~  
40 ~~person.~~

41 D. Where the information requested by an investigative order may be derived or ascertained from  
42 the business records of the person upon whom the order is served, or from an examination, audit or  
43 inspection of such business records, or from a compilation, abstract or summary thereof, and the  
44 burden of deriving or ascertaining the information is substantially the same for the Attorney General,  
45 attorney for the Commonwealth, or attorney for a county, city, or town as for the person from whom  
46 such information is requested, it shall be sufficient for that person to specify the records from which  
47 the requested information may be derived or ascertained, and to afford the Attorney General, attorney  
48 for the Commonwealth, or attorney for the county, city, or town reasonable opportunity to examine,  
49 audit or inspect such records and to make copies, compilations, abstracts or summaries thereof.

50 E. It shall be the duty of the Attorney General, attorney for the Commonwealth, or attorney for a  
51 county, city, or town, his assistants, employees and agents, to maintain the secrecy of all evidence,  
52 documents, data and information obtained through the use of investigative orders or obtained as a  
53 result of the voluntary act of the person under investigation and it shall be unlawful for any person  
54 participating in such investigations to disclose to any other person not participating in such

1 investigations to disclose to any other person not participating in such investigation any information  
2 so obtained. Any person violating this subsection shall be guilty of a Class 2 misdemeanor and shall  
3 be punished in accordance with § 18.2-11. Notwithstanding the foregoing, this section shall not  
4 preclude the presentation and disclosure of any information obtained pursuant to this section in any  
5 suit or action in any court of this Commonwealth wherein it is alleged that a violation of § 59.1-200  
6 has occurred, is occurring or may occur, nor shall this section prevent the disclosure of any such  
7 information by the Attorney General, attorney for the Commonwealth, or attorney for a county, city,  
8 or town to any federal or state law-enforcement authority that has restrictions governing  
9 confidentiality and the use of such information similar to those contained in this subsection; however,  
10 such disclosures may only be made as to information obtained after July 1, 1979.

11 F. Upon the failure of a person without lawful excuse to obey an investigative order under this  
12 section, the Attorney General, attorney for the Commonwealth, or attorney for the county, city, or  
13 town may initiate contempt proceedings in the circuit court that issued the order to hold such person  
14 in contempt.

15 G. No information, facts or data obtained through an investigative order shall be admissible in any  
16 civil or criminal proceeding other than for the enforcement of this chapter and the remedies provided  
17 herein is empowered to issue civil investigative demands in accordance with § 59.1-9.10.

18 § 59.1-200.1. Investigations by the Commissioner of the Virginia Department of Agriculture and  
19 Consumer Services.

20 A. Upon reasonable cause to believe that a violation of this chapter has occurred or is about to  
21 occur and upon his own motion or the complaint of any person, the Commissioner of the Department  
22 of Agriculture and Consumer Services, or his designee, may:

23 1. Make necessary investigations within or without this Commonwealth to determine whether any  
24 person has violated, or is about to violate, the provisions of this chapter or any rule, regulation, or  
25 order issued pursuant to this chapter or any chapter incorporated by reference into this chapter;

26 2. Require or permit any person to file a statement in writing, under oath or otherwise as the  
27 Commissioner determines, as to all facts and circumstances concerning the matter under  
28 investigation; and

29 3. Administer oaths or affirmations and, upon motion or request of any party, subpoena witnesses,  
30 compel their attendance, take evidence, and require the production of any matter that is relevant to  
31 the investigation, including (i) the existence, description, nature, custody, condition, and location of  
32 any books, documents, or other tangible things; (ii) the identity and location of persons having  
33 knowledge of relevant facts; or (iii) any other matter reasonably calculated to lead to the discovery of  
34 material evidence.

35 B. Any proceeding or hearing of the Commissioner, or his designee, pursuant to this section in  
36 which witnesses are subpoenaed and their attendance is required for evidence to be taken or any  
37 matter produced to ascertain material evidence may take place within the City of Richmond or any  
38 forum convenient to the parties under the provisions of §§ 8.01-261 and 8.01-262.

39 C. If any person fails to obey a subpoena or to answer questions propounded by the  
40 Commissioner, or his designee, and upon reasonable notice to all persons affected thereby, the  
41 Commissioner, or his designee, may apply to the circuit court of the City of Richmond or any circuit  
42 court convenient to the parties under the provisions of §§ 8.01-261 and 8.01-262 for an order  
43 compelling compliance.

1995 SESSION

LD3619480

HOUSE BILL NO. 1628

Offered January 13, 1995

A BILL to amend and reenact § 59.1-206 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.1-133.5, relating to the continuation of the Regulatory and Consumer Advocacy Revolving Trust Fund; civil penalties under the Virginia Consumer Protection Act.

Patrons—Van Yahres, Jones, D.C., Keating and Orrock; Senators: Calhoun and Maxwell

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 59.1-206 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.1-133.5 as follows:

§ 2.1-133.5. *Regulatory and Consumer Advocacy Revolving Trust Fund; administration; sources of funds; distribution; purposes.*

A. *The Regulatory and Consumer Advocacy Revolving Trust Fund (the "Fund"), created in Item 48 of § 1-17 of Chapter 966 of the 1994 Acts of Assembly, shall be administered and distributed by the Attorney General in accordance with this section. The Fund shall consist of:*

1. *Such sums as have been or may be appropriated from time to time by the General Assembly and designated for the Fund;*

2. *Notwithstanding any other provision of law, ten percent of any amounts recovered by or on behalf of the Commonwealth, at trial or by settlement, from any case brought pursuant to the Virginia Antitrust Act (§ 59.1-9.1 et seq.) or the Virginia Consumer Protection Act (§ 59.1-196 et seq.); however, civil penalties imposed by the court shall be deposited into the Literary Fund;*

3. *Any moneys, gifts, endowments, or grants (i) donated or devised by individuals; (ii) donated by associations, corporations, or partnerships, whether public or private; or (iii) obtained from the United States government, its agencies or instrumentalities, and designated for the Fund; and*

4. *All interest, dividends, and appreciation which may accrue to the Fund.*

B. *Moneys in the Fund shall be made available by the Attorney General to the Office of the Attorney General; the Virginia Department of Agriculture and Consumer Affairs; if a local office of consumer affairs has been established pursuant to § 15.1-23.2 in any part of their jurisdiction, the attorney for the Commonwealth and the attorney for a county, city, or town; and the local offices of consumer affairs established pursuant to § 15.1-23.2. The moneys shall be used for the following purposes and in the order indicated: (i) operation of a statewide, toll-free consumer telephone hotline by the Virginia Department of Agriculture and Consumer Services in an amount not to exceed \$200,000 per biennium; (ii) expenditures for and reimbursements of reasonable costs and expenses associated with litigation or investigation of alleged violations of the Virginia Antitrust Act (§ 59.1-9.1 et seq.) or the Virginia Consumer Protection Act (§ 59.1-196 et seq.), including, but not limited to, attorney's and expert-witness fees, investigation expenses, and costs; and (iii) establishment of new or maintenance of existing alternative dispute resolution programs for consumer complaints involving the Virginia Antitrust Act or the Virginia Consumer Protection Act within the Virginia Department of Agriculture and Consumer Services or the local offices of consumer affairs established pursuant to § 15.1-23.2.*

C. *Prior to the distribution of any moneys for purposes (ii) and (iii) of subsection B, the Attorney General shall promulgate rules and regulations pursuant to the Administrative Process Act (§ 9-6.14:1 et seq.) which shall specify the criteria for distributing moneys for such purposes.*

§ 59.1-206. *Civil penalties; attorney's fees.*

A. *In any action brought under this chapter, if the court finds that a person has willfully engaged in an act or practice in violation of § 59.1-200, or has willfully violated the terms of any assurance of voluntary compliance, the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover for the ~~literary fund~~ Literary Fund, upon petition to the court, a civil penalty of not more than \$1,000 per violation. ~~Such attorney may also recover, upon petition to~~*

1 the court, court costs, reasonable expenses incurred by the state or local agency in investigating and  
 2 preparing the case not to exceed \$200 per violation, and attorney's fees. Such expenses and attorney's  
 3 fees shall be paid into the general fund of the Commonwealth or of the county, city, or town which  
 4 such attorney represented. For purposes of this section, prima facie evidence of a willful violation  
 5 may be shown when the Attorney General, the attorney for the Commonwealth, or the attorney for  
 6 the county, city, or town notifies the alleged violator by certified mail that an act or practice is a  
 7 violation of § 59.1-200, and the alleged violator, after receipt of said notice, continues to engage in  
 8 the act or practice.

9 B. Any person who willfully violates the terms of an injunction issued under § 59.1-203 shall  
 10 forfeit and pay to the ~~literary fund~~ *Literary Fund* a civil penalty of not more than \$5,000 per  
 11 violation. For purposes of this section, the circuit court issuing an injunction shall retain jurisdiction,  
 12 and the cause shall be continued, and in such cases the Attorney General, the attorney for the  
 13 Commonwealth, or the attorney for the county, city, or town may petition for recovery of civil  
 14 penalties, ~~attorney's fees, court costs for the Commonwealth, and reasonable expenses incurred by the~~  
 15 ~~state or local agency in investigating and preparing the case for the Commonwealth or for the county,~~  
 16 ~~city, or town represented. Such expenses shall not exceed the sum of \$200 per violation. Such~~  
 17 ~~expenses and attorney's fees shall be paid into the appropriate general fund as provided in subsection~~  
 18 ~~A of this section.~~

19 C. *In any action brought under this chapter, if the court finds that a person has willfully engaged*  
 20 *in a continuing series or pattern of violations of this chapter against consumers who cannot*  
 21 *reasonably protect their interests because of age, physical or mental infirmity, ignorance, illiteracy,*  
 22 *or inability to understand the language of the consumer transaction, the Attorney General, the*  
 23 *attorney for the Commonwealth, or the attorney for the county, city, or town may recover for the*  
 24 *Literary Fund, upon petition to the court, a civil penalty of not more than \$15,000 from any person*  
 25 *who has obtained substantial income or resources as a result of such violations.*

26 D. *In any action pursuant to subsections A, B, or C, the Attorney General, the attorney for the*  
 27 *Commonwealth, or the attorney for the county, city, or town may recover, in addition to any*  
 28 *applicable civil penalty, costs, reasonable expenses incurred by the state or local agency in*  
 29 *investigating and preparing the case not to exceed \$200 per violation, and attorney's fees. Ten*  
 30 *percent of such expenses and attorney's fees recovered shall be paid into the Regulatory and*  
 31 *Consumer Advocacy Revolving Trust Fund established in § 2.1-133.5, and the remainder shall be paid*  
 32 *into the general fund of the Commonwealth or of the county, city, or town which such attorney*  
 33 *represented.*

34 E. Nothing in this section shall be construed as limiting the power of the court to punish as  
 35 contempt the violation of any order issued by the court, or as limiting the power of the court to enter  
 36 other orders under § 59.1-203 or § 59.1-205.

37 F. The right of trial by jury as provided by law shall be preserved in actions brought under this  
 38 section.

39 2. That the provisions of this act relating to § 2.1-133.5 shall apply to: (1) such sums as may be  
 40 appropriated by the General Assembly on or after July 1, 1995, and designated for the Fund; (2) ten  
 41 percent of any amounts recovered by or on behalf of the Commonwealth, at trial or by settlement,  
 42 from any case brought pursuant to the Virginia Antitrust Act (§ 59.1-9.1 et seq.) or the Virginia  
 43 Consumer Protection Act (§ 59.1-196 et seq.) on or after July 1, 1995; (3) any moneys, gifts,  
 44 endowments, or grants (i) donated or devised by individuals on or after July 1, 1995; (ii) donated by  
 45 associations, corporations, or partnerships, whether public or private on or after July 1, 1995; (iii)  
 46 obtained from the United States government, its agencies or instrumentalities, on or after July 1,  
 47 1995, and designated for the Fund; and (4) all interest, dividends, and appreciation which may accrue  
 48 to the Fund on or after July 1, 1995.

1995 SESSION

LD3620480

HOUSE BILL NO. 1623

Offered January 13, 1995

A BILL to amend and reenact §§ 59.1-204, 59.1-204.1, and 59.1-207 of the Code of Virginia, relating to the Virginia Consumer Protection Act; private rights of action.

Patrons—Keating, Orrock and Van Yahres; Senator: Calhoun

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-204, 59.1-204.1, and 59.1-207 of the Code of Virginia are amended and reenacted as follows:

§ 59.1-204. Individual action for damages or penalty.

A. Any person who suffers loss as the result of a violation of § 59.1-200 shall be entitled to this chapter may initiate an action to recover (i) actual damages, or in the case of a willful violation, three times the actual damages incurred, or \$100 (ii) \$500, whichever is greater.

B. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded, such person also may, or in the case of a willful violation, shall, be awarded entitled to an award of reasonable attorney's fees and court costs.

C. If the court finds, upon motion or its own initiative, that an action was brought pursuant to this chapter in violation of § 8.01-271.1, it shall impose sanctions as authorized by that section.

§ 59.1-204.1. Tolling of limitation.

A. Any individual action pursuant to this chapter accruing on or after July 1, 1995, shall be commenced within two years after the cause of action has accrued. The cause of action shall accrue as provided in § 8.01-230.

B. When any of the authorized government agencies files suit under this chapter, the time during which such governmental suit and all appeals therefrom is pending shall not be counted as any part of the period within which an action under § 59.1-204 shall be brought.

§ 59.1-207. Unintentional violations.

In any case arising under this chapter, no liability shall be imposed upon a supplier who shows by a preponderance of the evidence (i) that the act or practice alleged to be in violation of § 59.1-200 was an act or practice of the manufacturer or distributor to the supplier over which the supplier had no control, or (ii) that the alleged violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid a violation; provided, however, that nothing in this section shall prevent the court from ordering restitution and payment of reasonable attorney's fees and costs pursuant to § 59.1-204 B to individuals aggrieved as a result of an unintentional violation of § 59.1-200 this chapter.