E. J. FACE, JR.
COMMISSIONER OF
FINANCIALINSTITUTIONS

COMMONWEALTH OF VIRGINIA

1300 EAST MAIN STREET
SUITE EIGHT HUNDRED
P.O. BOX 640
RICHMOND, VIRGINIA 23218-0640
(804) 371-9657
FAX (804) 371-9416
scc.virginia.gov

STATE CORPORATION COMMISSION
BUREAU OF FINANCIAL INSTITUTIONS

December 1, 2024

TO: The Honorable Adam P. Ebbin, Chair
Senate Committee on General Laws and
Technology

The Honorable David L. Bulova, Chair
House Committee on General Laws

As required by Chapter 838 of the 2024 Virginia Acts of Assembly, the Bureau of Financial Institutions of the State Corporation Commission respectfully submits the attached report.

Sincerely,

E. J. Face, Jr.

Report Pursuant to Chapter 838 of the 2024 Virginia Acts of Assembly Relating to House Bill 1519: Virginia Consumer Protection Act; Fees for Electronic Fund Transfers, Prohibited.

Prepared by the
Bureau of Financial Institutions
State Corporation Commission

December 1, 2024

TABLE OF CONTENTS

EXECUTIVE SUMMARY

House Bill 1519 ("HB 1519") was introduced in 2024 and enacted by the General Assembly as Chapter 838 of the 2024 Acts of Assembly. The first enactment amends §§ 55.1-1208, 59.1-199, and 59.1-200 of the Code of Virginia ("Code"), but the second enactment provides that the provisions of the first enactment shall not become effective unless reenacted by the 2025 session of the General Assembly. Accordingly, these amendments will be inoperative unless the General Assembly reenacts them in its upcoming session. The third enactment directs the State Corporation Commission ("Commission") to assess the amendments to the Code proposed by the first enactment and report its findings to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology no later than December 1, 2024.

HB 1519 proposes to prohibit convenience fees that landlords and sellers of goods or services may charge tenants or consumers for making payments using electronic fund transfers ("EFT"). Although the term "electronic fund transfer" is defined in a manner that employs banking terminology, the Commission's Bureau of Financial Institutions ("Bureau") concludes that HB 1519 would likely not impose any new restrictions on banks or other providers of financial services that operate under Title 6.2 of the Code. On the other hand, HB 1519 may increase operating costs for certain landlords and sellers of goods or services and/or result in fewer available payment options for consumers because of its proposal to prohibit EFT fees in the Commonwealth.

INTRODUCTION

The Commission, through its Bureau, assessed the amendments to §§ 55.1-1208, 59.1-199, and 59.1-200 of the Code proposed by the first enactment of HB 1519. In completing its assessment, the Bureau solicited the views of the Honorable Delegate Kannan Srinivasan, the Commission's Office of General Counsel, the Office of the Virginia Attorney General, the Virginia Department of Professional

and Occupational Regulation, the Virginia Department of Housing and Community Development, and the National Association of Consumer Credit Administrators. In addition, the Bureau reviewed information from other sources, such as pertinent media reports and academic research. On behalf of the Commission, the Bureau is pleased to submit this Report.

BACKGROUND

An EFT is a transfer of funds initiated through an electronic terminal, telephone, computer (including on-line banking) or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account. Examples of common EFT services include transfers through automated teller machines, point-of-sale terminals, automated clearinghouse systems, telephone bill-payment plans in which periodic or recurring transfers are contemplated, wire transfers, credit and debit cards, mobile payments, and remote banking programs.

EFT transactions are governed at the federal level by the Electronic Fund Transfer Act (15 USC 1693 *et seq*.) ("EFTA"). The Federal Reserve Board implements EFTA through Regulation E, which establishes a basic framework of rights, liabilities, and responsibilities of participants in electronic funds and remittance systems. Violations of Regulation E may result in liability for the actual damages sustained by the consumer, statutory damages of $100 – $1,000, class action damages in the lesser of $500,000 or 1% of net worth, as well as reasonable attorney's fees and costs as determined by the court (15 U.S.C. 1693m (a)).

A 2023 paper by the Federal Reserve indicates that the use of cash as a payment method has gradually diminished as consumers have turned to payment cards and online transactions, a trend that accelerated during the COVID-19 pandemic. According to the Federal Reserve's own surveys, the value of core noncash payments grew faster from 2018 to 2021 than in any previous three-year period going back to 2000. Consumers have also increasingly embraced mobile person-to-person payments

as smartphones have spread. Nearly three-quarters of Americans used mobile payments in 2022, compared to just one in 10 in 2013.[1]

The EFT ecosystem is supported by fees paid to financial institutions and other intermediaries that process such transactions. For example, merchants and retailers that accept payment via credit and debit card transactions pay a fee called the merchant discount rate ("MDR") for each transaction. This fee is paid to the merchant's bank and then further split among the other market participants in the form of interchange fees, assessment fees, and payment processing fees. The MDR is typically around 1%-3% per transaction. While these fees are typically paid by the merchant, the merchant may be able to pass the cost indirectly to the consumer through higher prices, if market characteristics allow.[2]

ANALYSIS

In Virginia, the amendments in the first enactment of HB 1519 would: (i) prohibit a landlord under the Virginia Residential Landlord and Tenant Act ("VRLTA"), § 55.1-1200 *et seq.* of the Code, from charging a tenant a transaction fee, processing fee, or similar surcharge for using an EFT to pay a security deposit, rent, or other amount owed; and (ii) make it unlawful under the Virginia Consumer Protection Act ("VCPA"), § 59.1-196 *et seq.* of the Code, for a supplier in a consumer transaction to charge a transaction fee, processing fee, or similar surcharge for using an EFT to pay for the purchase of a good or service (this provision does not apply to the withdrawal of funds from an automated teller machine or for expediting an EFT).

HB 1519 defines the term "electronic fund transfer" by incorporating the meaning of this term under 12 C.F.R. § 1005.3, which is part of Regulation E.[3] The definition of "electronic fund transfer"

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[1] Sablik, T. (2023, Third Quarter). "Bringing Payments into the Fast Lane. *Federal Reserve Bank of Richmond Econ Focus*, 21-24; https://www.richmondfed.org/publications/research/econ_focus/2023/q3_federal_reserve.

[2] Scott, A. (2021, Aug. 6). Merchant Discount, Interchange, and Other Transaction Fees in the Retail Electronic Payment System. *Congressional Research Service*, IF11893. https://crsreports.congress.gov/product/pdf/IF/IF11893/1

[3] Subject to numerous exclusions that are set forth in 12 C.F.R. § 1005.3 (c), the term "electronic fund transfer" is generally defined as follows:

that appears in 12 C.F.R. § 1005.3 mentions financial institutions and uses terms that are commonly associated with the banking industry, such as automated teller machines, direct deposits, and debit card transactions. The Bureau regulates numerous types of financial institutions pursuant to Title 6.2 of the Code, including banks, savings institutions, and credit unions; however, financial institutions are not the target of this legislation. Rather, HB 1519 is aimed at landlords and sellers of goods or services who: (i) impose certain convenience fees on consumers, and (ii) are subject to either the VRLTA or the VCPA. The Bureau does not regulate landlords, and sellers of goods or services are outside the Bureau's jurisdiction with the possible limited exception of sellers of financial services that are chartered or licensed under Title 6.2 of the Code.

Moreover, neither the VRLTA nor the VCPA confers any powers upon the Bureau, and financial institutions such as banks, savings institutions, and credit unions are expressly exempt from the VCPA pursuant to § 59.1-199 (4) of the Code. Consequently, HB 1519 would likely not impose any new restrictions on banks or other providers of financial services that operate under Title 6.2 of the Code.

The Office of the Virginia Attorney ("OAG") filed a Fiscal Impact Statement for HB 1519 during the 2024 Virginia General Assembly session, indicating the legislation would create a new enforcement of the VCPA and, therefore, may increase OAG workload requiring an additional $25,343 per year in attorney and investigator costs. Specifically, a violation under the proposed legislation in HB 1519 would be subject to the VCPA's private right of action, which provides for the recovery of the greater of actual damages or a statutory penalty of $500 and an award of reasonable attorneys' fees

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> [A]ny transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account. The term includes but is not limited to: (i) [p]oint-of-sale transfers; (ii) [a]utomated teller machine transfers; (iii) [d]irect deposits or withdrawals of funds; (iv) [t]ransfers initiated by telephone; and (v) [t]ransfers resulting from debit card transactions, whether or not initiated through an electronic terminal.

(Code § 59.1-204 (A) and (B)). If the violations are willful, the damages may be increased to an amount not exceeding three times the actual damages sustained, or $1,000, whichever is greater (Code § 59.1-204 (A)). In addition, pursuant to § 59.1-206 (A) of the Code, if the court finds that a person has willfully engaged in an act or practice in violation of § 59.1-200 or 59.1-200.1, 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 $2,500 per violation.

SUMMARY

HB 1519 would prohibit landlords and sellers of goods or services from charging fees to tenants and consumers for making payments using electronic fund transfers. Although the term "electronic fund transfer" is defined in a manner that employs banking terminology, it does not appear that HB 1519 was crafted for the principal purpose of restricting banks or other providers of financial services that operate under Title 6.2 of the Code. Additionally, the Bureau does not have any authority under the VRLTA or VCPA with respect to landlords or sellers of goods or services, and banks, savings institutions, and credit unions are not subject to the VCPA.

If HB 1519 is reenacted by the 2025 General Assembly, landlords and sellers of goods or services who are subject to either the VRLTA or the VCPA would no longer be able to impose convenience fees on Virginia consumers who pay by EFT. As a result, such businesses would be faced with a decision to either absorb the transaction costs charged by their financial institution partners in connection with EFTs or discontinue/limit EFT payment options to their customers.

The proposed legislation would reportedly create a new enforcement of the VCPA for the OAG and, therefore, may increase OAG workload requiring an additional $25,343 per year in attorney and investigator costs.

This concludes the Commission's Report on the assessment of the amendments proposed by Chapter 838 of the 2024 Acts of Assembly.