

43.70

TITLE 119
PROPOSED LEGISLATIVE RULE
SECRETARY OF TAX AND REVENUE

Series 301
REGISTRATION OF TELEMARKETERS

Summary of Rule

The West Virginia Legislature enacted Committee Substitute for House Bill 4267 during its 1998 regular session, which adds a new article 6F pertaining to telemarketing to the West Virginia Consumer Credit and Protection Act. Part III of article 6F requires telemarketers to register with the Secretary of Tax and Revenue, unless the telemarketer is exempt from registration as provided in W. Va. Code §§46A-6F-201 through 218 and 220. This rule implements, explains and clarifies W. Va. Code §§46A-6F-301 through 303 and the exemptions provided in W. Va. Code §§46A-6F-201 through 220.

A telemarketer must register with the Secretary at least 60 days before offering consumer goods or services, or offering for sale consumer goods or services through any medium.

"Telemarketer" is defined to mean any person who initiates or receives telephone calls to or from a consumer in this State for the purpose of making a telemarketing solicitation.

Generally, "telemarketing solicitation" includes any communication, whether written or oral notification or advertisement, between a telemarketer and a prospective purchaser for the purpose of selling, or attempting to sell, the prospective purchaser any consumer goods or services if the telemarketer (i) intends to enter into an agreement with the consumer for the purchase of consumer goods or services during an unsolicited telephone call to a consumer, or (ii) the telemarketer communicates by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at during the course of a telephone conversation or during one or more subsequent conversations.

The annual registration fee is \$250. A \$50 discount when the applicant registers over the Internet at the Department of Tax and Revenue's web page, <http://www.state.wv.us/taxrev/>. Registrants must post a security bond of \$100,000 for each physical location from which telemarketing solicitation will begin or end in West Virginia. The maximum bond is \$500,000. This security is retained by the Secretary for a period of three years after the date the telemarketer ceases doing telemarketing business in this State.

Administration of article 6F, chapter 46A of the West Virginia Code is bifurcated. The Consumer Protection Division of the West Virginia Attorney General's Office administers the other provisions of article 6F.

Questions about registration and security should be directed to the Secretary of Tax and Revenue:

Secretary of Tax and Revenue
W. Va. Dept. of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Blvd., East
Charleston, WV 25305-0842
Telephone: 304-558-3333
1-800-982-8297 (toll free Within W. Va.)
TDDD No: 1-800-282-9833

Questions about the West Virginia Consumer Protection Act codified in chapter 46A of the West Virginia Code, including those provisions of article 6F of that Act should be directed to the:

West Virginia Attorney General
Consumer Protection/Antitrust Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301-2617
Telephone: 304-558-8986

**TITLE 119
PROPOSED LEGISLATIVE RULE
SECRETARY OF TAX AND REVENUE**

**Series 301
REGISTRATION OF TELEMARKETERS**

Statement of Circumstances

This Proposed Legislative Rule is required by W. Va. Code §§ 46A-6F-301 and 303.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Registration of Telemarketers [119 CSR 301]
Type of Rule: Legislative
Agency: Office of the Secretary, West Virginia Department of Tax and Revenue
Address: State Capitol Complex
Building 1, West Wing Suite 300
Charleston, West Virginia 25305-0963

1. Effect of Proposed Rule:

| | Current Fiscal Year | Next Fiscal Year |
|---|------------------------|---------------------|
| <u>Cost of Proposed Rules to Registrants:</u> | | |
| Cost of Registration: | \$ 250.00 | \$ 250.00 |
| Cost of Providing Security per registered business location | \$ 2,500.00 | \$ 2,500.00 |

Cost of Proposed Rules to the Office of the Secretary to administer WV Code §§ 46A-6F-301 and 302:

| | Current Fiscal Year | Next Fiscal Year |
|---|------------------------|---------------------|
| Consultant Fees | \$ 760.00 | \$ 760.00 |
| Database Management and Encryption/Decryption Software | \$ 100.00 | \$ - |
| Miscellaneous Office Expenses | \$ 200.00 | \$ 200.00 |
| Total Cost to Office of the Secretary for Administration | \$ 1,060.00 | \$ 960.00 |

2. Explanation of above estimates:

The cost estimates presented above are based on a projected total of fifteen(15) registrants by the end of fiscal year 1999. This projection is based on the reported number of registrants by the states of Arizona(12), Idaho(70), Kentucky(17), and Ohio(3).

Registrants who file their application via the Internet will qualify for a \$50.00 discount. The security is based upon the annual premium of a surety bond for a single telemarketing business location. The maximum annual cost to a registrant with multiple registered business locations is estimated to be \$12,500 for one \$500,000 bond.

The Miscellaneous Office Expenses listed as a cost to the Office of the Secretary include postage, paper, ink, and similar supplies.


3. Explanation of Economic Impact of Proposed Rules:

A. Economic Impact on State Government Nominal

B. Economic Impact on:
Political Subdivisions None
Specific Industries Nominal
Specific Groups of Citizens None

The economic impact on individual telemarketing businesses depends upon the amount of business conducted relative to the registration and security costs of compliance with WV Code §§ 46A-6F-301 and 302.

C. Economic Impact on Citizens /Public at Large Minimal



Keith N. Olson, Chief of Staff
WV Department of Tax and Revenue

6-24-98
Date

July 31, 1998

DATE: July 31, 1998

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Secretary of Tax and Revenue

LEGISLATIVE RULE TITLE: Registration of Telemarketers, 110 C.S.R. series 301.

1. Authorizing statute(s) citation: W. Va. Code §§ 46A-6F-301 and 303
2.
 - a. Date filed in State Register with Notice of Public Comment Period
June 24, 1998
 - b. What other notice, including advertising, did you give of the Public Comment Period?

Available on the Department of Tax and Revenue's Internet Site. Copies were sent to the Consumer Protection Division and the Tax Division of the Attorney General's Office for comment.
 - c. Date of Public Comment Period: June 24, 1998 through July 24, 1998.
Timely mailing was treated as timely filing.
 - d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received X
 - e. Date you filed in the State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 31, 1998
 - f. Name and phone number(s) of agency person to contact for additional information:

Dale W. Steager 558-3356

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

Not applicable.

- b. Date of hearing: _____

- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

- d. Attach findings and determinations and reasons.

Attached: _____

**TITLE 119
AGENCY APPROVED
LEGISLATIVE RULE
SECRETARY OF TAX AND REVENUE**

**Series 301
REGISTRATION OF TELEMARKETERS**

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**TITLE 119
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**Series 301
REGISTRATION OF TELEMARKETERS**

Part I General Information

§ 119-301-1. General.

1.1. **Scope.** -- This rule clarifies, explains and implements provisions of article 6F, chapter 46A of the Code that pertain to registration of telemarketers, bonding of telemarketers, penalties for failure to register or meet security requirements, and record keeping requirements.

1.2. **Authority.** -- The authority for this rule is W. Va. Code §§ 46A-6F-301 and 46A-6F-303.

1.3. **Filing Date.** -- June 24, 1998.

1.4. **Effective Date.**

1.5. **Official Citation.** -- The official citation of this rule is title 119, series 301 of the West Virginia Code of State Rules. Sections of this rule may be cited as 119 W.Va.C.S.R. § _____, or 119 C.S.R. § _____.

§119-301-2. Summary of rule.

2.1 The West Virginia Legislature enacted Committee Substitute for House Bill 4267 during its 1998 regular session, which adds a new article 6F pertaining to telemarketing to the West Virginia Consumer Credit and Protection Act. Part III of article 6F requires telemarketers to register with the Secretary of Tax and Revenue, unless the telemarketer is exempt from registration as provided in W. Va. Code §§46A-6F-201 through 218 and 220. This rule implements, explains and clarifies W. Va. Code §§46A-6F-301 through 303 and the exemptions provided in W. Va. Code §§46A-6F-201 through 220.

2.2 A telemarketer must register with the Secretary at least 60 days before offering consumer goods or services, or offering for sale consumer goods or services through any medium.

2.3 "Telemarketer" is defined to mean any person who initiates or receives telephone calls to or from a consumer in this State for the purpose of making a telemarketing solicitation.

2.4 Generally, "telemarketing solicitation" includes any communication, whether written or oral notification or advertisement, between a telemarketer and a prospective purchaser for the purpose of selling, or attempting to sell, the prospective purchaser any consumer goods or services if the telemarketer (i) intends to enter into an agreement with the consumer for the purchase of consumer goods or services during an unsolicited telephone call to a consumer, or (ii) the telemarketer communicates by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at during the course of a telephone conversation or during one or more subsequent conversations.

2.5 The annual registration fee is \$250. A \$50 discount when the applicant registers over the Internet at the Department of Tax and Revenue's web page, <http://www.state.wv.us/taxrev/>. Registrants must post a security bond of \$100,000 for each physical location from which telemarketing solicitation will begin or end in West Virginia. The maximum bond is \$500,000. This security is retained by the Secretary for a period of three years after the date the telemarketer ceases doing telemarketing business in this State.

2.6 Administration of article 6F, chapter 46A of the West Virginia Code is bifurcated. The Consumer Protection Division of the West Virginia Attorney General's Office administers the other provisions of article 6F.

2.6.1 Questions about registration and security should be directed to the Secretary of Tax and Revenue:

Secretary of Tax and Revenue
W. Va. Dept. of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Blvd., East
Charleston, WV 25305-0842
Telephone: 304-558-3333
1-800-982-8297 (toll free Within W. Va.)
TDDD No: 1-800-282-9833

2.6.2 Questions about the West Virginia Consumer Protection Act codified in chapter 46A of the West Virginia Code, including those provisions of article 6F of that Act should be directed to the:

West Virginia Attorney General
Consumer Protection/Antitrust Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301-2617
Telephone: 304-558-8986

§ 119-301-3. Rules of Construction.

3.1 **General.** -- Without limiting the scope of any provision of article 6F, chapter 46A of the Code, or any other rule or law, this rule is to be liberally construed and applied to promote the general purposes and policies of article 6F, chapter 46A of the Code.

3.2 **Non-inclusive.** -- This rule is not intended to cover all practices that violate article 6F, chapter 46A of the Code. Persons who believe they are the subject of consumer fraud, an abusive act or other act of a telemarketer that violates article 6F, chapter 46A of this Code should contact the Consumer Protection Division of the West Virginia Attorney General's Office by calling (304) 558-8986 or by writing to.

W. Va. Attorney General's Office
Consumer Protection Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301-2617

3.3 **Non-exclusive.** -- This rule is in addition to, and does not affect, any other rights or obligations that may exist by statute or judicial decision.

3.4 **Preceding, succeeding or following.** -- The words "preceding," "succeeding" or "following" used in reference to any section, subsection, subdivision or other part of this rule means next preceding, next succeeding or next following that in which such reference is made, unless a different interpretation be required by the context in which the term is used.

3.5 **Definitions.** --The definitions set forth in sections 101 through 114, article 6F, chapter 46A of the Code apply with full force and effect to all provisions and sections of this rule. Terms not defined in this rule or in article 6F, chapter 46A of the Code are to be construed in accordance with general principles of West Virginia law.

3.6 **Singular and plural.** -- A word importing the singular number only may be applied to several persons or things, as well as to one person or thing; a word importing the plural number only may be applied to one person or thing as well as to several; and a word importing the masculine gender only may be applied to females as well as males.

3.7 Severability. –The provisions of every section of this rule, whether adopted before or subsequent to the effective date of this rule, are severable from one another. If any provision of this rule, or any provision of article 6F, chapter 46A of the Code implemented, explained or clarified in this rule, is stayed or is held to be unconstitutional or void by a court of competent jurisdiction, the remaining provisions of this rule remain valid, unless:

3.7.1 The court finds that the valid provisions of article 6F, chapter 46A of the Code, or of this rule, are so essentially and inseparably connected with, and so dependent upon, the stayed or the unconstitutional or void provision that the court cannot presume the Legislature would have enacted the remaining valid provisions of article 6F, chapter 46A of the Code, or authorized this rule, without the stayed, unconstitutional or void provision(s).

3.7.2 The court finds that the remaining valid provisions of article 6F, chapter 46A of the Code, or of this rule, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 119-301-4. Application of this rule.

4.1 This rule applies to every sole proprietor or business entity who (a) initiates or receives in this State a communication that constitutes a telemarketing solicitation as defined in this rule, or (b) initiates or receives outside this State a communication to or from a consumer in this State that constitutes a telemarketing solicitation as defined in this rule, unless the sole proprietor or business entity is exempt from the provisions of article 6F, chapter 46A of the Code.

4.2 This rule does not apply to a person who makes telemarketing solicitations of consumers but is exempt from the definition of “telemarketer” under the provision of sections 46A-6F-201 through 218 and 46A-6F-220 of the Code, except as otherwise provided in this rule. Each of these exemptions is discussed more fully in sections 119-301-21 through 119-301-40 of this rule.

4.3 The registration and bonding requirements of sections 46A-6F-301 and 302 of the Code do not apply to owners, operators, officers, directors, partners, or other individuals engaged in the management activities of a business entity that is subject to registration under section 46A-6F-301 of the Code.

4.4 The registration and bonding requirements of sections 46A-6F-301 and 302 of the Code do not apply to a “salesperson” of a business entity that is subject to registration under section 46A-6F-301 of the Code.

4.5 Exemption from the registration and security requirements of sections 46A-6F-301 and 302 of the Code does not apply to:

4.5.1 Certain charitable organizations that employ a professional solicitor or fund-raiser, or receive contributions from the public in excess of \$10,000 during the calendar year. These organizations must register as a telemarketer, post the required security and pay the application fee specified in this rule. These requirements are discussed more fully in section 119-301-21 of this rule.

4.5.2 A "telemarketer in good standing," as defined in section 46A-6F-114, must file an application for registration as a telemarketer with the Secretary and pay the applicable registration fee in order to claim exemption from the security requirements of section 46A-6F-302 of the Code. After the initial application is filed, the telemarketer in good standing must file an annual application for renewal. This provision is discussed more fully in section 119-301-39 of this rule.

Part II Registration of Telemarketers

§ 119-301-5. Registration of telemarketers required.

5.1 **Registration required.** -- Except as otherwise provided in this rule, no sole proprietor or business entity may act as a telemarketer after June 11, 1998, without first registering with the Secretary of Tax and Revenue.

5.2 **Initial application.** -- A telemarketer must file an initial application for registration with the Secretary at least 60 days before the telemarketer: (a) begins offering consumer goods or services to West Virginia consumers, (b) begins offering consumer goods or services to consumers in other States from a physical location in this State, or (c) begins offering for sale consumer goods or services through any medium to West Virginia consumers, or from a physical location in this State to consumers wherever located.

5.3 **Renewal of registration.** -- After initial application for registration as a telemarketer is filed and a telemarketing registration certificate is issued by the Secretary, the registrant must annually file an application for renewal until the telemarketer ceases doing telemarketing activity in this State.

5.3.1 A telemarketer is deemed to be doing telemarketing activity in this State if the telemarketer solicits prospective consumers from a location(s) in this State, or solicits prospective consumers located in this State from an out-of-state location(s).

5.3.2 An application for renewal of registration must be filed 60 days before expiration of the current West Virginia telemarketing registration certificate.

5.4 **Certificate not to validate illegal activity.** -- Nothing in this rule, including, but not limited to, any payment of the registration fee imposed or issuance of any

telemarketing registration certificate under the provisions of this rule, may be deemed to legalize any act, business activity or transaction which otherwise may be illegal or conducted in violation of law; or to exempt any person from any civil or criminal penalty prescribed for such illegal act or violation.

5.5 For purposes of this rule:

5.5.1 "Telemarketing solicitation" means and includes any communication between a telemarketer and a prospective purchaser for the purpose of selling or attempting to sell the purchaser any consumer goods or services, if it is intended by the telemarketer that an agreement to purchase the consumer goods or services will be made after any of the following events occur:

5.5.1.1 The telemarketer makes an unsolicited telephone call to a consumer, attempting to sell consumer goods or services to the consumer, when the consumer has not previously expressed an interest to the telemarketer in purchasing, investing in, or obtaining information regarding, the consumer goods or services offered by the telemarketer; or

5.5.1.2 The telemarketer communicates with a consumer by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at some time during the course of one or more subsequent telephone communications with the consumer.

5.5.2 "Telemarketing solicitation" does not include telephone calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer.

5.5.3 "Telemarketer," except as otherwise provided in this subdivision, means any person who initiates or receives telephone calls to or from a consumer in this State for the purpose of making a telemarketing solicitation as defined in this section. "Telemarketer" includes, but is not limited to, owners, operators, officers, directors, partners, or other individuals engaged in the management activities of a business entity that is subject to registration pursuant to section 46A-6F-301 of this Code and this rule.

5.5.3.1 A telemarketer may initiate or receive a communication that constitutes a telemarketing solicitation on his own behalf, through a salesperson, or through an automated dialing machine.

5.5.3.2 "Telemarketer" does not include:

5.5.3.2.1 Any person or entity exempt from registration pursuant to sections 46A-6F-201 through 220 of the Code and this rule.

5.5.3.2.2 A "salesperson" as defined in this rule.

§ 119-301-6. Application forms and content.

6.1 Application forms. – Application for registration as a telemarketer and application for renewal of registration must be made in forms prescribed by the Secretary. These forms will require the applicant to provide the information required by subsection 46A-6F-301(c) of the Code and other information reasonably required by the Secretary to administer sections 46A-6F-301 through 303 of the Code.

6.2 Signature. – Every application for a telemarketing registration certificate and every application for renewal of a telemarketing certificate must bear the signature, or the digital signature, of a responsible principal of the telemarketer.

6.3 Verification. – Every application for a telemarketing registration certificate or for renewal of a telemarketing certificate must be verified by a declaration signed by a responsible principal that it is made under penalty of perjury. This declaration must specify the date and location of the signing.

6.4 Registration on Internet. – An application filed over the Internet must be validated and authenticated either by the personal identification number entered and verified by the applicant or by digital signature.

§ 119-301-7. Place and method of filing of applications.

7.1 Place of filing. – The initial application for registration form and all applications for renewal required by article 6F, chapter 46A of the Code must be filed by hand delivery or mailing to the following address except as provided in subsection 7.2:

W. Va. Secretary of Tax and Revenue
Office of Telemarketer Registration
P.O. Box 963
Charleston, WV 25324-0963

W. Va. Secretary of Tax and Revenue
Office of Telemarketer Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

7.2 Registration over Internet.

7.2.1 To facilitate compliance, the Secretary will establish on a secure server a telemarketing registration web page. At this site, the telemarketer may complete the required application for registration, validate and authenticate the application, pay the registration fee by credit card, and specify how the security requirement will be satisfied. When this is done, the applicant will be issued an electronic registration confirmation. This confirmation will serve as a temporary registration certificate, which is valid for a period of 30 days from date of issuance unless it is revoked by the Secretary or lapses due to failure to timely pay the registration fee or timely furnish the required security.

7.2.2 Applicants who register over the Internet after July 31, 1998 will have 15 days after the date the temporary registration certificate is issued within which to submit the required security and any other papers or information necessary to complete registration.

§ 119-301-8. Registration fees.

8.1 **General.** -- The Secretary may charge reasonable application and renewal fees. These fees are deposited in the *Telemarketer Registration Fund* created in the State Treasury and used to administer and enforce the registration requirements of article 6F, chapter 46A of the Code and this rule.

8.2 **Fees.** --The Secretary hereby establishes the following fees:

8.2.1 **Initial application fee** -- \$250.00

8.2.2 **Renewal fee** -- \$250.00

8.2.3 **Discount.** -- If the telemarketer registers at the Secretary's web site, or renews its registration at the Secretary's web site, the applicant will be allowed a \$50 discount.

8.3 Refund of fee.

8.3.1 No refund will be given, or credit established, for all or a portion of the registration fee if during the registration year the registrant: (a) goes out of business, (b) stops doing telemarketing activity in this State, or (c) has its telemarketing registration certificate revoked or suspended.

8.3.2 No refund will be given, or credit established, for all or a portion of the registration fee when the claim is for any other reason, except that a refund will be

made if payment of the fee, or any portion of the fee, was erroneous at the time it was paid.

§ 119-301-9. Payment of registration fee.

9.1 The registration fee and other amounts payable under this rule may be paid in currency, or by check, bank draft, certified check, cashier's check, post-office money order, or express money order payable to the Secretary of Tax and Revenue, or by credit card when the person applies for a telemarketing registration certificate, or applies for renewal of its certificate, at the Internet web page maintained for that purpose by the Secretary.

9.2 If a check, money order or other payment tendered in payment of the registration fee or any other amounts payable under this rule is not duly paid, the person by whom the check, money order or other payment was tendered remains liable for payment of the face amount of the check, money order or other payment plus all bad check charges or other similar charges imposed on the Secretary, the Department of Tax and Revenue, or the State of West Virginia directly attributable to the check, money order or other payment not duly paid.

§ 119-301-10. Security requirement.

10.1 **Bond required.** -- Except as otherwise provided in this rule, an application for registration or renewal of registration must be accompanied by a continuing surety bond executed by a corporation licensed to sell fidelity and surety insurance in the State of West Virginia.

10.2 **Amount and form.** -- The amount and form of bond must be approved by the Secretary before a certificate of registration is issued.

10.2.1 A separate bond in the amount of \$100,000 may be filed for each telemarketing location, including each principal office and each branch office thereof, engaged in telemarketing activity in West Virginia, or a single bond in the amount of \$500,000 may be filed for all locations of the telemarketer.

10.2.2 This bond must provide that the telemarketer will pay all damages to this State or a private person resulting from any unlawful act or action by the telemarketer or its agent in connection with the conduct of telemarketing activities.

10.3 **Revocation of registration certificate upon loss of security.** -- The registration of any telemarketer is void upon termination of the bond of the surety company, or loss of the bond, unless, prior to such termination, a new bond is filed with the Secretary.

10.3.1 Subsection 10.3 does not apply to a *telemarketer in good standing* that is required to register with the Secretary but is exempt from furnishing a corporate surety bond or other security, as provided in subsection 46A-6F-219 of the Code. This exemption is discussed more fully in section 39 of this rule.

10.4 Cancellation of surety bond. --The surety, for any cause, may cancel the bond upon giving 60-days written notice by certified mail to the telemarketer and to the Secretary. Unless the bond is replaced by that of another surety licensed by this State to sell fidelity and surety insurance, or other adequate security is furnished, before the expiration of the 60-day notice of cancellation, the registration of the telemarketer becomes void on the 61st day.

10.5 Duration of bond. -- A surety bond must remain in effect for 36 months after the telemarketing business stops making telemarketing solicitation of West Virginia consumers.

10.6 Other allowable security.

10.6.1 Any business required under this rule to file a corporate surety bond with its registration application, may, in lieu of the surety bond, file the following in the same amount as required if a corporate surety bond were filed:

10.6.1.1 An irrevocable letter of credit, in the form prescribed by the Secretary, issued by a financial organization authorized to do business in this State or by a United States bank that is a member of the Federal Reserve System, with provision for automatic annual renewals;

10.6.1.2 A certificate of deposit issued by a West Virginia bank or a National bank either in the name of the State of West Virginia, or in the "name of registrant **or** the State of West Virginia." A certificate of deposit issued in the "name of registrant **and** the State of West Virginia" will not be accepted as security;

10.6.1.3 Cash, which the Secretary must invest in an interest bearing account; or

10.6.1.4 One or more government bond(s) backed by the full faith and credit of the issuing government entity issued by the United States Department of the Treasury or any State provided the bond(s) is issued in the name of the State of West Virginia. A bond issued in the "name of registrant **and/or** the State of West Virginia" will not be accepted as security.

10.7 Retention of alternative security. -- The Secretary must hold the letter of credit, cash, certificate of deposit or government bond to pay claims made by or on behalf of West Virginia consumers against the registrant for a period of 36 months after

the date: (a) the registrant stops doing telemarketing activity in this State, (b) its registration lapses, or (c) its registration is revoked by the Secretary. At the end of the 36-months, any principal and accrued interest not required for payment of claims, will be returned to the registrant.

10.8 The registration of the telemarketer will be treated as lapsed if at any time, during the registration year or for 36 months thereafter the amount of the letter of credit, bond, cash, certificate of deposit or government bond falls below the amount required by this section.

10.9 If the license of any surety to sell fidelity and surety insurance in this State is terminated, all surety bonds given pursuant to section 46A-6F-302 of the Code and this rule upon which the surety company is surety are suspended as of the effective date of the termination of the license of the surety and the registrant must provide replacement security.

10.9.1 Whenever the license of a surety authorizing to transact fidelity and surety insurance in this State is terminated, the Insurance Commissioner must notify the Secretary of the name of the surety and the effective date of the termination.

10.9.2 Upon receipt of notification from the Insurance Commissioner, the Secretary must immediately notify each affected telemarketer of the termination and require that a new corporate surety bond be filed. This notice must be sent by registered or certified mail, return receipt requested, addressed to the telemarketer at his or its principal place of business as shown by the Secretary's records.

10.9.3 Failure of any telemarketer to file (a) a corporate surety bond with new or additional surety, or (b) acceptable alternative security, within 30 days after being advised in writing by the Secretary of the necessity to do so is cause for the Secretary to revoke the telemarketer's registration.

10.10 **Action on bond or other security.** -- An action may be brought in any court of competent jurisdiction upon the bond or other security by any person to whom the registrant fails to account and pay as set forth in section 46A-6F-302(b) of the Code. The aggregate liability of the surety company to all persons injured by a registrant's violations may not exceed the amount of the bond.

§ 119-301-11. Time for which registration certificate granted.

11.1 **Registration year.** -- A West Virginia Telemarketing Registration Certificate is for a period of one year beginning with the day the certificate is issued and expiring at 11:59 p.m. eastern time on the day before the beginning of the next registration year, unless it is suspended or revoked by the Secretary or surrendered by the registrant before the end of the registration year.

11.2 If a temporary registration certificate is issued, the one-year registration period begins with the day the temporary registration certificate is issued by the Secretary.

§ 119-301-12. Record keeping requirements..

12.1 A telemarketer must keep for a period of 4 years from the date the record is produced the following records related to its telemarketing activities.

12.1.1 One of each advertisement, brochure and other promotional materials;

12.1.2 The name and last known address of each prize recipient and the prize awarded for prizes represented, directly or by implication, to have a value of \$25 or more;

12.1.3 The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;

12.1.4 The name, last known home address and telephone number, and job title for all current and former employees directly involved in telephone sales; and

12.1.5 All verifiable authorizations required to be provided or received under article 6F, chapter 46A of the Code;

12.1.6 A copy of all scripts, outlines or presentation materials the seller will require the telemarketer to use when soliciting, as well as all sales information to be provided by the seller to a purchaser in connection with any solicitation.

12.2 A seller or telemarketer may keep the records required by subsection 46A-6F-304(a) of the Code and this rule in any form, and in any manner, format, or place as they keep these records in the ordinary course of business.

12.3 Failure to keep all records required by subsection 46A-6F-304 of the Code is a violation of article 46A-6F.

12.4 A telemarketer is responsible for complying with the requirements of subsections 46A-6F-304(a) and (b).

12.5 In the event of dissolution or termination of the seller's or telemarketer's business, the principal of that telemarketer is required to maintain all records required by section 46A-6F-304 of the Code.

12.5.1 In the event a telemarketer is adjudicated bankrupt and liquidated, the trustee must notify the Consumer Protection Division of the legal name, business address and telephone number of the person who is or will be in possession of these records after the trustee is discharged by the Bankruptcy Court.

12.6 The Consumer Protection Division may require a telemarketer to file a true copy of all scripts, outlines and promotional materials and any modifications thereto for a period of time to be determined by the Consumer Protection Division. Filings may be required when, upon investigation, the Consumer Protection Division determines that:

12.6.1 A telemarketer is using scripts, outlines or presentation material that contain material misrepresentations or that fail to state material facts, or

12.6.2 A telemarketer is deviating from scripts, outlines or presentation material so as to make material misrepresentations or to fail to state material facts.

Sections 119-301-13 through 119-301-19 (Reserved for future use.)

Part III. Exempt Persons or Entities.

§ 119-301-20. General rule.

20.1 Not every person who makes telemarketing solicitations of West Virginia consumers is required to register with the Secretary. This is because the definition of "telemarketer" does not include any person or entity exempt under W. Va. Code § 46A-6F-220, except that a person claiming exemption under section 46A-6F-219 of the Code is required to register in order to claim the exemption.

20.2 As provided in section 46A-6F-113(c) of the Code, "telemarketer" **does not include:**

20.2.1 Any person or entity that is exempt pursuant to sections 46A-6F- 201 through 220 of the Code; or

20.2.2 A salesperson as defined in this rule.

§ 119-301- 21. Certain charitable organizations.

21.1 A charitable organization that is exempt from filing an annual registration statement with the West Virginia Secretary of State under the provisions of section 29-19-6 of the Code is exempt from the registration and bonding provisions of sections

46A-6F-301 and 302 of the Code and this rule when making a telemarketing solicitation. The charitable organization is subject to all other provisions of article 6F, chapter 46A of the Code when making a telemarketing solicitation.

21.2 Persons and organizations exempt from registration with the Secretary of State under section 29-19-6 of the Code include and are limited to:

21.2.1 Educational institutions, the curriculums of which, in whole or in part, are registered or approved by the state board of education, either directly or by acceptance of accreditation by an accrediting body recognized by the state board of education; and any auxiliary associations, foundations and support groups which are directly responsible to any such educational institutions;

21.2.2 Persons requesting contributions for the relief of any individual specified by name at the time of the solicitation when all of the contributions collected without any deductions whatsoever are turned over to the named beneficiary for his or her use;

21.2.3 Hospitals which are nonprofit and charitable;

21.2.4 Organizations that solicit only within the membership of the organization by the members thereof:

21.2.4.1 As used in paragraph 21.2.4, the term "membership" does not include those persons who are granted a membership upon making a contribution as the result of solicitation.

21.2.4.2 As used in the term "member" means a person having membership in a nonprofit corporation, or other organization, in accordance with the provisions of its articles of incorporation, bylaws or other instruments creating its form and organization; and having bona fide rights and privileges in the organization, such as the right to vote, to elect officers, directors and issues, to hold office or otherwise as ordinarily conferred on members of such organizations.

21.2.5 Churches, synagogues, associations or conventions of churches, religious orders or religious organizations that are an integral part of a church which qualifies as tax exempt under the provisions of 26 U.S.C. § 501(c)(3) as in effect on June 12, 1998.

21.2.6 Any person, firm, corporation or organization that sponsors a single fund-raising event for the benefit of a named charitable organization when all or part of the funds collected are donated to the named charitable organization, provided the named charitable organization receiving the funds (a) is registered pursuant with the Secretary of State under article 19, chapter 29 of the Code, (b) reports each of these

donations individually, and (c) certifies that no funds were withheld by the organization that solicited the funds.

21.3 The following charitable organizations are exempt from filing an annual registration statement with the Secretary of State if (a) they do not employ a professional solicitor or fund-raiser, or (b) do not intend to solicit and receive and do not actually raise or receive contributions from the public in excess of \$10,000 during a calendar year:

21.3.1 Local youth athletic organizations.

21.3.2 Community civic clubs.

21.3.3 Community service clubs.

21.3.4 Fraternal organizations.

21.3.5 Labor unions.

21.3.6 Local posts, camps, chapters or similarly designated elements or county units of such elements of bona fide veterans' organizations or auxiliaries which issue charters to such local elements throughout the state;

21.3.7 Bona fide organizations of volunteer firemen or auxiliaries;

21.3.8 Bona fide ambulance associations or auxiliaries;

21.3.9 Bona fide rescue squad associations or auxiliaries.

21.4 Charitable organizations listed in subsection 21.3 of this rule that engage in telemarketing activity and employ a professional solicitor or fund-raiser are subject to the registration and security requirements of sections 46A-6F-301 and 302 of the Code and this rule. The application for registration as a telemarketer must be filed at least 60 days before the professional solicitor or fund-raiser begins raising funds for the organization.

21.5 Charitable organizations listed in subdivision 21.3 of this rule that engage in telemarketing activity and do not intend to solicit and receive in excess of \$10,000, but do receive in excess of that amount from the public, must file an application for registration as a telemarketer and post the required security as soon as it is known or should have been known to the organization that contributions in excess of \$10,000 have been pledged or received, whichever occurs first.

21.6 Charitable organizations listed in subdivision 21.3 of this rule that engage in telemarketing activity and intend to solicit and received in excess of \$10,000 from the

public must file an application for registration as a telemarketer and post the required security 60 days before beginning telemarketing activity in this State.

21.7 For purposes of this rule, "professional fund-raiser" means any person who is retained under contract or otherwise compensated by or on behalf of a charitable organization primarily for the purpose of soliciting funds. "Professional fund-raiser" includes a person who plans, manages, advises, consults or prepares materials for solicitations.

21.7.1 Professional fund-raising status is evidenced by one or more of the following characteristics:

21.7.1.1 Access to contributions or other receipts from a solicitation and/or authority to pay expenses associated with solicitation, including amounts owed to the professional fund raising firm or third party vendors;

21.7.1.2 Conducting direct solicitations of prospective donors, whether in person or by telephone and whether those solicitations are performed personally or through employees or agents; or

21.7.1.3 Advising a charitable organization with regard to the volume, targeting, duration or content of a direct mail solicitation campaign and also having primary responsibility for the campaign's production.

21.7.2 "Professional fund-raiser" does not include any bona fide employee of a charitable organization who receives regular compensation and is not primarily employed for the purpose of soliciting funds, or an attorney, investment counselor, or banker who in the conduct of his or her work advises a client to make a contribution.

21.7.3 For purposes of this section "solicitation" means any request or appeal, either oral or written, or any endeavor to obtain, seek or plead funds, property, financial assistance or other thing of value, including the promise or grant of any money or property of any kind for a charitable purpose, but excluding: (a) direct grants or allocation of funds received or solicited from any affiliated fund-raising organization by a member agency; and (b) unsolicited contributions received from any individual donor, foundation, trust, governmental agency or other source, unless the contributions are received in conjunction with a solicitation drive.

21.7.4 For purposes of this section 119-301-21 "solicitation drive" means the day the first solicitation is made until the following dates:

21.7.4.1 The last day the solicitation is made; or

21.7.4.2 The day that an entertainment event, if any, occurs in conjunction with the solicitations.

§ 119-301-22. Licensed securities, commodities, or investment broker, dealer, or investment adviser.

22.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to any person licensed as a securities, commodities, or investment broker, dealer, or investment adviser, when that person is soliciting within the scope of his or her license.

22.2 If a person is soliciting outside the scope of his or her license as a securities, commodities, or investment broker, dealer, or investment advisor, then the person must register as a telemarketer unless another exemption applies.

22.3 As used in this section, "licensed securities, commodities, or investment broker, dealer, or investment adviser" means a person who is licensed or registered as such by the United States Securities and Exchange Commission, by the National Association of Securities Dealers or some other self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. § 78c), or by an official or agency of this State or of any State of the United States, and whose license has not expired or been suspended or revoked.

§ 119-301-23. Licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser.

23.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to any licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser, when the licensed associate is soliciting within the scope of his or her license.

23.2 If a licensed associated person of a securities, commodities, or investment broker, dealer or investment advisor makes telephone solicitations that are not within the scope of his or her license, he or she must register as a telemarketer with the Secretary unless another exemption applies.

23.3 As used in this section, a "licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser means any associated person registered or licensed by the National Association of Securities Dealers or other self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. § 78c) or by an official or agency of this state or of any State of the United States.

§ 119-301-24. Persons who do not make the major sales presentation.

24.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person who does not make the major sales presentation during the telephone solicitation and who does not intend to, and does not actually complete or obtain provisional acceptance of a sale during the telephone solicitation, but who makes the major sales presentation and completes the sale at a later face-to-face meeting between the seller and the prospective consumer in accordance with the home solicitation provisions of chapter 46A of the Code and as a home solicitation sale as defined in section 46A-1-102 of the Code and subsection 24.3 of this rule.

24.2 However, if a seller engages in unfair and deceptive practices, as defined in subdivision 46A-6F-501(a)(4) of the Code, by causing an individual to go to the prospective consumer for the primary purpose of collecting payment or delivering any item purchased, this exemption does not apply.

24.3 The term "home solicitation sale" means a consumer credit sale in excess of \$25 in which the buyer receives a solicitation of the sale at a place other than the seller's business establishment at a fixed location and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller. "Home solicitation sale" does not include: (a) a sale made pursuant to a preexisting open-end credit account with the seller in existence for at least three months prior to the transaction, (b) a sale made pursuant to prior negotiations between the parties at the seller's business establishment at a fixed location, (c) a sale of motor vehicles, mobile homes or farm equipment, or (d) a sale which may be rescinded under the Federal Truth in Lending Act (being Title I of the Federal Consumer Credit Protection Act). A sale which would be a home solicitation sale if credit were extended by the seller is a home solicitation sale although the goods or services are paid for, in whole or in part, by a consumer loan in which the creditor is subject to claims and defenses arising from the sale.

24.4 Practices identified as unfair or deceptive practices in subdivision 46A-6F-501(a)(4) include procurement by a seller or telemarketer of the services of any professional delivery, courier or other pick-up service to obtain immediate receipt and possession of a consumer's payment unless:

24.4.1 The service is requested by the consumer;

24.4.2 The consumer is informed that he or she can inspect the goods or services prior to payment and may refuse to accept the goods or services; **and**

24.4.3 The consumer is actually afforded an opportunity to inspect the goods or services prior to payment.

§ 119-301-25. Person who solicits sales by catalog.

25.1 The provisions of this article 6F, chapter 46A of the Code and this rule do not apply to a person who solicits sales by periodically publishing and delivering a catalog of a seller's merchandise to prospective purchasers as long as the catalog:

25.1.1 Contains a written description or illustration of each item offered for sale;

25.1.2 Includes the business address or home address of the seller;

25.1.3 Includes at least twenty pages of written material and illustrations;

25.1.4 Is distributed in more than one State; **and**

25.1.5 Has an annual circulation, by mailing, of not less than 150,000 catalogs.

25.2 If the seller engages in telemarketing activity in this State and all of the criteria listed above are not satisfied, then the seller must have a West Virginia telemarketing registration certificate unless another exemption applies.

§ 119-301-26. Business-to-business sale.

26.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a business-to-business sale of property or services.

26.2 "Business" includes (a) all activities engaged in, or caused to be engaged in, with the object of gain or economic benefit, direct or indirect, and (b) all activities of a not for profit corporation or other organization that compete, or may compete, with activities engaged in by a person with the object of gain or economic benefit, direct or indirect. "Business" does not include services rendered by an employee within the scope of his or her contract of employment. Employee services, services by a partner on behalf of his or her partnership and services by a member of any other business entity on behalf of that entity are the business of the employer, or partnership, or other business entity as the case may be.

26.3 Examples of business to business sales include:

26.3.1 Sales of property or services by one for-profit business to another for-profit business.

26.3.2 Sales of property or services by for-profit business to a not-for-profit business for use or consumption in its business activity.

26.3.3 Sales of property or services by a not-for-profit business to a for-profit business.

26.3.4 Sales of property or services by a not-for-profit business to a not-for-profit business.

26.3.5 Sales of property or services by a for-profit business to (a) the United States, (b) this or another State, or (c) an agency, board or commission of the United States or of any State.

26.3.6 Sales of property or services by a not-for-profit business to (a) the United States, (b) this or another State, or (c) an agency, board or commission of the United States or of any State.

26.3.7 Unlike rules of the Federal Trade Commission governing telemarketing sales, 16 C.F.R. § 310.6(g), this exemption also applies to retail sales of nondurable office or cleaning supplies to a business.

§ 119-301-27. Persons who solicit contracts for maintenance or repair of goods.

The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person who solicits contracts for the maintenance or repair of goods previously purchased (a) from the person making the solicitation, or (b) from the person on whose behalf the solicitation is made.

This exempts retailers of goods, such as household appliances, who also sell maintenance or repair contracts for those goods when subsequent to the sale they, or a third-party on their behalf, solicits sales of repair or maintenance contracts with regard to those goods.

§ 119-301-28. Persons soliciting a transaction regulated by Commodity Futures Trading Commission.

28.1 The provisions of article 6F, chapter 46A of the Code do not apply to a person soliciting a transaction regulated by the Federal Commodity Futures Trading Commission if the person is registered or temporarily licensed for this activity with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) and the registration or license has not expired or been suspended or revoked.

28.2 A person who is registered or licensed by the Federal Commodities Futures Trading Commission who solicits sales of a consumer good or service that are not

regulated by the Commodity Futures Trading Commission must register and comply with the provisions of article 6F, chapter 46A of the Code and this rule.

28.3 The Commodity Futures Trading Commission regulates the buying and selling of commodities by contracts for future delivery.

28.4 Definitions. For purposes of this section”

28.4.1 “Act” means the Commodity Exchange Act (7 U.S.C. § 1 et seq.).

28.4.2 “Associated person” means any natural person who is associated in any of the following capacities with:

28.4.2.1 A futures commission merchant as a partner, officer, or employee (or any natural person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers’ or option customers’ orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged;

28.4.2.2 An introducing broker as a partner, officer, employee, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers’ or option customers’ orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged;

28.4.2.3 A commodity pool operator as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or persons so engaged; or

28.4.2.4 A commodity trading advisor as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves: (i) The solicitation of a client’s or prospective client’s discretionary account, or (ii) the supervision of any person or persons so engaged; and

28.4.2.5 A leverage transaction merchant as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves: (i) The solicitation or acceptance of leverage customers’ orders (other than in a clerical capacity) for leverage transactions as defined in subdivision 28.14.12, or (ii) the supervision of any person or persons so engaged.

28.4.3 "Commodity" means and includes wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, millfeeds, butter, eggs, Irish potatoes, wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in Pub. L. 85-839, and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in.

28.4.4 "Commodity pool operator" means any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery or commodity option on or subject to the rules of any contract market, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

28.4.5 "Commodity trading advisor" means any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market, any commodity option authorized under section 4c of the Act, or any leverage transaction authorized under section 19 of the Act, or who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing; but such term does not include (i) any bank or trust company or any person acting as an employee thereof, (ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees, (v) the named fiduciary, or trustee, of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, or any fiduciary whose sole business is to advise that plan, (vi) any contract market, and (vii) such other persons not within the intent of this definition as the Commission may specify by rule, regulation or order: Provided, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession: Provided further, That the Commission, by rule or regulation, may include within this definition, any person advising as to the value of commodities or issuing reports or analyses concerning commodities, if the Commission determines that such rule or regulation will effectuate the purposes of this provision.

28.4.6 "Contract Market" means a board of trade designated by the Commission as a contract market under the Commodity Exchange Act or in accordance with the provisions of part 33 of this chapter.

28.4.7 "Floor broker" means any person who, in or surrounding any pit, ring, post or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market and shall include any person required to register as a floor broker under the Act by virtue of part 33 of this chapter.

28.4.8 "Floor trader" means any person who, in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, purchases or sells solely for such person's own account, or has been authorized by a contract market to purchase or sell for such person's own account, any commodity for future delivery on or subject to the rules of any contract market and shall include any person required to register as a floor trader under the Act by virtue of 17 C.F.R. part 33 of this chapter or by rule or regulation of the Commission pertaining to the operation of an electronic trading system.

28.4.9 "[Futures] Commission merchant" means:

28.4.9.1 Individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee or secure any trades or contracts that result or may result therefrom; and

28.4.9.2 Includes any person required to register as a futures commission merchant under the Act by virtue of 17 C.F.R. part 32 or part 33.

28.4.10 "Future Delivery" does not include any sale of a cash commodity for deferred shipment or delivery.

28.4.11 "Introducing Broker"

28.4.11.1 "Introducing broker" means any person who, for compensation or profit, whether direct or indirect, is engaged in soliciting or in accepting orders (other than in a clerical capacity) for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; and

28.4.11.2 "Introducing broker" includes any person required to register as an introducing broker by virtue of 17 C.F.R. part 33, except that the term "introducing broker" shall not include:

28.4.11.2.1 Any futures commission merchant, floor broker, or associated person, acting in its capacity as such, regardless of whether that futures

commission merchant, floor broker, or associated person is registered or exempt from registration in such capacity;

28.4.11.2.2 Any commodity trading advisor, which, acting in its capacity as a commodity trading advisor, is not compensated on a per-trade basis or which solely manages discretionary accounts pursuant to a power of attorney, regardless of whether that commodity trading advisor is registered or exempt from registration in such capacity; and

28.4.11.2.3 Any commodity pool operator which, acting in its capacity as a commodity pool operator, solely operates commodity pools, regardless of whether that commodity pool operator is registered or exempt from registration in such capacity.

28.4.12 "Leverage Contract" means a contract, standardized as to terms and conditions, for the long-term (ten years or longer) purchase ("long leverage contract") or sale ("short leverage contract") by a leverage customer of a leverage commodity which provides for:

28.4.12.1 Participation by the leverage transaction merchant as a principal in each leverage transaction;

28.4.12.2 Initial and maintenance margin payments by the leverage customer;

28.4.12.3 Periodic payment by the leverage customer or accrual by the leverage transaction merchant of a variable carrying charge or fee on the unpaid balance of a long leverage contract, and periodic payment or crediting by the leverage transaction merchant to the leverage customer of a variable carrying charge or fee on the initial value of the contract plus any margin deposits made by the leverage customer in connection with a short leverage contract;

28.4.12.4 Delivery of a commodity in an amount and form which can be readily purchased and sold in normal commercial or retail channels;

28.4.12.5 Delivery of the leverage commodity after satisfaction of the balance due on the contract; and

28.4.12.6 Determination of the contract purchase and repurchase, or sale and resale prices by the leverage transaction merchant.

28.4.13 "Leveraged transaction" means the purchase or sale of any leverage contract, the repurchase or resale of any leverage contract, the delivery of the leverage commodity, or the liquidation or rescission of any such leverage contract by or to the leverage transaction merchant.

28.4.14 "Leveraged transaction merchant" means and includes any individual, association, partnership, corporation, trust or other person that is engaged in the business of offering to enter into, entering into or confirming the execution of leverage contracts, or soliciting or accepting orders for leverage contracts, and who accepts leverage customer funds (or extends credit in lieu thereof) in connection therewith.

28.4.14.1 A leverage transaction merchant as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves: (i) The solicitation or acceptance of leverage customers' orders (other than in a clerical capacity) for leverage transactions as defined in Sec. 31.4(x) of this chapter, or (ii) the supervision of any person or persons so engaged.

28.4.15 "Person" includes individuals, associations, partnerships, corporations, and trusts.

28.4.16 "Self-regulatory organization" means a contract market as defined in subdivision 28.4.5.

§ 119-301-29. Supervised financial organization.

29.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to (a) a supervised financial organization, (b) an affiliate or subsidiary of a supervised financial organization or (c) a regulated consumer lender, that is subject to regulation by the West Virginia Banking Commissioner, or by a federal agency charged with regulating supervised financial organizations or regulated consumer lenders, when the organization is acting within the scope of the supervised or regulated activity.

29.2 If a supervised financial organization, or its affiliate or subsidiary, or a regulated consumer lender makes telemarketing solicitations for consumer goods or services not generally offered to the public in the course of its supervised or regulated activity, the telemarketer is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.

29.3 For purposes of this section:

29.3.1 "Regulated consumer lender" means a person authorized to make or take assignments of regulated consumer loans.

29.3.2 "Supervised financial organization" means any organization, corporation or person, other than an insurance company or other organization primarily engaged in an insurance business, which is required under state law to register or

obtain a license from the Commissioner of Banking of this State before conducting business in this State; or which is authorized under federal law to make consumer loans without a license from the Commissioner of Banking, provided such loans are subject to supervision and examination by an official or agency of the United States.

29.3.3 "Consumer loan" means a loan made by a person regularly engaged in the business of making loans in which: (a) the debtor is a person other than an organization; (b) the debt is incurred primarily for a personal, family, household or agricultural purpose; (c) either the debt is payable in installments or a loan finance charge is made; **and** (d) either the principal does not exceed \$45,000 or the debt is secured by an interest in land or a factory-built home, as defined in section 37-15-2 of the Code.

29.3.4 "Factory-built home" includes modular homes, mobile homes, house trailers and manufactured homes;

§ 119-301-30. Licensed insurance broker, agent, customer representative, or solicitor.

30.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a licensed insurance broker, agent, customer representative, or solicitor when that person is soliciting within the scope of his or her license.

30.2 A licensed insurance broker, agent, customer representative or solicitor who makes telemarketing solicitations outside the scope of his or her license is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.

30.3 As used in this section, "licensed insurance broker, agent, customer representative, or solicitor" means any insurance broker, agent, customer representative, or solicitor licensed by the Insurance Commissioner of West Virginia or an official or agency of this State pursuant to subsection 33-12-1(a) of the Code, or of any State of the United States.

30.3.1 "Insurance agent" means an individual appointed by an insurer to solicit, negotiate, effect or countersign insurance contracts in its behalf.

30.3.2 "Insurance broker" means an individual who for compensation in any manner solicits, negotiates or procures insurance or the renewal or continuance thereof on behalf of insureds or prospective insureds.

30.3.3 "Insurance solicitor" means an individual appointed and authorized by an agent to solicit and receive applications for insurance as a representative of such agent.

§ 119-301-31. Persons soliciting sale of services provided by cable television system or subscriber television services.

31.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to:

31.1.1 A person soliciting the sale of services provided by a cable television system operating under authority of a franchise or permit; or

31.1.2 A person soliciting the sale of subscriber television services or advertising.

31.2 If the telemarketing solicitation is for the sale of consumer goods or for the sale of any other consumer service, then the person soliciting the sale is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.

§ 119-301-32. Certain telephone and communications companies.

32.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to any of the following entities to the extent that its acts or practices are subject to the jurisdiction or regulation of the West Virginia Public Service Commission or the Federal Communications Commission:

32.1.1 A telephone company, or any affiliate or agent of a telephone company; or

32.1.2 Any provider of commercial mobile service, as defined by the communications act of 1934, as amended by the telecommunications act of 1966 (47 U.S.C. § 151, et seq.).

32.2 If an act or practice of a telephone company, or any affiliate or agent of a telephone company, constitutes telemarketing solicitation or results in telemarketing solicitation, and that act or practice is not regulated by the West Virginia Public Service Commission or the Federal Communications Commission, then the provisions of article 6F-chapter 46A of the Code and this rule apply, unless another exemption applies.

§ 119-301-33. Persons maintaining continuing business locations for sales of consumer goods or services.

33.1 The provisions of article 6F, chapter 46A of the Code do not apply to a person who offers to sell consumer goods or services through telemarketing activities if the person maintains one or more permanent business locations under the same exact name as that used in connection with telemarketing sales and both of the following activities occur on a continuing basis:

33.1.1 The identical consumer goods or services offered for sale by the person through telemarketing are offered for sale to consumers at the person's permanent retail locations;

33.1.2 More than 50 percent of all consumer goods and services offered for sale by the person are sold to consumers at its permanent retail locations rather than through telemarketing.

33.2 For purposes of subdivision 33.1:

33.2.1 The permanent retail business location(s) may be located in this State or elsewhere.

33.2.2 The permanent retail business location(s) from which consumer goods or services are sold to consumers must operate under the same exact name as that used in connection with the telemarketing sales.

33.2.3 If the doing business names are different, this exemption does not apply even if the legal name is the same.

Example 1. Mid-America Retailer, Inc has two divisions. One division operates permanent business locations from which consumer goods or services are offered for sale under the name March Stores. The second division makes telemarketing sales under the name MAR Corp. The telemarketing activity of MAR Corp. is not exempt under this rule.

33.2.4 If the legal names of the business are different but the doing business names are the same, the telemarketing activity is not exempt.

Example 2. Mid-America Retailers, Inc operates retail stores under the name March Stores. A wholly owned subsidiary called MAR Telemarketing Inc. makes telemarketing sales of the same identical consumer goods or services as those sold by the March Stores at its retail locations and the telemarketing sales are made under the named March Stores. The telemarketing activity of MAR Telemarketing, Inc. is not exempt under this rule.

33.2.5 If the consumer goods and services offered for sale through its telemarketing activity are not identical to those offered for sale at its permanent retail locations, the telemarketing activity is not exempt.

Example 3. Mid-America Retailers sells consumer goods at its permanent retail stores and through telemarketing activity. However, not all consumer goods or services available through its telemarketing activity are identical to the consumer goods or services offered for sale at its permanent retail stores. For example, Christmas decorations are sold seasonally at its permanent retail stores but may be purchased through telemarketing activity throughout the year. Mid-America Retailers, Inc is not exempt from article 6F, chapter 46A of the Code because the telemarketing goods available for sale on a continuing basis include other goods or services that can only be purchased at a permanent retail store on a seasonal basis.

33.2.6 To determine whether more than 50 percent of all consumer goods or services offered for sale by the person are sold at permanent retail locations of the person maintained under the same exact legal name, and the same exact doing business name, used in connection with the telemarketing sales, gross receipts from selling consumer goods and services for the last 12 months preceding the month of registration at the permanent retail locations is compared with total gross receipts during that same period from all sales of consumer goods and services.

33.2.6.1 Gross receipts is determined net of returns, allowances and discounts but includes shipping, handling and delivery charges paid by the customer that are added to or included in the sales price. Gross receipts does not include separately stated federal excise taxes the legal incidence of which is on the consumer or sales or use taxes collected by the seller from the customer.

§ 119-301-34. Issuers of certain securities.

The provisions of article 6F, chapter 46A of the Code do not apply to an issuer or a subsidiary of an issuer that has a class of securities that is subject to Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) and which is either registered or exempt from registration under paragraphs (A), (B), (C), (E), (F), (G), or (H), subsection (g)(2) of that section [15 U.S.C. § 781(g)(2) (A), (B), (C), (E), (F), (G), or (H)].

§ 119-301-35. Book, video, record, or multimedia club.

35.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a book, video, record, or multimedia club or contractual plan or arrangement:

35.1.1 Under which the seller provides the consumer with a form which the consumer may use to instruct the seller not to ship the offered merchandise;

35.1.2 That is regulated by the Federal Trade Commission trade regulation concerning use of negative option plans by sellers in commerce; **or**

35.1.3 That provides for the sale of books, records, videos, multimedia products or other goods that are not covered subdivisions 35.1.1 or 35.1.2 of this subsection, including continuity plans, subscription arrangements, standing order arrangements, single sales of items offered for sale one time, supplements, and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive the merchandise on a periodic basis.

35.2 If a telemarketer described in this section engages in other telemarketing activity, the telemarketer is, with respect to that other telemarketing activity, subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.

§ 119-301-36. Registered developers or real estate salespersons or brokers.

36.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person who is licensed as a real estate broker, associate broker, or real estate salesperson, in accordance with the provisions of sections 47-12-1 *et seq.* of the Code, when the person is acting within the scope of his or her license.

36.2 If a licensed real estate broker, associate broker, or real estate salesperson makes telemarketing solicitations that are outside the scope of his or her license, the person is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.

§ 119-301-37. Persons soliciting sale of electric or natural gas energy or related goods or services.

37.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person soliciting on behalf of an entity that sells electric or natural gas energy, or an affiliate of an entity that sells electric or natural gas energy, if the solicitation is for the sale of electric or natural gas energy or related goods and services, and the transaction is governed and regulated by the West Virginia Public Service Commission or the Federal Energy Regulatory Commission.

37.2 If the sale of electric or natural gas energy or related goods or services is not made in a transaction governed and regulated by the West Virginia Public Service Commission or the Federal Energy Regulatory Commission, the telemarketer is not exempt under this section. The telemarketer must register with the Secretary and comply with the provisions of article 6F, chapter 46A of the Code and this rule unless another exemption applies.

37.3 If a telemarketer soliciting the sale of electric or natural gas energy or related services in a regulated transaction also solicits the sale of other consumer goods or services, the telemarketer must register with the Secretary and comply with the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.

37.3 "A person soliciting on behalf of an entity" includes an employee, agent or independent contractor who solicits on behalf of the entity the sale of electric or natural gas energy, or solicits on behalf of an affiliate of an entity that sells electric or natural gas energy.

§ 119-301-38. Person soliciting sales of a magazine or newspaper.

38.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person primarily soliciting (a) the sale of a single magazine subscription or subscription to a newspaper of general circulation, or (b) the sale of advertisements in a magazine or newspaper of general circulation.

38.2 If a telemarketer solicits the sale of (a) subscriptions to 2 or more magazines, (b) subscriptions to 2 or more newspapers of general circulation, (c) subscriptions to 1 or more magazines and to 1 or more newspapers of general jurisdiction, or (c) other consumer goods or services, the telemarketer must register with the Secretary and comply with the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.

§ 119-301-39. Telemarketers based on continuous sales and gross sales to exempt persons.

39.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to any telemarketer in good standing (a) who has been providing telemarketing sales and services continuously for at least two years prior to the date of application under this rule, under the same name and ownership, and (b) who derives 50 percent or more of its gross telemarketing sales revenues from contracts with persons who are exempt from registration under sections 119-301-21 through 119-301-40 of this rule.

39.2 To claim this exemption, a telemarketer must annually file an application for registration with the Secretary and pay the applicable registration fee. If the claim of exemptions is allowed, the telemarketer will not be required to furnish a surety bond or other security.

39.3 "Telemarketer in good standing" means a telemarketer who, during the previous two years, has continually been engaged in the business of telemarketing and

who has not been convicted, or pled guilty or *nolo contendere* to racketeering, embezzlement, fraudulent conversion, misappropriation of property or any violation of State or Federal securities laws, a theft offence, or any consumer protection law or telemarketing law.

39.4 For purposes of this section "telemarketer" includes the owners, operators, officers, directors, partners, or other individuals engaged in management activities of a business entity that is subject to licensing and registration pursuant to this article.

§ 119-301-40. Annual sale of less than \$100 of food stuffs and edibles.

40.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person soliciting the sale of food stuffs and edibles, except vitamins, if the solicitations neither intends to result in, or actually results in a sale or sales which costs the consumer in excess of \$100 annually to a single address as long as the sales are not solicited by a professional telemarketer.

40.2 If a person's telemarketing sales of food stuffs and edibles to a single address exceed \$100 annually to a single address, the telemarketer is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.

40.3 If a person's sales of food stuffs and edibles are solicited by a professional telemarketer, the exemption provided in this section does not apply.

40.4 For purposes of this section:

40.4.1 "Food" means and includes all edible foodstuffs, beverages containing no alcohol and items commonly thought of as food, including by way of illustration and not by limitation, cereals and cereal products, meat and meat products, fish and fish products, poultry and poultry products, fresh and salt water animal products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, flour and flour products, sugar and sugar products, milk and milk products, cocoa and cocoa products, coffee and coffee substitutes, tea, herbs, spices, salt and salt substitutes, condiments, candy and confections, soft drinks, soft drink mixes and syrups, tenderizers, food coloring, bottled drinking water, sugar substitutes, oleomargarine, shortening, gelatins, baking and cooking ingredients, mushrooms, spreads, relishes, desserts, flavorings, chewing gum, edible seeds, nuts and berries.

40.4.2 "Food" does not include medicines, vitamins and dietary supplements whether in liquid, powdered, granular, tablet, capsule, lozenge, or pill form; spirituous, malt or vinous liquors or beer; tobacco or tobacco products.

40.4.3 "Professional telemarketer" means a person who in the ordinary course of business makes telemarketing solicitations for another or others.

Part IV Administration and Compliance

§ 119-301-51. Revocation or suspension of certificate.

51.1 The Secretary may revoke or suspend a telemarketer's registration certificate at any time during the registration year if the Secretary finds that the registrant:

51.1.1 Failed to provide security acceptable to the Secretary in the form and amount required by section 46A-6F-302 of the Code and this rule.

51.1.2 Failed to maintain the required security by timely providing replacement security or additional security before the security provided terminates, is cancelled or expires.

51.1.6 Failed to timely provide additional security after the amount of the security provided, falls below \$100,000 per business location of the registrant listed in the application form or \$500,000 for all business locations listed in the application form.

51.2 Before revoking or suspending a temporary registration certificate or an annual registration certificate before the day certificate expires due to passage of time, the Secretary must give written notice of his or her intent to revoke or suspend the certificate, the reason for the revocation or suspension, the effective date of the revocation or suspension, and the date, time and place where the registrant may appear and show cause why the registration certificate should not be suspended or cancelled.

51.3 The notice required by subsection 51.3 must be served as provided in section 56 of this rule.

§ 119-301-52. Timely filing and paying – Delivery in person.

52.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date, under authority of article 6F, chapter 46A of the Code or this rule, is delivered in person on or before the prescribed date to the Secretary of Tax and Revenue or to the Office of Telemarketing Registration, Department of Tax and Revenue, at Charleston, West Virginia, during normal business hours of the Department, it is deemed timely filed.

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

52.2 Normal business hours. -- Normal business hours are 8:30 a.m. to 4:30 p.m. Monday through Friday unless the day is a legal holiday in this State.

52.3 Meaning of document. -- The term "document" as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

52.4 Last date for filing or payment. -- The last date for timely filing or timely making payment includes any extension of time authorized by law or this rule and any extension of time granted in writing by the Secretary.

§119-301-53. Timely filing and paying – Timely mailing.

53.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of sections 46A-6F-301 through 303 of the Code or this rule is, after the prescribed period or date, delivered by United States mail to the Secretary, then the date of the postmark of the United States Postal Service stamped on the cover in which the document or payment is mailed is deemed to be the date of filing or the date of payment, as the case may be, provided the following mailing requirements are met.

53.1.1 The postmark date falls within the prescribed period or on or before the prescribed date for filing (including any extension granted for such filing) of the document, or for making the payment (including any extension granted for such payment); and

53.1.2 The document or payment was, within the time prescribed in subdivision 52.3.1, deposited in the United States mail in an envelope or other appropriate wrapper, postage prepaid, addressed as follows:

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
P.O. Box 963
Charleston, WV 25324-0963

or

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

53.2 The term “document,” as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

53.3 Postmarks not made by U.S. Postal Service. – Subsection 53.1 applies to postmarks not made by the United States Postal Service or a designated private delivery service only to the extent provided in the following subsections or section 54 of this rule (pertaining to delivery by designated private delivery services).

53.3.1 If the postmark on the envelope or wrapper is made other than by the United States Postal Service, (a) the postmark so made must bear a date on or before the last date, or the last day of the period, prescribed for filing or paying, and (b) the document or payment must be received by the Secretary not later than the time when a document or payment contained in an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Post Office on the last date, or the last day of the period, prescribed for filing the document or making payment. However, if the document or payment is received after the time when a document or payment so mailed and so postmarked by the U.S. Post Office would ordinarily be received, the document or payment will be treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received, if the person who is required to file the document or make payment establishes (i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the U.S. Post Office on or before the last date, or the last day of the period, prescribed for filing the document, (ii) that the delay in receiving the document was due to a delay in the transmission of the mail, and (c) the cause of the delay.

53.3.2 If the envelope has a postmark made by the United States Postal Service in addition to the postmark not so made, the postmark that was not made by the United States Postal Service is disregarded, and whether the envelope was mailed in accordance with this subsection 53.3.1 is determined solely by the postmark made by the United States Postal Service.

53.4 Registered and certified mailing. – For purposes of this section:

53.4.1 If any document or payment is sent by United States registered mail, the date of registration is deemed the postmark date.

53.4.2 If any document or payment is sent by United States certified mail and the sender's receipt is postmarked by the United States Postal Service employee to whom the document is presented, the date of the postmark on the receipt is deemed to be the postmark date of the document or payment.

§119-301-54. Timely mailing – Delivery by designated private delivery service.

54.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of sections 46A-6F-301 through 303 of the Code or this rule is, after the prescribed period or date, delivered by a designated private delivery service ("PDS") to the Secretary, then the date recorded by the private PDS or marked, by the private PDS, on the cover in which document or payment is delivered is deemed to be the postmark date and the date of delivery or date of payment, as the case may be, provided the following requirements are met:

54.1.1 The postmark date falls within the prescribed period or on or before the prescribed date for filing (including any extension granted for such filing) of the document, or for making the payment (including any extension granted for such payment); and

54.1.2 The document or payment was, within the time prescribed in subdivision 54.1, delivered to a designated PDS in an envelope or other appropriate wrapper, postage prepaid, addressed as follows:

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

54.2 The term "document," as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

54.3 The term "designated delivery service" means any delivery service provided by a trade or business if the service is designated as a delivery service by the Internal Revenue Service, or by the Secretary of Tax and Revenue in an administrative notice. Until further notice, the following private companies and their specific service may be used:

54.3.1 Airborne Express – Overnight Air Express Service, Next Afternoon Service, and Second Day Service;

54.3.2 DHL World Express – DHL Same Day Service and DHL USA Overnight;

54.3.3 Federal Express – FedX Priority Overnight, FedX Standard Overnight, and FedX 2Day; and

54.3.4 United Parcel Service – UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, and UPS 2nd Day Air A.M.

54.3.5 Airborne, DHL, FedEx, and UPS are not designated with respect to any type of delivery service not identified above. Consequently, the "timely mailing as timely filing/paying" rule of subsection 54.1 does not apply to any other type of delivery service offered by them.

54.4 Special rule for determining postmark date when a designated PDS delivers the item.

54.4.1 If the date on which the item is given to the designated PDS is recorded electronically to the data base of the PDS, the date recorded in the electronic data base of the designated PDS is treated as the postmark date for purposes of subsection 54.1 of this rule.

54.4.1.1 For items that are delivered after their due dates, there is a presumption that the postmark date is the day that precedes the delivery date by an amount of time that equals the amount of time it would normally take for an item to be delivered under the terms of the specific type of delivery service used (e.g., two days before the actual delivery date for a two day delivery service). This presumption applies to items sent by persons subject to this rule and, in appropriate cases, to items sent by the Secretary.

54.4.1.2 Persons subject to this rule who wish to overcome this presumption will need to provide information that shows that the date recorded in the electronic data base is on or before the due date. For example, this information could be obtained in the form of a written confirmation produced and issued by the designated PDS before the expiration of the period for storing the date recorded in its electronic data base. If persons subject to this rule wish to maintain this type of proof for their records, they should make a timely request to receive this information from the designated PDS before expiration of its data storage period.

54.4.2 If an electronically generated label is applied to the cover of all items delivered by the designated PDS, including those items that already have an airbill attached, the date on which an item is given to designated PDS for delivery is marked on the label. There are two types of labels (which are distinguishable from each other). One type of label is generated and applied to an item by an employee of the designated PDS. The other type of label is generated (using computer software and/or

hardware provided by the designated PDS) and applied to an item by a customer. The date that will be treated as the postmark date for purposes of subsection 54.1 of this section is determined under the following rules:

54.2.1 If an item has a label generated and applied by an employee of the designated PDS, the date marked on that label is treated as the postmark date for purposes of subsection 52.3, regardless of whether the item also has a label generated and applied by the customer.

54.2.2 If an item has a label generated and applied by a customer, the date marked on that label is treated as the postmark date for purposes of subsection 54.1, if the item is received by the Secretary within the normal delivery time. (Normal delivery time is one day for FedEx Priority Overnight and FedEx Standard Overnight, or two days for FedEx 2Day.)

54.2.3 If an item is not delivered within the normal delivery time, the person required to file the document or to make the payment must establish (a) that the item was actually either given to, or picked up by, an employee of the designated PDS on or before the due date and (b) the cause of the delay in delivery of the document or payment.

54.2.4 The information recorded electronically to the data base of designated PDS (in the regular course of its business) can be used to show that the item was actually either given to, or picked up by, an employee of the designated PDS on or before the due date when (a) an item has a label generated and applied by a customer or (b) an item has a label generated and applied by an employee of the designated PDS, but the date is illegible or otherwise unavailable.

54.3 Private delivery service that is not a designated PDS. -- If any person subject to this rule uses a business that provides mailing services similar to those of a designated PDS, but the business itself is not a designated PDS, the person should be aware that the "timely mailing as timely filing/paying" rule in subsection 54.1 of this section will not apply unless the item is actually given to, or picked up by, a designated PDS on or before the due date. The person should take appropriate precautions to ensure that the item will be given to, or picked up by, a designated PDS on or before the due date.

§119-301-55. Time for performance when last day falls on Saturday, Sunday or legal holiday in this State.

When the last day prescribed in sections 46A-6F-301 through 303 of the Code, or this rule, falls on a Saturday, Sunday or a legal holiday in this State, performance of the act is considered timely if it is performed on the next succeeding day that is not a Saturday, Sunday or legal holiday in this State.

§ 119-301-56. Service.

56.1 Whenever the Secretary or another person is authorized or required to give any notice under this rule, unless a different method of giving such notice is expressly permitted or prescribed, the notice must be given either by personal delivery thereof to the Secretary or person to be notified, or by depositing the notice in the United States mail, postage prepaid, in an envelope addressed to such agency or person at the last known address of the Secretary or other person.

56.2 Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the Secretary, or by affidavit of any person over eighteen years of age, naming the Secretary or other person to whom the notice was given and specifying the time, place and manner of the service.

§ 119-301-57. Notice of hearing.

57.1 In any contested case, all parties will be afforded an opportunity for a hearing after at least ten (10) days written notice of the date, time and place of the hearing and a short and plain statement of the matters asserted. At this hearing, all parties will have an opportunity to present evidence and argument with respect to the matters and issues involved.

57.2 This notice of hearing must be given in the manner specified in section 56 of this rule.

§ 119-301-58. Hearings.

58.1 All hearings must be conducted in an impartial manner by the Secretary or by a hearing examiner designated to hold hearings for the Secretary, and duly authorized by the Secretary to hold the hearings.

58.2 For this purpose, the Secretary or the hearing examiner, as the case may be, has the power to:

58.2.1 Administer oaths and affirmations;

58.2.2 Rule upon offers of proof and receive evidence;

58.2.3 Regulate the course of the hearing;

58.2.4 Hold conferences for the settlement or simplification of the issues, by consent of the parties;

58.2.5 Dispose of procedural requests or similar matters; and

58.2.6 Take any other action authorized in this rule.

58.3 All of the testimony and evidence at any hearing must be recorded by electronic means or by a certified court reporter. All rulings on the admissibility of testimony and evidence must be reported.

58.4 The Secretary must prepare an official record, which includes the reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case. Reported testimony will not be transcribed unless required for purposes of rehearing or judicial review.

58.5 Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default.

58.6 Evidentiary depositions may be taken and read as in civil actions in Circuit Courts of the State.

58.7 The hearing in any contested case will be held in Kanawha County, West Virginia, unless another county is selected by the Secretary.

§ 119-301-59. Rules of evidence.

59.1 In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record. Any party to any such hearing may vouch for the record as to any excluded testimony or other evidence.

59.2 All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, must be offered and made a part of the record in the case. Factual information or evidence that is not part of the record may not be considered in the determination of the case, unless the facts are of a type that may be judicially noticed in courts of this State.

59.3 Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

59.4 Every party has the right to cross-examine witnesses who testify, and to submit rebuttal evidence.

59.5 The Secretary, or the designated hearing examiner, may take notice of judicially cognizable facts. All parties must be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed. The parties must be afforded an opportunity to contest the facts so noticed.

59.6 Upon motion, in writing served by any party as notice may be served pursuant to section two [§ 29A-7-2], article seven of this chapter, assigning error or omission in any part of any transcript of the proceedings and testimony taken at any hearing, the Secretary must settle all differences arising as to whether the transcript truly discloses what occurred at the hearing. If there are errors or omissions in the transcript, the Secretary, or the designated hearing examiner, must direct that the transcript be corrected and revised in the respects designated by the agency, so as to make it conform to the whole truth.

§ 119-301-60. Orders or decisions.

60.1 Every final order or decision rendered by the Secretary in a contested case must be in writing or stated in the record and must be accompanied by findings of fact and conclusions of law.

60.2 Prior to the rendering of any final order or decision, any party may propose findings of fact and conclusions of law. If proposed, all other parties will be given an opportunity to except to the proposed findings and conclusions. The final order or decision will include a ruling on each proposed finding.

60.3 Findings of fact, if set forth in statutory language, will be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

60.4 A copy of the final order or decision and accompanying findings and conclusions will be served upon each party and on the party's attorney of record, if any. Service may be in person or by registered or certified mail, return receipt requested.

§ 119-301-61. Judicial review of contested cases.

61.1 Any party adversely affected by a final order or decision in a contested case is entitled to judicial review as provided in article 6, chapter 29A of the Code. However, this does not prevent other means of review, redress or relief provided by law.

61.2 Proceedings for judicial review must be instituted by filing a petition, at the election of the petitioner, in either the Circuit Court of Kanawha County, West Virginia, or in the Circuit Court of the county of this State in which the petitioner, or any one of the petitioners, resides or does business, within 30 days after the date upon which the party received notice of the final order or decision of the Secretary. A copy of the petition must be served upon the Secretary and all other parties of record by registered or certified mail. The petition must state whether the appeal is taken on questions of law or questions of fact, or on both questions of law and questions of fact.

61.3 No appeal bond is required to effect any appeal under this section.

61.4 The filing of the petition will not stay enforcement of the Secretary's order or decision, or act as a supersedeas to the order or decision. The Secretary may stay the enforcement, and the appellant, at any time after the filing of the petition for judicial review, may apply to the Circuit Court for a stay of, or supersedeas to, the final order or decision. While the appeal is pending before the court, the court may grant a stay or supersedeas upon such terms as the court deems proper.

61.5 Within 15 days after the Secretary receives a copy of the petition, or within any further time allowed by the court, the Secretary must transmit to the Circuit Court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the Secretary in connection with the case, and a statement of matters officially noted. By stipulation of all parties to the review proceeding, the record may be shortened.

61.6 The expense of preparing such record will be taxed as a part of the costs of the appeal. The appellant must provide security for costs satisfactory to the court. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved.

61.7 Upon written demand by any party to the appeal, the Secretary must furnish, at the cost of the party requesting same, a copy of the record. In the event the complete record is not filed with the court within the time provided for in this section, the appellant may apply to the court to have the case docketed, and an order entered directing the Secretary to file the record.

61.8 Appeals taken on questions of law, fact or both, will be heard upon assignments of error filed in the cause or set out in the briefs of the appellant. Errors not argued by brief may be disregarded by the court. However, the court may consider and decide errors that are not assigned or argued. The court or judge will fix a date and time for the hearing on the petition. The hearing, unless by agreement of the parties, will not be held sooner than 10 days after the filing of the petition. Notice of the hearing date and time must be given promptly to the Secretary.

61.9 The review will be conducted by the court without a jury and will be upon the record made before the Secretary, except that in cases of alleged irregularities in procedure before the Secretary, not shown in the record, testimony on the alleged irregularities may be taken by the court. The court may hear oral arguments and require written briefs.

61.10 The court may affirm the order or decision of the Secretary or remand the case for further proceedings. The Court must reverse, vacate or modify the order or decision of the Secretary if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

61.10.1 In violation of constitutional or statutory provisions; or

61.10.2 In excess of the statutory authority or jurisdiction of the agency; or

61.10.3 Made upon unlawful procedures; or

61.10.4 Affected by other error of law; or

61.10.5 Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

61.10.6 Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

61.11. The judgment of the Circuit Court is final unless reversed, vacated or modified on appeal to the West Virginia Supreme Court of Appeals in accordance with the provisions of article 6, chapter 29A of the Code.

§ 119-301-62. Appeal to West Virginia Supreme Court of Appeals.

Any party adversely affected by the final judgment of the Circuit Court under this chapter may seek review thereof by appeal to the Supreme Court of Appeals of this State, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally.

§119-301-63. Failure to register or meet security requirement; remedies.

63.1 Any person subject to this rule is subject to imposition of a civil administrative penalty of not more than \$5,000 per violation if the person does any of the following:

63.1.1 Acts as a telemarketer without first registering with the Secretary as required by section 46A-6F-301 of the Code and section 119-301-7 of this rule;

63.1.2 Acts as a telemarketer after the telemarketer's certificate of registration expires or is revoked;

63.1.3 Acts as a telemarketer without first meeting the security requirements set forth in section 46A-6F-302 of the Code and section 119-301-8 of this rule, unless the telemarketer is exempt from the security requirements. For example, a "telemarketer in good standing" is required to register to claim exemption from furnishing the required security. If the Secretary finds that the telemarketer is in good standing, then the telemarketer will be exempt from furnishing the security otherwise required by section 46A-6F-302 of the Code;

63.1.4 Acts as a telemarketer after failing to maintain a certificate of registration as required by section 46A-6F-301 of the Code;

63.1.5 Acts as a telemarketer without furnishing the security required by section 46A-6F-302 of the Code;

63.1.6 Acts as a telemarketer without maintaining the amount of security required by section 46A-6F-302 of the Code;

63.1.7 Includes any material information on a registration application, or on a renewal application, that is false or misleading; or

63.1.8 Misrepresents that the telemarketer is registered with the Secretary.

63.2 When determining the amount of penalty to assess, the Secretary must take the following into account:

63.2.1 The seriousness of the violation,

63.2.2 Any good faith efforts of the telemarketer to comply with applicable requirements of article 6F, chapter 46A of the Code and this rule,

63.2.3 Any benefit obtained by person due to the act or omission, and

63.2.4 The past history of the telemarketer in filing the initial application for registration and subsequent renewals.

63.2.5 Whether the cause of the delinquency was unavoidable, or was due to negligence or an intentional act of the telemarketer or an agent of the telemarketer.

63.2.6 The opportunity and degree of difficulty to correct erroneous or incomplete information in the initial application or a renewal application.

63.2.7 The cooperativeness and efforts made by the telemarketer or an agent of the telemarketer to correct the erroneous or incomplete information for which the penalty is to be imposed, in whole or in part.

63.2.8 The cost to the Secretary and time involved in investigation and correspondence prior to the time the erroneous or incomplete information is actually corrected.

63.2.9 Any other appropriate factor(s) establish by rule by the Secretary.

63.3 No assessment may be levied pursuant to subsection 61.1 of this section until after the alleged violator is notified by certified mail or personal service of the alleged violation. The notice must include:

63.3.1 A reference to the provision(s) of W. Va. Code §§ 46A-6F-301, 302 and 303 and to any provision(s) of this rule that that the person allegedly violated;

63.3.2 A concise statement of the facts alleged to constitute the violation;

63.3.3 A statement of the amount of penalty to be imposed; and

63.3.4 A statement of the alleged violator's right to an informal hearing.

63.4 **Request for hearing.** -- The alleged violator has 20 calendar days from receipt of the notice within which to file with the Secretary a written request for a hearing.

63.4.1 If the 20th calendar day falls on a Saturday, Sunday or legal holiday in this State, the written request is timely if it is filed on the next day that is not a Saturday, Sunday or legal holiday in this State.

63.4.2 A written request for a hearing is filed timely when the request is delivered to the Secretary in person , or the request is timely mailed. Sections 119-301-53 and 54 define timely filing for purposes of this rule.

§119-301-64. Service of process on nonresident telemarketers.

64.1 Any nonresident person, except a nonresident corporation authorized to do business in the State of West Virginia pursuant to chapter 31 of the Code, who directs telemarketing solicitations to persons residing in this State is conclusively presumed in section 46A-6F-703 of the Code to have appointed the Secretary of Tax and Revenue as his, her or its attorney-in-fact with authority to accept service of notice and process in any action or proceeding brought against him, her, or it, arising out of a consumer credit sale, consumer lease or consumer loan. No act of a nonresident person appointing the Secretary as his, her, or its, attorney-in-fact is necessary.

64.1.1 If the nonresident person is a nonresident corporation that has a certificate of authority from the West Virginia Secretary of State authorizing it to do business in this State, the Secretary of State is the nonresident corporation's statutory attorney-in-fact, not the Secretary of Tax and Revenue.

64.2 A person is considered to be a nonresident person if he, she, or it, is a nonresident at the time the service of notice or process is sought.

64.3 An original of the process or notice must be served on the Secretary as statutory attorney-in-fact for the nonresident telemarketer along with two copies for each defendant and a fee of \$15 for each defendant to be served. The addresses for service on the Secretary are:

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
P.O. Box 963
Charleston, WV 25324-0963

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

64.4 Immediately after being served with or accepting any process or notice for a nonresident person who directs telemarketing solicitations to persons residing in this state, the Secretary must file in his or her office a copy of the process or notice, with a note thereon endorsed of the time of service or acceptance, as the case may be. The Secretary must then transmit one copy of the process or notice by registered or certified mail, return receipt requested, to the defendant at his address, which address must be stated in the process or notice.

64.4.1 The return receipt must be signed by the nonresident person, or by an agent or employee of such person if a corporation, limited liability company, professional limited liability company or other business entity.

64.5 If the process or notice sent by registered or certified mail by the Secretary is refused by the addressee and the registered or certified mail is returned to the Secretary bearing the stamp of the U.S. Postal Service showing that delivery was refused, the return receipt for registered or certified mail must be attached to the original process or notice and filed in the clerk's office of the court from which the process or notice was issued.

64.6 No process or notice may be served on the Secretary or accepted by the Secretary fewer than 10 days before the return date of the process or notice.

64.7 The provisions for service of process or notice provided in section 46A-6F-703 of the Code are cumulative and are not to be construed as a bar to the plaintiff in any action from having process or notice in the action served in any other mode and manner provided by law.

Part V Definitions

§ 119-301-71. Definitions – General.

71.1 **General.** -- The definitions set forth in sections 101 through 114, article 6F, chapter 46A of the Code apply with full force and effect to all provisions and sections of this rule. Terms not defined in this rule or in article 6F, chapter 46A of the Code are construed in accordance with general principles of West Virginia law.

71.2 **Singular and plural.** -- A word importing the singular number only may be applied to several persons or things, as well as to one person or thing; a word importing the plural number only may be applied to one person or thing as well as to several; and a word importing the masculine gender only may be applied to females as well as males.

71.3 **Specific terms defined.** -- For purposes of this rule, the words or terms defined in following subsection of this rule have the meanings ascribed to them. These definitions apply unless a different meaning is clearly required by the context in which the word or term is used in this rule.

71.4 *Advertisement* means the publication, dissemination or circulation of any matter, oral or written, including labeling, which tends to induce, directly or indirectly, any person to enter into any obligation, sign any contract, or acquire any title or interest in any goods or services and includes every word device to disguise any form of business solicitation by using such terms as "renewal," "invoice," "bill," "statement" or "reminder," to create an impression of existing obligation when there is none, or other language to mislead any person in relation to any sought-after commercial transaction.

71.5 *Affiliate*, when used in relation to a person, means a business entity including a sole proprietorship that is owned by, operated by, or under common control with another business entity or other person.

71.6 *Agreement* means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. A "consumer credit agreement" is an agreement where credit is granted.

71.7 *Agriculture* means the production of food, fiber and woodland products, by means of cultivation, tillage of the soil and by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, and the practice of forestry, silviculture, horticulture, or any other plant or animal production and all farm practices related, usual or incidental thereto, including the storage, packing, shipping and marketing, but not including any manufacturing, milling or processing of such products by other than the producer thereof.

71.8 *Agricultural business* means not less than five acres of land and the improvements thereupon, used or usable in the production of food, fiber or woodland products of an annual value of one thousand dollars, or more, by the conduct of the business of agriculture.

71.9 *Agricultural purpose* means a purpose related to the production, harvest, exhibition, marketing, transportation, processing or manufacture of agricultural products by a natural person who cultivates, plants, propagates or nurtures the agricultural products. "Agricultural products" includes agricultural, horticultural, viticultural and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

71.10 *Automatic dialing-announcing device* includes any user terminal equipment that when connected to a telephone line can:

71.10.1 Dial, with or without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator; or

71.10.2 Disseminate a recorded message to the telephone number called, either with or without manual assistance.

71.11 *Automated dialing machine* includes, but is not limited to, any user terminal equipment that when connected to a telephone line can:

71.11.1 Dial, with or without manual assistance, telephone numbers; or

71.11.2 Disseminate a recorded message to the telephone number called, either with or without manual assistance. (Based on Missouri Code § 407.725.)

71.12 *Bank* and *banking institution* mean a corporation or association chartered to conduct a banking business under the laws of the United States or any State, territory, district or possession thereof, which is authorized in West Virginia to accept deposits that the depositor has a legal right to withdraw on demand and is authorized to engage in the business of commercial lending, and meets the criteria set forth in Section 2(c) of the Bank Holding Company Act, as amended, 12 U.S.C. § 1841(c). *Bank* and *banking institution* embrace and include a savings bank, savings and loan association, trust company or an institution combining banking and trust company facilities, functions and services so chartered or authorized to conduct such business in this state.

71.13 *Banking business* means the functions, services and activities contained, detailed and embraced in sections 31A-4-13 and 31A-4-14 of the Code, and as elsewhere defined by law.

71.14 *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

71.15 *Communication* means a written or oral notification or advertisement transmitted from a telemarketer to a consumer by any means.

71.16 *Consumer telephone call* includes a call made by a telemarketer to the residence of a consumer for: (a) the purpose of soliciting the sale of any consumer good or service to the person called; (b) the purpose of soliciting an extension of credit for consumer goods or services to the person called, or (c) the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services to the person called or an extension of credit for that purpose.

71.17 *Consumer* or *purchaser* means a person who is solicited to become or does become obligated to pay for consumer goods or services offered by a telemarketer through telemarketing.

71.18 *Consumer goods or services* means:

71.18.1 Any property or services offered or sold to a natural person primarily for personal, family, household or agricultural purposes;

71.18.2 Any property or service offered or sold for the purpose of providing a profit or investment opportunity; or

71.18.3 Any property intended to be attached to or installed in any real property, without regard to whether it is so attached or installed, as well as timeshare estates and licenses, resort and campground memberships, and any services related to such property.

71.19 "Consumer Protection Division" means the Consumer Protection Division of the West Virginia Office of the Attorney General.

71.20 *Corporation.*

71.20.1 *Domestic corporation* means any corporation organized under the laws of West Virginia and certain corporations organized under the laws of the State of Virginia before June 20, 1863. Every other corporation is a foreign corporation.

71.20.2 *Foreign corporation* means any corporation that is not a domestic corporation.

71.20.3 "Nonprofit corporation" means a nonprofit corporation as defined by section 31-1-6 of the Code.

71.21 *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

71.22 *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor or other services on credit.

71.23 *Credit services organization* includes any person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide, any of the following services:

71.23.1 Improving a buyer's credit record, history or rating;

71.23.2 Obtaining an extension of credit for a buyer; or

71.23.3 Providing advice or assistance to a buyer with regard to paragraph 17.1 or 17.2.

71.24 *Delegate* in the phrase "or his or her delegate", when used in reference to the Secretary, means any officer or employee of the Department of Tax and Revenue duly authorized by the Secretary directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article 6F, chapter 6F of the Code or this rule.

71.25 *Doing business in this State* means making telemarketing solicitation of prospective purchasers from locations in this State, or making telemarketing solicitations of prospective purchasers who are located in this State from any location, whether with in or without this State.

71.26 *Financial organization* means a person which:

71.26.1 Is organized, chartered or holding an authorization certificate under the laws of this State or another State of the United States which authorizes the organization to make consumer loans; and

71.26.2 Is subject to supervision and examination with respect to such loans by an official or agency of this State or of the United States.

71.27 *Goods* includes goods not in existence at the time the transaction is entered into and gift and merchandise certificates, but excludes money, chattel paper, documents of title and other instruments.

71.28 *Home solicitation sale* means a consumer credit sale in excess of twenty-five dollars in which the buyer receives a solicitation of the sale at a place other than the seller's business establishment at a fixed location and the buyer's agreement or offer to purchase is thereby given to the seller or a person acting for the seller. The term does not include a sale made pursuant to a preexisting open-end credit account with the seller in existence for at least three months prior to the transaction, a sale made pursuant to prior negotiations between the parties at the seller's business establishment at a fixed location, a sale of motor vehicles, mobile homes or farm equipment or a sale which may be rescinded under the federal Truth in Lending Act (being Title I of the federal Consumer Credit Protection Act). A sale which would be a home solicitation sale if credit were extended by the seller is a home solicitation sale although the goods or services are paid for, in whole or in part, by a consumer loan in which the creditor is subject to claims and defenses arising from the sale.

71.29 *Includes* and *including* when used in a definition contained in this rule is not be deemed to exclude other things otherwise within the meaning of the term being defined.

71.30 *Individual* means a single human being and does not mean a firm, association of individuals, corporation, partnership, joint venture, sole proprietorship, or any other entity.

71.31 *Investment opportunity* means anything tangible or intangible, that is offered for sale, sold or traded based, wholly or in part, on representations, either express or implied, about past, present or future income, profit or appreciation.

71.32 *Limited liability company* means a limited liability company organized under article 1, chapter 31B of the Code, a predecessor law, or comparable law of another jurisdiction.

71.32.1 *Foreign limited liability company* means an unincorporated entity organized under laws other than the laws of this State which afford limited liability to its owners comparable to the liability under section 31B-3-303 of the Code.

71.32.2 *Professional limited liability company* means a limited liability company organized under article 13, chapter 31B of this Code for the purpose of rendering a professional service.

71.33 *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services.

71.34 *Partnership and partner.*

71.34.1 *Partnership* includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation or venture is carried on, and which is not a trust or estate, a corporation or a sole proprietorship or an unincorporated organization which under Section 761 of the Internal Revenue Code of 1986, as amended, and is not treated as a partnership for the taxable year for federal income tax purposes.

71.34.2 *Partner* includes a member in such a syndicate, group, pool, joint venture or other unincorporated organization that is a partnership.

71.34.3 *Limited partnership* means a limited partnership created under article nine, chapter 47 of the Code, a predecessor law, or comparable law of another jurisdiction.

71.34.4 *Limited partner* means a limited partner in a limited partnership.

71.35 *Parent and subsidiary corporations.* A corporation which owns on average during the taxable year, that begins or ends within the telemarketer's registration year under this rule, more than fifty percent of the stock of all classes of another corporation is defined to be the *parent corporation* and the corporation which is so owned by the parent is defined to be a *subsidiary corporation*.

71.36 *Person* includes any individual, group of individuals, firm, association, corporation, partnership, joint venture, sole proprietorship, or any other business entity.

71.36.1 *Person* does not include a State agency or public corporation. -- Notwithstanding the definition in this section, the word "person" in a statute or ordinance, in the absence of an express provision to the contrary, does not include a

state agency or a public corporation. *City of Charleston v. Southeastern Construction Co.*, 134 W.Va. 666, 64 S.E.2d 676 (1950).

71.37 *Person related to another person* means:

71.37.1 With respect to an individual:

71.37.1.1 The spouse of the individual;

71.37.1.2 A brother, brother-in-law, sister or sister-in-law of the individual;

71.37.1.3 An ancestor or lineal descendant of the individual or his spouse; and

71.37.1.4 Any other relative, by blood or marriage, of the individual or his spouse who shares the same home with the individual.

71.37.2 With respect to an organization:

71.37.2.1 A person directly or indirectly controlling, controlled by or under common control with the organization;

71.37.2.2 An officer or director of the organization or a person performing similar functions with respect to the organization or to a person related to the organization;

71.37.2.3 The spouse of a person related to the organization; and

71.37.2.4 A relative by blood or marriage of a person related to the organization who shares the same home with him.

71.38 *Principal* means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor of a sole proprietorship, a trustee of a trust, an officer of a limited liability company or a professional limited liability company, or any other individual with similar supervisory functions with respect to any person.

71.39 "Professional service" means the services rendered by the following professions: Attorneys-at-law under article 2, chapter 30 of the Code, physicians and podiatrists licensed under article 3, chapter 30 of the Code, dentists licensed under article 4, chapter 30 of the Code, optometrists licensed under article 8, chapter 30 of the Code, accountants licensed under article 9, chapter 30 of the Code, veterinarians licensed under article 10, chapter 30 of the Code, architects licensed under article 12, chapter 30 of the Code, engineers licensed under article 13, chapter 30 of the Code, osteopathic physicians and surgeons licensed under article 14, chapter 30 of the Code,

chiropractors licensed under article 16, chapter 30 of the Code and psychologists licensed under article 21, chapter 30 of the Code.

71.40 *Purchaser or prospective purchaser* means a person who is solicited to become or does become obligated to a telemarketer.

71.41 *Registration year* means a period of twelve calendar months beginning on the day the certificate of registration is issued and expiring on the one-year anniversary.

71.42 *Registrant* means any person who is issued a telemarketing registration certificate under article 6F, chapter 46A of the Code and this rule that has not expired, been revoked or surrendered.

71.43 *Sale* includes any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit.

71.44 *Sale of goods* includes any agreement in the form of a bailment or lease of goods if the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods upon full compliance with his obligations under the agreement.

71.45 *Sale of an interest in land* includes a lease in which the lessee has an option to purchase the interest and all or a substantial part of the rental or other payments previously made by him are applied to the purchase price.

71.46 *Sale of services* means furnishing or agreeing to furnish services and includes making arrangements to have services furnished by another.

71.47 *Salesperson* means any person who is:

71.47.1 Employed or authorized by the seller to sell, or attempt to sell, goods or services by telephone;

71.47.2 Retained by the seller to provide consulting services relating to the management or operation of the seller's business; or

71.47.3 Communicates on behalf of the seller with a consumer.

71.48 *Salesperson* means any individual employed, appointed or authorized by a telemarketer, whether referred to by the telemarketer as an agent, representative, or independent contractor, who attempts to solicit or solicits a sale of consumer goods or services on behalf of the telemarketer. The principals of a telemarketer are themselves salespersons if they solicit sales on behalf of the telemarketer.

71.49 *Secretary* means the West Virginia Secretary of Tax and Revenue and includes his or her delegate.

71.50 *Services* includes: (a) Work, labor and other personal services; (b) privileges with respect to transportation, use of vehicles, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and (c) insurance.

71.51 *"Sign"* means to identify a record by means of a signature, mark or other symbol, with intent to authenticate it.

71.52 *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, and any foreign country or political subdivision thereof.

71.53 *Telemarketing solicitation*

71.53.1 *Telemarketing solicitation* means and includes any communication between a telemarketer and a prospective purchaser for the purpose of selling or attempting to sell the purchaser any consumer goods or services, if it is intended by the telemarketer that an agreement to purchase the consumer goods or services will be made after any of the following events occur:

71.53.1.1 The telemarketer makes an unsolicited telephone call to a consumer, attempting to sell consumer goods or services to the consumer, when the consumer has not previously expressed an interest to the telemarketer in purchasing, investing in, or obtaining information regarding, the consumer goods or services offered by the telemarketer; or

71.53.1.2 The telemarketer communicates with a consumer by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at some time during the course of one or more subsequent telephone communications with the consumer.

71.53.2 *Telemarketing solicitation* does not include:

71.53.2.1 Telephone calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer.

71.53.2.2 Telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations, unless the call is initiated by the customer in response to an advertisement relating to investment

opportunities, goods or services described below, or advertisements that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit.

71.54 *Telemarketer*, except as otherwise provided in this subdivision, means any person who initiates or receives telephone calls to or from a consumer in this State for the purpose of making a telemarketing solicitation as defined in this section. Telemarketer includes, but is not limited to, owners, operators, officers, directors, partners, or other individuals engaged in the management activities of a business entity that is subject to registration pursuant to section 46A-6F-301 of this Code and this rule.

71.54.1 A telemarketer may initiate or receive a communication that constitutes a telemarketing solicitation on his own behalf, through a salesperson, or through an automated dialing machine.

71.54.2 *Telemarketer* does not include:

71.54.2.1 Any person or entity exempt from registration pursuant to sections 46A-6F-201 through 220 of the Code and this rule.

71.54.2.2 A salesperson as defined in this section.

71.55 *Telemarketer in good standing* means a telemarketer who, during the previous two years has continually been engaged in the business of telemarketing and who has not been convicted, or pled guilty or nolo contendere to racketeering, embezzlement, fraudulent conversion, misappropriation of property or any violations of state or federal securities laws, a theft offense, or any consumer protection law or telemarketing law.

71.56 *The Code* means the Code of West Virginia of 1931, as amended.

71.57 *This State* means the State of West Virginia.

71.58 *Unsolicited consumer telephone call* means a consumer telephone call other than a call made: (a) in response to an express request of the person called; (b) primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of the call; or (c) to any person with whom the telemarketer has an existing business relationship.

71.59 *Warranty* means express and implied warranties described and defined in sections 46-2-313, 46-2-314 and 46-2-315 of the Code and expressions or actions of a merchant which assure the consumer that the goods have described qualities or will perform in a described manner.

71.60 *Written or in writing* include any representation of words, letters or figures, whether by printing, engraving, writing or otherwise. When the writing must be signed, the signature of the person must be in his or her own proper handwriting, or his or her mark, attested, proved or acknowledged. An electronic signature satisfies this signature requirement if the electronic signature meets the requirements of subsection 39-5-3(a) of the Code.

**BOWLES RICE
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August 28, 1998

The Honorable Ken Hechler
Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

FILED
AUG 28 2 20 PM '98
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Re: Emergency Legislative Rule, Secretary of Tax and
Revenue, Series 301, Registration of Telemarketers

Dear Mr. Secretary:

Please consider this letter and the attachments to be comments filed on behalf of Bell Atlantic – West Virginia, Inc. ("Bell Atlantic") to the withdrawn Emergency Legislative Rule of the Secretary of Tax and Revenue, Series 301, Registration of Telemarketers, which was initially filed on June 12, 1998.

Bell Atlantic has been at the forefront of economic development in West Virginia for many years. One of the greatest successes has been the ability of Bell Atlantic and the Governor's Office of Economic Development to interest prestigious companies in locating teleservice centers in the State. By Bell Atlantic's estimate, these efforts have created more than 15,000 new good-paying jobs in West Virginia since 1990. The Legislature, by the passage of House Bill 4267, certainly did not intend to stifle the growth of this now significant segment of our economy.

We fear, however, that the proposed Rule would have precisely that effect if adopted as written. The proposed Rule is a daunting 56 pages long, much of which merely restates the provisions of House Bill 4267 or other statutes that are cross-referenced in House Bill 4267. We feel that legitimate telemarketing firms who are considering West Virginia will be quickly intimidated by the sheer size and complexity of the proposed Rule. Moreover, although it is undoubtedly unintentional, many of the additional provisions of the Rule that would interpret the law strike the reader as distrustful of telemarketing firms in general.

We respectfully suggest a different approach. Rather than attempting to make the Rule a comprehensive document, the Rule should instead be limited to the narrow tasks mandated by the Legislature in W. Va. Code Sections 46-6F-301 and 46-6F-303. That is, it should establish fees for the registration of telemarketers [46-6F-301] and the factors for assessing civil administrative penalties [46-6F-303], together with such other ancillary provisions that are essential to administer the law.

We have taken the liberty of revising the Rule along these lines. Attached are both "redlined" and "clean" versions of the proposed revised Rule for consideration.

There are many provisions of the Rule on which we could comment, but which would be eliminated under the above approach. There are, however, a few provisions that we found particularly objectionable.

Subsection 32.2 of Section 119-301-32, for example, in our respectful opinion, could potentially be read restrictively to narrow the exemption applicable to telephone and communications companies that was adopted by the Legislature. We believe that there is no intention to do so. It would be best, in our opinion, simply to delete that subsection.

The interpretation of Code Section 46-6F-213 in Subsection 32.3.3 of the Rule is, in our respectful opinion, unnecessarily restrictive. Example 2 in that subsection seems to us to be particularly restrictive. In our opinion, if wholly-owned subsidiaries of the same parent corporation use the exact same name to operate a retail store and telemarket the same products offered at the store, the arrangement falls within the exemption adopted by the Legislature.

In conclusion, we must state our appreciation of the good-intentioned effort and thought put into the Rule. We only desire that the Rule not unintentionally leave the impression that West Virginia is now hostile to an industry that has brought so many jobs to the State over the past several years. If the Rule continues to leave that impression, the economic development efforts of Bell Atlantic and the Governor's Office of Economic Development will be seriously undermined.

Very truly yours,



Joseph J. Starsick, Jr.

cc: John Ruddick, Director - Government Relations &
Regulatory Accounting, Bell Atlantic
Sam Cipoletti, Senior Analyst, Bell Atlantic

Attachments

TITLE 119
EMERGENCY LEGISLATIVE RULE
SECRETARY OF TAX AND REVENUE

Series 301
REGISTRATION OF TELEMARKETERS

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Part I General Information

119-301-1. General.

1.1. **Scope.** -- This emergency rule clarifies, explains and implements provisions of article 6F, chapter 46A of the Code that pertain to registration of telemarketers, bonding of telemarketers, penalties for failure to register or meet security requirements, and record keeping requirements.

1.2. **Authority.** -- The authority for this rule is W. Va. Code §§ 29A-3-15, 46A-6F-301 and 46A-6F-303.

1.3. **Filing Date.** - ~~June 12, 1998~~ September 1, 1998

1.4. **Effective Date.** - This emergency rule takes effect on the earlier of the day the Secretary of State approves the emergency rule, or the 42nd day after this emergency rule is filed in the West Virginia State Register.

1.5. **Official Citation.** - The official citation of this rule is title 119, series 301 of the West Virginia Code of State Rules. Sections of this rule may be cited as 119 W.Va.C.S.R. § _____, or 119 C.S.R. § _____.

§ 119-301-2. Statement of facts and circumstances constituting emergency.

2.1 Section 29A-3-15 of the Code permits promulgation of an emergency rule when an emergency exists. Subsection 29A-3-15(f) provides that an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest.

2.2 The West Virginia Legislature enacted Committee Substitute for House Bill 4267 on March 14, 1998. This bill takes effect June 12, 1998. Three requirements of this enactment relevant here are:

2.2.1 After June 12, 1998, no person may act as a telemarketer without first registering with the Secretary of Tax and Revenue.

2.2.2 A person who registers with the Secretary as a telemarketer must pay the application fee as established by the Secretary in a legislative rule, W. Va. Code § 46A-6F-301 (b).

2.2.3 A civil administrative penalty not to exceed \$5,000 is imposed for failure to comply with the requirements of sections 46A-6F-301 through 304 of the Code. Criteria for imposing and mitigating this penalty are to be established by promulgation of a legislative rule, W. Va. Code § 46A-6F-303(a).

2.3 Unless an emergency rule is promulgated, the Secretary of Tax and Revenue will not be able to implement or apply the provisions of W. Va. Code §§ 46A-6F-301 through 304 until after the Legislature authorizes promulgation of the similar proposed legislative rule during the 1999 Regular Session of the Legislature and that rule takes effect as provided in W. Va. Code § 29A-3-13.

§ 119-301-3. Rules of Construction.

3.1 **General.** -- Without limiting the scope of any provision of article 6F, chapter 46A of the Code, or any other rule or law, this rule is to be liberally construed and applied to promote the general purposes and policies of article 6F, chapter 46A of the Code.

3.2 **Non-inclusive.** - This rule is not intended to cover all practices that violate article 6F, chapter 46A of the Code. Persons who believe they are the subject of consumer fraud, an abusive act or other act of a telemarketer that violates article 6F, chapter 46A of this Code should contact the Consumer Protection Division of the West Virginia Attorney General's Office by calling (304) 558-8986 or by writing to:

W. Va. Attorney General's Office
Consumer Protection Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301-2617

3.3 **Non-exclusive.** - This rule is in addition to, and does not affect, any other rights or obligations that may exist by statute or judicial decision.

3.4 **Preceding, succeeding or following.** - The words "preceding," "succeeding" or "following" used in reference to any section, subsection, subdivision or other part of this rule means next preceding, next succeeding or next following that in which such reference is made, unless a different interpretation be required by the context in which the term is used.

3.5 **Definitions.** - The definitions set forth in sections 101 through 114, article 6F, chapter 46A of the Code apply with full force and effect to all provisions and sections of this rule. Terms not defined in this rule or article 6F, chapter 46A of the Code are to be construed in accordance with general principles of West Virginia law.

3.6 **Singular and plural.** - A word importing the singular number only may be applied to several persons or things, as well as to one person or thing; a word importing the plural number only may be applied to one person or thing as well as to several; and a word importing the masculine gender only may be applied to females as well as males.

~~3.7~~ **Exemptions.** - All exemptions, and all limitations and provisions thereof, of sections 201 through 220, article 6F of the Code apply with full force and effect to all provisions of this rule.

~~3.73~~ **8 Severability.** - The provisions of every section of this rule, whether adopted before or subsequent to the effective date of this rule, are severable from one another. If any provision of this rule, or any provision of article 6F, chapter 46A of the Code implemented, explained or clarified in this rule, is stayed or is held to be unconstitutional or void by a court of competent jurisdiction, the remaining provisions of this rule remain valid, unless:

~~3.73~~ **8.1** The court finds that the valid provisions of article 6F, chapter 46A of the Code, or of this rule, are so essentially and inseparably connected with, and so dependent upon, the stayed or the unconstitutional or void provision that the court cannot presume the Legislature would have enacted the remaining valid provisions of article 6F, chapter 46A of the Code, or authorized this rule, without the stayed, constitutional or void provision(s).

3-73.8.2 The court finds that the remaining valid provisions of article 6F, chapter 46A of the Code, or of this rule, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 119-301-4. Scope and application of this rule.

4.1 This rule applies to every sole proprietor or business entity who (a) initiates or receives in this State a communication that constitutes a telemarketing solicitation as defined in this rule, or (b) initiates or receives outside this State a communication to or from a consumer in this State that constitutes a telemarketing solicitation as defined in this rule, unless the sole proprietor or business entity is exempt from the provisions of article 6F, chapter 46A of the Code. Part II of this rule establishes application and renewal fees for the registration of telemarketers in accordance with section 46A-6F-301(b) of the Code. Part I also establishes regulations necessary for the Department of Tax and Revenue to administer the registration and security requirements of article 6F, chapter 46A of the Code. Part II applies to all telemarketers who are required to register or post security, or both, as the case may be, under the provisions of article 6F, chapter 46A of the Code.

4.2 This rule does not apply to a person who makes telemarketing solicitations consumers but is exempt from the definition of "telemarketer" under the provision of sections 46A-6F-201 through 218 and 46A-6F-220 of the Code, except as otherwise provided in this rule. Each of these exemptions is discussed more fully in sections 119-301-21 through 119-301-40 of this rule. Part III of this rule establishes the factors to be taken into account by the Department of Tax and Revenue in assessing civil administrative penalties under section 46A-6F-303 of the Code. Part III also establishes regulations necessary for the administration and assessing of such penalties by the Department. Part III applies to all persons against whom a civil administrative penalty may be assessed under section 46A-6F-303.

4.3 The registration and bonding requirements of sections 46A-6F-301 and 302 of the Code do not apply to owners, operators, officers, directors, partners, or other individuals engaged in the management activities of a business entity that is subject to registration under section 46A-6F-301 of the Code.

4.4 The registration and bonding requirements of sections 46A-6F-301 and 302 of the Code do not apply to a "salesperson" of a business entity that is subject to registration under section 46A-6F-301 of the Code.

4.5 Exemption from the registration and security requirements of sections 46A-6F-301 and 302 of the Code does not apply to:

4.5.1 Certain charitable organizations that employ a professional solicitor or fund-raiser, or receive contributions from the public in excess of \$10,000 during the calendar year. These organizations must register as a telemarketer, post the required security and pay the application fee specified in this rule. These requirements are discussed more fully in section 119-301-21 of this rule.

4.5.2 A "telemarketer in good standing," as defined in section 46A-6F-114, must file an application for registration as a telemarketer with the Secretary and pay the applicable registration fee in order to claim exemption from the security requirements of section 46A-6F-302 of the Code. After the initial application is filed, the telemarketer in good standing must file an annual application for renewal. This provision is discussed more fully in section 119-301-39 of this rule.

Part II: Registration of Telemarketers

119-301-5. Registration of telemarketers required.

5.1 Registration required. -- Except as otherwise provided in this rule, no sole proprietor or business entity may act as a telemarketer after June 11, 1998, without first registering with the Secretary of Tax and Revenue.

5.2 Initial application. - Except as provided in subsection 5.3, a telemarketer must file an initial application for registration with the Secretary at least 60 days before the telemarketer: (a) begins offering consumer goods or services to West Virginia consumers, (b) begins offering consumer goods or services to consumers in other States from a physical location in this State, or (c) begins offering for sale consumer goods or services through any medium to West Virginia consumers, or from a physical location in this State to consumers wherever located.

5.3 Transition rule.

5.3.1 Prior to June 12, 1998, telemarketers were not required to obtain a telemarketing registration certificate from the State of West Virginia. Beginning June 12, 1998 no person may act as a telemarketer without first registering with the Secretary of Tax and Revenue. The Legislature imposed a registration fee to accompany each application for a telemarketing registration certificate but provided for the amount of the fee to be set by the Secretary in a legislative rule. The authority to set fees and implement this registration program takes effect June 12, 1998. This emergency rule was filed in the State Register on June 12, 1998, and takes effect on the day the Secretary of State approves its filing, or the 42nd day after it is filed in the State Register in the event the Secretary of State fails to act before that day.

5.3.2 To minimize disruption of a telemarketer's business and to avoid inconvenience to West Virginia consumers, the Secretary suspends until ~~August 1~~ September 30, 1998 enforcement of the prohibition against engaging in telemarketing activity without a West Virginia Telemarketing Registration Certificate.

5.3.3 To facilitate compliance with this new registration requirement, the Secretary suspends until ~~September 30~~ October 30, 1998, compliance with the requirement that an application for registration be submitted at least 60 days before the applicant begins offering consumer goods or services, or offering for sale consumer goods or services through any medium.

5.4 Renewal of registration. - After initial application for registration as a telemarketer is filed and a telemarketing registration certificate is issued by the Secretary, the registrant must annually file an application for renewal until the telemarketer ceases doing telemarketing activity in this State.

5.4.1 A telemarketer is deemed to be doing telemarketing activity in this State if the telemarketer solicits prospective consumers from a location(s) in this State, or solicits prospective consumers located in this State from an out-of-state location(s).

5.4.2 An application for renewal of registration must be filed 60 days before expiration of the current West Virginia telemarketing registration certificate.

~~5.5 Certificate not to validate illegal activity. -- Nothing in this rule, including, but not limited to, any payment of the registration fee imposed or issuance of any telemarketing registration certificate under the provisions of this rule, may be deemed to legalize any act, business activity or transaction which otherwise may be illegal or conducted in violation of law; or to exempt any person from any civil or criminal penalty prescribed for such illegal act or violation.~~

~~5.6 For purposes of this rule:~~

~~5.6.1 "Telemarketing solicitation" means and includes any communication between a telemarketer and a prospective purchaser for the purpose of selling or attempting to sell the purchaser any consumer goods or services, if it is intended by the telemarketer that an agreement to purchase the consumer goods or services will be made after any of the following events occur:~~

~~5.6.1.1 The telemarketer makes an unsolicited telephone call to a consumer, attempting to sell consumer goods or services to the consumer, when the consumer has not previously expressed an interest to the telemarketer in purchasing, investing in, or obtaining information regarding, the consumer goods or services offered by the telemarketer; or~~

~~5.6.1.2 The telemarketer communicates with a consumer by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at some time during the course of one or more subsequent telephone communications with the consumer.~~

~~5.6.2 "Telemarketing solicitation" does not include:~~

~~5.6.2.1 Telephone calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer.~~

~~5.6.2.2 Telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations, unless the call is initiated by the customer in response to an advertisement relating to investment opportunities, goods or services described below, or advertisements that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit.~~

~~5.6.3 "Telemarketer," except as otherwise provided in this subdivision, means any person who initiates or receives telephone calls to or from a consumer in this State for the purpose of making a telemarketing solicitation as defined in this section. "Telemarketer" includes, but is not limited to, owners, operators, officers, directors, partners, or other individuals engaged in the management activities of a business entity that is subject to registration pursuant to section 46A-6F-301 of this Code and this rule.~~

~~5.6.3.1 A telemarketer may initiate or receive a communication that constitutes a telemarketing solicitation on his own behalf, through a salesperson, or through an automated dialing machine.~~

~~5.6.3.2 "Telemarketer" does not include:~~

~~5.6.3.2.1 Any person or entity exempt from registration pursuant to sections 46A-6F-201 through 220 of the Code and this rule.~~

~~5.6.3.2.2 A salesperson as defined in this rule.~~

§ 119-301-6. Application forms and content.

6.1 Application forms. - Application for registration as a telemarketer and application for renewal of registration must be made in forms prescribed by the Secretary. These forms will require the applicant to provide the information required by subsection 46A-6F-301 (c) of the Code and other information reasonably required by the Secretary to administer sections 46A-6F-301 through 303 of the Code.

6.2 Signature. - Every application for a telemarketing registration certificate and every application for renewal of a telemarketing certificate must bear the signature, or the digital signature, of a responsible principal of the telemarketer.

6.3 Verification. - Every application for a telemarketing registration certificate or for renewal of a telemarketing certificate must be verified by a declaration signed by a responsible principal that it is made under penalty of perjury. This declaration must specify the date and location of the signing.

6.4 Registration on Internet. - An application filed over the Internet must be validated and authenticated either by the personal identification number entered and verified by the applicant or by digital signature.

§ 119-301-7. Place and method of filing of applications.

7.1 Place of filing. - The initial application for registration form and all applications for renewal required by article 6F, chapter 46A of the Code must be filed by hand delivery or mailing to the following address except as provided in subsection 7.2:

W. Va. Secretary of Tax and Revenue
Office of Telemarketer Registration
P.O. Box 963 Charleston
WV 25324-0963

W. Va. Secretary of Tax and Revenue
Office of Telemarketer Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

7.2 Registration over Internet. -- To facilitate compliance, the Secretary established on a secure over a telemarketing registration web page. At this site, the telemarketer may complete the required application

for registration, validate and authenticate the application, pay the registration fee by credit card, and specify how the security requirement will be satisfied. When this is done, the applicant will be issued an electronic registration confirmation. This confirmation will serve as a temporary registration certificate, which is valid for a period of 30 days from date of issuance unless it is revoked by the Secretary or lapses due to failure to timely pay the registration fee or timely furnish the required security.

~~7.2.1 Applicants who register over the Internet during the months of June and July will have 30 days after the date the temporary registration certificate is issued within which to submit the required security and any other papers or information necessary to complete registration:~~

~~7.2.2~~ **7.2.1** Applicants who register over the Internet after July 31, 1998 will have ~~15~~ **30** days after the date the temporary registration certificate is issued within which to submit the required security and any other papers or information necessary to complete registration.

7.3 Transition rule. - At present, the telemarketing registration web page will not accept a credit card number for payment of the registration fee or a digital signature. A telemarketer who registers at the telemarketing registration web page must print a copy of the completed registration form. After it is signed by a principal of the registrant, it must be filed with the Secretary along with payment of the registration fee and the required security. The personal identification number of the applicant must appear on (a) the hard copy of the registration form, (b) the remittance of the registration fee, e.g., a check, and (c) the security required by section 46A-6F-302. Once a credit card may be used to pay the registration fee, a telemarketer registering at the web page must pay the registration fee by credit card and may not pay the registration fee at the same time the required security is provided.

§ 119-301-8. Registration fees.

8.1 General. - The Secretary may charge reasonable application and renewal fees. These fees are deposited in the *Telemarketer Registration Fund* created in the State Treasury and used to administer and enforce the registration requirements of article 6F, chapter 46A of the Code and this rule.

8.2 Fees. --The Secretary hereby establishes the following fees:

8.2.1 Initial application fee - \$250.00

8.2.2 Renewal fee - \$250.00

8.2.3 Discount. - If the telemarketer registers at the Secretary's web site, or renews its registration at the Secretary's web site, the applicant will be allowed a \$50 discount.

8.3 Refund of fee.

8.3.1 No refund will be given, or credit established, for all or a portion of the registration fee if during the registration year the registrant: (a) goes out of business, (b) stops doing telemarketing activity in this State, or (c) has its telemarketing registration certificate revoked or suspended.

8.3.2 No refund will be given, or credit established, for all or a portion of the registration fee when the claim is for any other reason, except that a refund will be made if payment of the fee, or any portion of the fee, was erroneous at the time it was paid.

§ 119-301-9. Payment of registration fee.

9.1 The registration fee and other amounts payable under this rule may be paid in currency, or by check, bank draft, certified check, cashier's check, post-office money order, or express money order payable to the Secretary of Tax and Revenue, or by credit card when the person applies for a telemarketing registration certificate, or applies for renewal of its certificate, at the Internet web page maintained for that purpose by the Secretary.

9.2 If a check or money order tendered in payment of the registration fee or any other amounts payable under this rule is not duly paid, the person by whom the check or money order was tendered remains liable for payment of the face amount of the check or money order plus all bad check charges or other similar charges imposed on the Secretary, the Department of Tax and Revenue, or the State of West Virginia directly attributable to the check or money order not duly paid.

§ 119-301-10. Security requirement.

10.1 **Bond required.** - Except as otherwise provided in this rule, an application for registration or renewal of registration must be accompanied by a continuing surety bond executed by a corporation licensed to sell fidelity and surety insurance in the State of West Virginia.

10.2 **Amount and form.** - The amount and form of bond must be approved by the Secretary before a certificate of registration is issued.

10.2.1 A separate bond in the amount of \$100,000 may be filed for each telemarketing location, including each principal office and each branch office thereof, engaged in telemarketing activity in West Virginia, or a single bond in the amount of \$500,000 may be filed for all locations of the telemarketer.

10.2.2 This bond must provide that the telemarketer will pay all damages to this State or a private person resulting from any unlawful act or action by the telemarketer or its agent in connection with the conduct of telemarketing activities.

10.3 **Revocation of registration certificate upon loss of security.** -- The registration of any telemarketer is void upon termination of the bond of the surety company, or loss of the bond, unless, prior to such termination, a new bond is filed with the Secretary.

10.3.1 Subsection 10.3 does not apply to a *telemarketer in good standing* that is required to register with the Secretary but is exempt from furnishing a corporate surety bond or other security, as provided in subsection 46A-6F-219 of the Code. ~~This exemption is discussed more fully in section 39 of this rule.~~

10.4 **Cancellation of surety bond.** --The surety, for any cause, may cancel the bond upon giving 60-days written notice by certified mail to the telemarketer and to the Secretary. Unless the bond is replaced by that

of another surety licensed by this State to sell fidelity and surety insurance, or other adequate security is furnished, before the expiration of the 60-day notice of cancellation, the registration of the telemarketer becomes void on the 61st day.

10.5 Duration of bond. - A surety bond must remain in effect for 36 months after the telemarketing business stops making telemarketing solicitation of West Virginia consumers.

10.6 Other allowable security.

10.6.1 Any business required under this rule to file a corporate surety bond with its registration application, may, in lieu of the surety bond, file the following in the same amount as required if a corporate surety bond were filed:

10.6.1.1 An irrevocable letter of credit, in the form prescribed by the Secretary, issued by a financial organization authorized to do business in this State or by a United States bank that is a member of the Federal Reserve System, with provision for automatic annual renewals;

10.6.1.2 A certificate of deposit issued by a State or National bank either in the name of the State of West Virginia, or in the "name of registrant or the State of West Virginia." A certificate of deposit issued in the "name of registrant and the State of West Virginia" will not be accepted as security;

10.6.1.3 Cash, which the Secretary must invest in an interest bearing account; or

10.6.1.4 One or more government bond(s) backed by the full faith and credit of the issuing government entity issued by the United States Department of the Treasury or any State and the bond(s) is issued in the name of the State of West Virginia, or in the "name of registrant or the State of West Virginia." A bond issued in the "name of registrant and the State of West Virginia" will not be accepted as security.

10.7 Retention of alternative security. -- The Secretary must hold the letter of credit, cash, certificate of deposit or government bond to pay claims made by or on behalf of West Virginia consumers against the registrant for a period of 36 months after the date: (a) the registrant stops doing telemarketing activity in this State, (b) its registration lapses, or (c) its registration is revoked by the Secretary. At the end of the 36-months, any principal and accrued interest not required for payment of claims, will be returned to the registrant.

10.8 The registration of the telemarketer will be treated as lapsed if at any time, during the registration year or for 36 months thereafter the amount of the letter of credit, bond, cash, certificate of deposit or government bond falls below the amount required by this section.

10.9 If the license of any surety to sell fidelity and surety insurance in this State is terminated, all surety bonds given pursuant to section 46A-6F-302 of the Code and this rule upon which the surety company is surety are suspended as of the effective date of the termination of the license of the surety and the registrant must provide replacement security.

10.9.1 Whenever the license of a surety authorizing to transact fidelity and surety insurance in this State is terminated, the Insurance Commissioner must notify the Secretary of the name of the surety and the effective date of the termination.

10.9.2 Upon receipt of notification from the Insurance Commissioner, the Secretary must immediately notify each affected telemarketer of the termination and require that a new corporate surety bond be filed. This notice must be sent by registered or certified mail, return receipt requested, addressed to the telemarketer at his or its principal place of business as shown by the Secretary's records.

10.9.3 Failure of any telemarketer to file (a) a corporate surety bond with new or additional surety, or (b) acceptable alternative security, within 30 days after being advised in writing by the Secretary of the necessity to do so is cause for the Secretary to revoke the telemarketer's registration.

10.10 **Action on bond or other security.** -- An action may be brought in any court of competent jurisdiction upon the bond or other security by any person to whom the registrant fails to account and pay as set forth in section 46A-6F-302(b) of the Code. The aggregate liability of the surety company to all persons injured by a registrant's violations may not exceed the amount of the bond.

§ 119-301 -11. Time for which registration certificate granted.

11.1 **Registration year.** - A West Virginia Telemarketing Registration Certificate is for a period of one year beginning with the day the certificate is issued and expiring at 11:59 p.m. eastern time on the day before the beginning of the next registration year, unless it is suspended or revoked by the Secretary or surrendered by the registrant before the end of the registration year.

11.2 If a temporary registration certificate is issued, the one-year registration period begins with the day the temporary registration certificate is issued by the Secretary.

~~§ 119-301-12. Record keeping requirements.~~

~~12.1 A telemarketer must keep for a period of 4 years from the date the record is produced the following records related to its telemarketing activities:~~

~~12.1.1 One of each advertisement, brochure and other promotional materials;~~

~~12.1.2 The name and last known address of each prize recipient and the prize awarded for prizes represented, directly or by implication, to have a value of \$25 or more;~~

~~12.1.3 The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;~~

~~12.1.4 The name, last known home address and telephone number, and job title for all current and former employees directly involved in telephone sales; and~~

~~12.1.5 All verifiable authorizations required to be provided or received under article 6F, chapter 46A of the Code;~~

~~12.1.6 A copy of all scripts, outlines or presentation materials the seller will require the telemarketer to use when soliciting, as well as all sales information to be provided by the seller to a purchaser in connection with any solicitation:~~

~~12.2 A seller or telemarketer may keep the records required by subsection 46A-6F-304(a) of the Code and this rule in any form, and in any manner, format, or place as they keep these records in the ordinary course of business:~~

~~12.3 Failure to keep all records required by subsection 46A-6F-304 of the Code is a violation of article 46A-6F:~~

~~12.4 A telemarketer is responsible for complying with the requirements of subsections 46A-6F-304(a) and (b):~~

~~12.5 In the event of dissolution or termination of the seller or telemarketer's business, the principal of that telemarketer is required to maintain all records required by section 46A-6F-304 of the Code:~~

~~12.5.1 In the event a telemarketer is adjudicated bankrupt and liquidated, the trustee must notify the Consumer Protection Division of the legal name, business address and telephone number of the person who is or will be in possession of these records after the trustee is discharged by the Bankruptcy Court:~~

~~12.6 The Consumer Protection Division may require a telemarketer to file a true copy of all scripts, outlines and promotional materials and any modifications thereto for a period of time to be determined by the Consumer Protection Division. Filings may be required when, upon investigation, the Consumer Protection Division determines that:~~

~~12.6.1 A telemarketer is using scripts, outlines or presentation material that contain material misrepresentations or that fail to state material facts, or~~

~~12.6.2 A telemarketer is deviating from scripts, outlines or presentation material so as to make material misrepresentations or to fail to state material facts:~~

~~Sections 119-301-13 through 119-301-19 (Reserved for future use.)~~

~~Part III. Exempt Persons or Entities:~~

~~§ 119-301-20. General rule:~~

~~20.1 Not every person who makes telemarketing solicitations of West Virginia consumers is required to register with the Secretary. This is because the definition of "telemarketer" does not include any person or entity exempt under W. Va. Code § 46A-6F-220, except that a person claiming exemption under section 46A-6F-219 of the Code is required to register in order to claim the exemption:~~

~~20.2 As provided in section 46A-6F-1 13(c) of the Code, "telemarketer" does not include:~~

~~20.2.1 Any person or entity that is exempt pursuant to sections 46A-6F- 201 through 220 of the~~

Code, or

~~20.2.2 A salesperson as defined in this rule.~~

~~§ 119-301-21. Certain charitable organizations:~~

~~21.1 A charitable organization that is exempt from filing an annual registration statement with the West Virginia Secretary of State under the provisions of section 2919-6 of the Code is exempt from the registration and bonding provisions of sections 46A-6F-301 and 302 of the Code and this rule when making a telemarketing solicitation. The charitable organization is subject to all other provisions of Article 6F, Chapter 46A of the Code when making a telemarketing solicitation.~~

~~21.2 Persons and organizations exempt from registration with the Secretary of State under section 29-19-6 of the Code include and are limited to:~~

~~21.2.1 Educational institutions, the curriculums of which, in whole or in part, are registered or approved by the state board of education, either directly or by acceptance of accreditation by an accrediting body recognized by the state board of education, and any auxiliary associations, foundations and support groups which are directly responsible to any such educational institutions;~~

~~21.2.2 Persons requesting contributions for the relief of any individual specified by name at the time of the solicitation when all of the contributions collected without any deductions whatsoever are turned over to the named beneficiary for his or her use;~~

~~21.2.3 Hospitals which are nonprofit and charitable;~~

~~21.2.4 Organizations that solicit only within the membership of the organization by the members thereof:~~

~~21.2.4.1 As used in paragraph 21.2.4, the term "membership" does not include those persons who are granted a membership upon making a contribution as the result of solicitation.~~

~~21.2.4.2 As used in the term "member" means a person having membership in a nonprofit corporation, or other organization, in accordance with the provisions of its articles of incorporation, bylaws or other instruments creating its form and organization; and having bona fide rights and privileges in the organization, such as the right to vote, to elect officers, directors and issues, to hold office or otherwise as ordinarily conferred on members of such organizations.~~

~~21.2.5 Churches, synagogues, associations or conventions of churches, religious orders or religious organizations that are an integral part of a church which qualifies as tax exempt under the provisions of 26 U.S.C. § 501(c)(3) as in effect on June 12, 1998.~~

~~21.2.6 Any person, firm, corporation or organization that sponsors a single fund-raising event for the benefit of a named charitable organization when all or part of the funds collected are donated to the named charitable organization, provided the named charitable organization receiving the funds (a) is registered pursuant to the Secretary of State under article 19, chapter 29 of the Code, (b) reports each of these donations~~

individually, and (c) certifies that no funds were withheld by the organization that solicited the funds:

~~21.3 The following charitable organizations are exempt from filing an annual registration statement with the Secretary of State if (a) they do not employ a professional solicitor or fund-raiser, or (b) do not intend to solicit and receive and do not actually raise or receive contributions from the public in excess of \$10,000 during a calendar year:~~

~~21.3.1 Local youth athletic organizations.~~

~~21.3.2 Community civic clubs.~~

~~21.3.3 Community service clubs.~~

~~21.3.4 Fraternal organizations.~~

~~21.3.5 Labor unions.~~

~~21.3.6 Local posts, camps, chapters or similarly designated elements or county units of such elements of bona fide veterans' organizations or auxiliaries which issue charters to such local elements throughout the state;~~

~~21.3.7 Bona fide organizations of volunteer firemen or auxiliaries;~~

~~21.3.8 Bona fide ambulance associations or auxiliaries;~~

~~21.3.9 Bona fide rescue squad associations or auxiliaries.~~

~~21.4 Charitable organizations listed in subsection 21.3 of this rule that engage in telemarketing activity and employ a professional solicitor or fund-raiser are subject to the registration and security requirements of sections 46A-6F-301 and 302 of the Code and this rule. The application for registration as a telemarketer must be filed at least 60 days before the professional solicitor or fund-raiser begins raising funds for the organization.~~

~~21.5 Charitable organizations listed in subdivision 21.3 of this rule that engage in telemarketing activity and do not intend to solicit and receive in excess of \$10,000, but do receive in excess of that amount from the public, must file an application for registration as a telemarketer and post the required security as soon as it is known or should have been known to the organization that contributions in excess of \$10,000 have been pledged or received, whichever occurs first.~~

~~21.6 Charitable organizations listed in subdivision 21.3 of this rule that engage in telemarketing activity and intend to solicit and received in excess of \$10,000 from the public must file an application for registration as a telemarketer and post the required security 60 days before beginning telemarketing activity in this State.~~

~~21.7 For purposes of this rule, "professional fund-raiser" means any person who is retained under contract or otherwise compensated by or on behalf of a charitable organization primarily for the purpose of soliciting funds. "Professional fund-raiser" includes a person who plans, manages, advises, consults or prepares~~

materials for solicitations:

~~21.7.1 Professional fund-raising status is evidenced by one or more of the following characteristics:~~

~~21.7.1.1 Access to contributions or other receipts from a solicitation and/or authority to pay expenses associated with solicitation, including amounts owed to the professional fund-raising firm or third party vendors;~~

~~21.7.1.2 Conducting direct solicitations of prospective donors, whether in person or by telephone and whether those solicitations are performed personally or through employees or agents; or~~

~~21.7.1.3 Advising a charitable organization with regard to the volume, targeting, duration or content of a direct mail solicitation campaign and also having primary responsibility for the campaign's production;~~

~~21.7.2 "Professional fund-raiser" does not include any bona fide employee of a charitable organization who receives regular compensation and is not primarily employed for the purpose of soliciting funds, or an attorney, investment counselor, or banker who in the conduct of his or her work advises a client to make a contribution;~~

~~21.7.3 For purposes of this section "solicitation" means any request or appeal, either oral or written, or any endeavor to obtain, seek or plead funds, property, financial assistance or other thing of value, including the promise or grant of any money or property of any kind for a charitable purpose, but excluding: (a) direct grants or allocation of funds received or solicited from any affiliated fund-raising organization by a member agency; and (b) unsolicited contributions received from any individual donor, foundation, trust, governmental agency or other source, unless the contributions are received in conjunction with a solicitation drive;~~

~~21.7.4 For purposes of this section 119-301-21 "solicitation drive" means the day the first solicitation is made until the following dates:~~

~~21.7.4.1 The last day the solicitation is made; or~~

~~21.7.4.2 The day that an entertainment event, if any, occurs in conjunction with the solicitations;~~

~~§ 119-301-22. Licensed securities, commodities, or investment broker, dealer, or investment adviser:~~

~~22.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to any person licensed as a securities, commodities, or investment broker, dealer, or investment adviser, when that person is soliciting within the scope of his or her license:~~

~~22.2 If a person is soliciting outside the scope of his or her license as a securities, commodities, or investment broker, dealer, or investment advisor, then the person must register as a telemarketer unless another exemption applies;~~

~~22.3 As used in this section, "licensed securities, commodities, or investment broker, dealer, or investment adviser" means a person who is licensed or registered as such by the United States Securities and Exchange Commission, by the National Association of Securities Dealers or some other self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. § 78c), or by an official or agency of this State or of any State of the United States, and whose license has not expired or been suspended or revoked.~~

~~§ 119-301-23. Licensed associated person of a securities, commodities,
or investment broker, dealer, or investment adviser.~~

~~23.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to any licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser, when the licensed associate is soliciting within the scope of his or her license.~~

~~23.2 If a licensed associated person of a securities, commodities, or investment broker, dealer or investment adviser makes telephone solicitations that are not within the scope of his or her license, he or she must register as a telemarketer with the Secretary unless another exemption applies.~~

~~23.3 As used in this section, a "licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser means any associated person registered or licensed by the National Association of Securities Dealers or other self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. § 78c) or by an official or agency of this state or of any State of the United States:~~

~~119-301-24. Persons who do not make the major sales presentation:~~

~~24.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person who does not make the major sales presentation during the telephone solicitation and who does not intend to, and does not actually complete or obtain provisional acceptance of a sale during the telephone solicitation, but who makes the major sales presentation and completes the sale at a later face-to-face meeting between the seller and the prospective consumer in accordance with the home solicitation provisions of chapter 46A of the Code and as a home solicitation sale as defined in section 46A-1-102 of the Code and subsection 24.3 of this rule.~~

~~24.2 However, if a seller engages in unfair and deceptive practices, as defined in subdivision 46A-6F-501(a)(4) of the Code, by causing an individual to go to the prospective consumer for the primary purpose of collecting payment or delivering any item purchased, this exemption does not apply.~~

~~24.3 The term "home solicitation sale" means a consumer credit sale in excess of \$25 in which the buyer receives a solicitation of the sale at a place other than the seller's business establishment at a fixed location and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller. "Home solicitation sale" does not include: (a) a sale made pursuant to a preexisting open-end credit account with the seller in existence for at least three months prior to the transaction, (b) a sale made pursuant to prior negotiations between the parties at the seller's business establishment at a fixed location, (c) a sale of motor vehicles, mobile homes or farm equipment, or (d) a sale which may be rescinded under the Federal Truth in Lending Act (being title I of the Federal Consumer Credit Protection Act). A sale which would be a home solicitation sale if credit~~

~~were* extended by the seller is a home solicitation sale although the goods or services are paid for, in whole or in part, by a consumer loan in which the creditor is subject to claims and defenses arising from the sale.~~

~~24.4 Practices identified as unfair or deceptive practices in subdivision 46A-6F501(a)(4) include procurement by a seller or telemarketer of the services of any professional delivery, courier or other pick-up service to obtain immediate receipt and possession of a consumer's payment unless:~~

~~24.4.1 The service is requested by the consumer;~~

~~24.4.2 The consumer is informed that he or she can inspect the goods or services prior to payment and may refuse to accept the goods or services; and~~

~~24.4.3 The consumer is actually afforded an opportunity to inspect the goods or services prior to payment.~~

~~§ 119-301-25. Person who solicits sales by catalog:~~

~~25.1 The provisions of this article 6F, chapter 46A of the Code and this rule do not apply to a person who solicits sales by periodically publishing and delivering a catalog of a seller's merchandise to prospective purchasers as long as the catalog:~~

~~25.1.1 Contains a written description or illustration of each item offered for sale;~~

~~25.1.2 Includes the business address or home address of the seller;~~

~~25.1.3 Includes at least twenty pages of written material and illustrations;~~

~~25.1.4 Is distributed in more than one State; and~~

~~25.1.5 Has an annual circulation, by mailing, of not less than 150,000 catalogs.~~

~~25.2 If the seller engages in telemarketing activity in this State and all of the criteria listed above are not satisfied, then the seller must have a West Virginia telemarketing registration certificate unless another exemption applies.~~

~~§ 119-301-26. Business-to-business sale:~~

~~26.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a business-to-business sale of property or services.~~

~~26.2 "Business" includes (a) all activities engaged in, or caused to be engaged in, with the object of in or economic benefit, direct or indirect, and (b) all activities of a not for profit corporation or other~~

~~organization that compete, or may compete, with activities engaged in by a person with the object of gain or economic benefit, direct or indirect. "Business" does not include services rendered by an employee within the scope of his or her contract of employment. Employee services, services by a partner on behalf of his or her partnership and services by a member of any other business entity on behalf of that entity are the business of the employer, or partnership, or other business entity as the case may be.~~

~~26.3 Examples of business to business sales include:~~

~~26.3.1 Sales of property or services by one for-profit business to another for-profit business.~~

~~26.3.2 Sales of property or services by for-profit business to a not-for-profit business for use or consumption in its business activity.~~

~~26.3.3 Sales of property or services by a not-for-profit business to a for-profit business.~~

~~26.3.4 Sales of property or services by a not-for-profit business to a not-for-profit business.~~

~~26.3.5 Sales of property or services by a for-profit business to (a) the United States, (b) this or another State, or (c) an agency, board or commission of the United States or of any State.~~

~~26.3.6 Sales of property or services by a not-for-profit business to (a) the United States, (b) this or another State, or (c) an agency, board or commission of the United States or of any State.~~

~~26.3.7 Unlike rules of the Federal Trade Commission governing tele-marketing sales, 16 C.F.R. 310.6(g), this exemption also applies to retail sales of nondurable office or cleaning supplies to a business.~~

~~§ 119-301-27. Persons who solicit contracts for maintenance or repair of goods:~~

~~The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person who solicits contracts for the maintenance or repair of goods previously purchased (a) from the person making the solicitation, or (b) from the person on whose behalf the solicitation is made.~~

~~This exempts retailers of goods, such as household appliances, who also sell maintenance or repair contracts for those goods when subsequent to the sale they, or a third-party on their behalf, solicits sales of repair or maintenance contracts with regard to those goods.~~

~~§ 119-301-28. Persons soliciting a transaction regulated by Commodity Futures Trading Commission:~~

~~28.1 The provisions of article 6F, chapter 46A of the Code do not apply to a person soliciting a transaction regulated by the Federal Commodity Futures Trading Commission if the person is registered or temporarily licensed for this activity with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. § 1 et seq.) and the registration or license has not expired or been suspended or revoked.~~

~~28.2 A person who is registered or licensed by the Federal Commodities Futures Trading Commission~~

~~who solicits sales of a consumer good or service that are not regulated by the Commodity Futures Trading Commission must register and comply with the provisions of article 6F, chapter 46A of the Code and this rule.~~

~~28.3 The Commodity Futures Trading Commission regulates the buying and selling of commodities by contracts for future delivery.~~

~~28.4 Definitions. For purposes of this section"~~

~~28.4.1 "Act" means the Commodity Exchange Act (7 U.S.C. § 1 et seq.).~~

~~28.4.2 "Associated person" means any natural person who is associated in any of the following capacities with:~~

~~28.4.2.1 A futures commission merchant as a partner, officer, or employee (or any natural person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers' or option customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged;~~

~~28.4.2.2 An introducing broker as a partner, officer, employee, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers' or option customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged;~~

~~28.4.2.3 A commodity pool operator as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or persons so engaged; or~~

~~28.4.2.4 A commodity trading advisor as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves: (i) The solicitation of a client's or prospective client's discretionary account, or (ii) the supervision of any person or persons so engaged; and~~

~~28.4.2.5 A leverage transaction merchant as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves: (i) The solicitation or acceptance of leverage customers' orders (other than in a clerical capacity) for leverage transactions as defined in subdivision 28.14.12, or (ii) the supervision of any person or persons so engaged.~~

~~28.4.3 "Commodity" means and includes wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, millfeeds, butter, eggs, Irish potatoes, wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in Pub. L. 85-839, and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in.~~

~~28.4.4 "Commodity pool operator" means any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery or commodity option on or subject to the rules of any contract market, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.~~

~~28.4.5 "Commodity trading advisor" means any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market, any commodity option authorized under section 4c of the Act, or any leverage transaction authorized under section 19 of the Act, or who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing; but such term does not include (i) any bank or trust company or any person acting as an employee thereof, (ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees, (v) the named fiduciary, or trustee, of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, or any fiduciary whose sole business is to advise that plan, (vi) any contract market, and (vii) such other persons not within the intent of this definition as the Commission may specify by rule, regulation or order. Provided, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession. Provided further, That the Commission, by rule or regulation, may include within this definition, any person advising as to the value of commodities or issuing reports or analyses concerning commodities, if the Commission determines that such rule or regulation will effectuate the purposes of this provision.~~

~~28.4.6 "Contract Market" means a board of trade designated by the Commission as a contract market under the Commodity Exchange Act or in accordance with the provisions of part 33 of this chapter.~~

~~28.4.7 "Floor broker" means any person who, in or surrounding any pit, ring, post or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market and shall include any person required to register as a floor broker under the Act by virtue of part 33 of this chapter.~~

~~28.4.8 "Floor trader" means any person who, in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, purchases or sells solely for such person's own account, or has been authorized by a contract market to purchase or sell for such person's own account, any commodity for future delivery on or subject to the rules of any contract market and shall include any person required to register as a floor trader under the Act by virtue of 17 C.F.R. part 33 of this chapter or by rule or regulation of the Commission pertaining to the operation of an electronic trading system.~~

~~28.4.9 "[Futures] Commission merchant" means:~~

~~28.4.9.1 Individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in connection with such solicitation or acceptance of orders, accepts any~~

~~money, securities, or property (or extends credit in lieu thereof) to margin, guarantee or secure any trades or contracts that result or may result therefrom; and~~

~~28.4.9.2 Includes any person required to register as a futures commission merchant under the Act by virtue of 17 C. F. R. part 32 or part 33;~~

~~28.4.10 "Future Delivery" does not include any sale of a cash commodity for deferred shipment or delivery;~~

~~28.4.11 "Introducing Broker"~~

~~28.4.11.1. "Introducing broker" means any person who, for compensation or profit, whether direct or indirect, is engaged in soliciting or in accepting orders (other than in a clerical capacity) for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; and~~

~~28.4.11.2 "Introducing broker" includes any person required to register as an introducing broker by virtue of 17 C.F.R. part 33, except that the term "introducing broker" shall not include:~~

~~28.4.11.2.1 Any futures commission merchant, floor broker, or associated person, acting in its capacity as such, regardless of whether that futures commission merchant, floor broker, or associated person is registered or exempt from registration in such capacity;~~

~~28.4.11.2.2 Any commodity trading advisor, which, acting in its capacity as a commodity trading advisor, is not compensated on a per-trade basis or which solely manages discretionary accounts pursuant to a power of attorney, regardless of whether that commodity trading advisor is registered or exempt from registration in such capacity; and~~

~~28.4.11.2.3 Any commodity pool operator which, acting in its capacity as a commodity pool operator, solely operates commodity pools, regardless of whether that commodity pool operator is registered or exempt from registration in such capacity;~~

~~28.4.12 "Leverage Contract" means a contract, standardized as to terms and conditions, for the long-term (ten years or longer) purchase ("long leverage contract") or sale ("short leverage contract") by a leverage customer of a leverage commodity which provides for:~~

~~28.4.12.1 Participation by the leverage transaction merchant as a principal in each leverage transaction;~~

~~28.4.12.2 Initial and maintenance margin payments by the leverage customer;~~

~~28.4.12.3 Periodic payment by the leverage customer or accrual by the leverage transaction merchant of a variable-carrying charge or fee on the unpaid balance of a long leverage contract, and periodic payment or crediting by the leverage transaction merchant to the leverage customer of a variable-carrying charge or fee on the initial value of the contract plus any margin deposits made by the leverage customer~~

in connection with a short leverage contract;

~~28.4.12.4 Delivery of a commodity in an amount and form which can be readily purchased and sold in normal commercial or retail channels;~~

~~28.4.12.5 Delivery of the leverage commodity after satisfaction of the balance due on the contract; and~~

~~28.4.12.6 Determination of the contract purchase and repurchase, or sale and resale prices by the leverage transaction merchant.~~

~~28.4.13 "Leveraged transaction" means the purchase or sale of any leverage contract, the repurchase or resale of any leverage contract, the delivery of the leverage commodity, or the liquidation or rescission of any such leverage contract by or to the leverage transaction merchant:~~

~~28.4.14 "Leveraged transaction merchant" means and includes any individual, association, partnership, corporation, trust or other person that is engaged in the business of offering to enter into, entering into or confirming the execution of leverage contracts, or soliciting or accepting orders for leverage contracts, and who accepts leverage customer funds (or extends credit in lieu thereof) in connection therewith:~~

~~28.4.14.1 "A leverage transaction merchant as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves: (i) The solicitation or acceptance of leverage customers' orders (other than in a clerical capacity) for leverage transactions as defined in Sec. 31.4(x) of this chapter, or (ii) the supervision of any person or persons so engaged:~~

~~28.4.15 "Person" includes individuals, associations, partnerships, corporations, and trusts.~~

~~28.4.16 "Self-regulatory organization" means a contract market as defined in subdivision 28.4.5.~~

§ 119-301-29. Supervised financial organization:

~~29.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to (a) a supervised financial organization, (b) an affiliate or subsidiary of a supervised financial organization or (c) a regulated consumer lender, that is subject to regulation by the West Virginia Banking Commissioner, or by a federal agency charged with regulating supervised financial organizations or regulated consumer lenders, when the organization is acting within the scope of the supervised or regulated activity:~~

~~29.2 If a supervised financial organization, or its affiliate or subsidiary, or a regulated consumer lender makes telemarketing solicitations for consumer goods or services not generally offered to the public in the course of its supervised or regulated activity, the telemarketer is subject to the provisions of, article 6F, chapter 46A of the Code and this rule, unless another exemption applies:~~

~~29.3 For purposes of this section:~~

~~29.3.1 "Regulated consumer lender" means a person authorized to make or take assignments of regulated consumer loans.~~

~~29.3.2 "Supervised financial organization" means any organization, corporation or person, other than an insurance company or other organization primarily engaged in an insurance business, which is required under state law to register or obtain a license from the Commissioner of Banking of this State before conducting business in this State, or which is authorized under federal law to make consumer loans without a license from the Commissioner of Banking, provided such loans are subject to supervision and examination by an official or agency of the United States.~~

~~29.3.3 "Consumer loan" means a loan made by a person regularly engaged in the business of making loans in which: (a) the debtor is a person other than an organization; (b) the debt is incurred primarily for a personal, family, household or agricultural purpose; (c) either the debt is payable in installments or a loan finance charge is made; and (d) either the principal does not exceed \$45,000 or the debt is secured by an interest in land or a factory-built home, as defined in section 37-15-2 of the Code.~~

~~29.3.4 "Factory-built home" includes modular homes, mobile homes, house trailers and manufactured homes;~~

~~§ 119-301-30. Licensed insurance broker, agent, customer representative, or solicitor.~~

~~30.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a licensed insurance broker, agent, customer representative, or solicitor when that person is soliciting within the scope of his or her license:~~

~~30.2 A licensed insurance broker, agent, customer representative or solicitor who makes telemarketing solicitations outside the scope of his or her license is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.~~

~~30.3 As used in this section, "licensed insurance broker, agent, customer representative, or solicitor" means any insurance broker, agent, customer representative, or solicitor licensed by the Insurance Commissioner of West Virginia or an official or agency of this State pursuant to subsection 33-12-1 (a) of the Code, or of any State of the United States.~~

~~30.3.1 "Insurance agent" means an individual appointed by an insurer to solicit, negotiate, effect or countersign insurance contracts in its behalf.~~

~~30.3.2 "Insurance broker" means an individual who for compensation in any manner solicits, negotiates or procures insurance or the renewal or continuance thereof on behalf of insureds or prospective insureds.~~

~~30.3.3 "Insurance solicitor" means an individual appointed and authorized by an agent to solicit and receive applications for insurance as a representative of such agent.~~

~~§ 119-301-31. Persons soliciting sale of services provided by cable television system or subscriber television services:~~

~~31.1 The provisions of article 617, chapter 46A of the Code and this rule do not apply to:~~

~~31.1.1 A person soliciting the sale of services provided by a cable television system operating under authority of a franchise or permit; or~~

~~31.1.2 A person soliciting the sale of subscriber television services or advertising.~~

~~31.2 If the telemarketing solicitation is for the sale of consumer goods or for the sale of any other consumer service, then the person soliciting the sale is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.~~

~~§ 119-301-32. Certain telephone and communications companies:~~

~~32.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to any of the following entities to the extent that its acts or practices are subject to the jurisdiction or regulation of the West Virginia Public Service Commission or the Federal Communications Commission:~~

~~32.1.1 A telephone company, or any affiliate or agent of a telephone company; or~~

~~32.1.2 Any provider of commercial mobile service, as defined by the communications act of 194, as amended by the telecommunications act of 1966 (47 U.S.C. § 151, et seq.).~~

~~32.2 If an act or practice of a telephone company, or any affiliate or agent of a telephone company, constitutes telemarketing solicitation or results in telemarketing solicitation, and that act or practice is not regulated by the West Virginia Public Service Commission or the Federal Communications Commission, then the provisions of article 6F chapter 46A of the Code and this rule apply, unless another exemption applies.~~

~~§ 119-301-33. Persons maintaining continuing business locations for sales of consumer goods or services:~~

~~33.1 The provisions of article 6F, chapter 46A of the Code do not apply to a person who offers to sell consumer goods or services through telemarketing activities if the person maintains one or more permanent business locations under the same exact name as that used in connection with telemarketing sales and both of the following activities occur on a continuing basis:~~

~~33.1.1 The identical consumer goods or services offered for sale by the person through telemarketing are offered for sale to consumers at the person's permanent retail locations;~~

~~33.1.2 More than 50 percent of all consumer goods and services offered for sale by the person are sold to consumers at its permanent retail locations rather than through telemarketing.~~

~~33.2 For purposes of subdivision 33.1:~~

~~33.2.1 The permanent retail business location(s) may be located in this State or elsewhere.~~

~~33.2.2 The permanent retail business location(s) from which consumer goods or services are sold to consumers must operate under the same exact name as that used in connection with the telemarketing sales.~~

~~33.2.3 If the doing business names are different, this exemption does not apply even if the legal name is the same.~~

~~Example 1. Mid-America Retailer, Inc. has two divisions. One division operates permanent business locations from which consumer goods or services are offered for sale under the name March Stores. The second division makes telemarketing sales under the name MAR Corp. The telemarketing activity of MAR Corp. is not exempt under this rule.~~

~~33.2.4 If the legal names of the business are different but the doing business names are the same, the telemarketing activity is not exempt.~~

~~Example 2. Mid-America Retailers, Inc. operates retail stores under the name March Stores. A wholly owned subsidiary called MAR Telemarketing Inc. makes telemarketing sales of the same identical consumer goods or services as those sold by the March Stores at its retail locations and the telemarketing sales are made under the name March Stores. The telemarketing activity of MAR Telemarketing, Inc. is not exempt under this rule.~~

~~33.2.5 If the consumer goods and services offered for sale through its telemarketing activity are not identical to those offered for sale at its permanent retail locations, the telemarketing activity is not exempt.~~

~~Example 3. Mid-America Retailers sells consumer goods at its permanent retail stores and through telemarketing activity. However, not all consumer goods or services available through its telemarketing activity are identical to the consumer goods or services offered for sale at its permanent retail stores. For example, Christmas decorations are sold seasonally at its permanent retail stores but may be purchased through telemarketing activity throughout the year. Mid-America Retailers, Inc. is not exempt from article 6F, chapter 46A of the Code because the telemarketing goods available for sale on a continuing basis include other goods or services that can only be purchased at a permanent retail store on a seasonal basis.~~

~~33.2.6 To determine whether more than 50 percent of all consumer goods or services offered for sale by the person are sold at permanent retail locations of the person maintained under the same exact legal name, and the same exact doing business name, used in connection with the telemarketing sales, gross receipts from selling consumer goods and services for the last 12 months preceding the month of registration at the permanent retail locations is compared with total gross receipts during that same period from all sales of consumer goods and services.~~

~~33.2.6.1 Gross receipts is determined net of returns, allowances and discounts but includes shipping, handling and delivery charges paid by the customer that are added to or included in the sales price. Gross receipts does not include separately stated federal excise taxes the legal incidence of which is on the consumer or sales or use taxes collected by the seller from the customer.~~

~~§ 119-301-34. Issuers of certain securities:~~

~~—The provisions of article 6F, chapter 46A of the Code do not apply to an issuer or a subsidiary of an issuer that has a class of securities that is subject to Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) and which is either registered or exempt from registration under paragraphs (A), (B), (C), (E), (F), (G), or (H), subsection (g)(2) of that section [15 U.S. C. § 781 (g)(2) (A), (B), (C), (E), (F), (G), or (H)].~~

~~§ 119-301-35. Book, video, record, or multimedia club:~~

~~—35.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a book, video, record, or multimedia club or contractual plan or arrangement:~~

~~—35.1.1 Under which the seller provides the consumer with a form which the consumer may use to instruct the seller not to ship the offered merchandise;~~

~~—35.1.2 That is regulated by the Federal Trade Commission trade regulation concerning use of negative option plans by sellers in commerce; or~~

~~—35.1.3 That provides for the sale of books, records, videos, multimedia products or other goods that are not covered subdivisions 35.1.1 or 35.1.2 of this subsection, including continuity plans, subscription arrangements, standing order arrangements, single sales of items offered for sale one time, supplements, and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive the merchandise on a periodic basis.~~

~~—35.2 If a telemarketer described in this section engages in other telemarketing activity, the telemarketer is, with respect to that other telemarketing activity, subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.~~

~~§ 119-301-36. Registered developers or real estate salespersons or brokers:~~

~~—36.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person who is licensed as a real estate broker, associate broker, or real estate salesperson, in accordance with the provisions of sections 47-12-1 et seq. of the Code, when the person is acting within the scope of his or her license.~~

~~—36.2 If a licensed real estate broker, associate broker, or real estate salesperson makes telemarketing solicitations that are outside the scope of his or her license, the person is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.~~

~~§ 119-301-37. Persons soliciting sale of electric or natural gas energy or related goods or services:~~

~~—37.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person soliciting on behalf of an entity that sells electric or natural gas energy, or an affiliate of an entity that sells electric or natural gas energy, if the solicitation is for the sale of electric or natural gas energy or related goods~~

and services, and the transaction is governed and regulated by the West Virginia Public Service Commission or the Federal Energy Regulatory Commission:

~~37.2 If the sale of electric or natural gas energy or related goods or services is not made in a transaction governed and regulated by the West Virginia Public Service Commission or the Federal Energy Regulatory Commission, the telemarketer is not exempt under this section. The telemarketer must register with the Secretary and comply with the provisions of article 6F, chapter 46A of the Code and this rule unless another exemption applies.~~

~~37.3 If a telemarketer soliciting the sale of electric or natural gas energy or related services in a regulated transaction also solicits the sale of other consumer goods or services, the telemarketer must register with the Secretary and comply with the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.~~

~~37.3 "A person soliciting on behalf of an entity" includes an employee, agent or independent contractor who solicits on behalf of the entity the sale of electric or natural gas energy, or solicits on behalf of an affiliate of an entity that sells electric or natural gas energy.~~

~~§ 119-301-38. Person soliciting sales of a magazine or newspaper:~~

~~38.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person primarily soliciting (a) the sale of a single magazine subscription or subscription to a newspaper of general circulation, or (b) the sale of advertisements in a magazine or newspaper of general circulation.~~

~~38.2 If a telemarketer solicits the sale of (a) subscriptions to 2 or more magazines, (b) subscriptions to 2 or more newspapers of general circulation, (c) subscriptions to 1 or more magazines and to 1 or more newspapers of general jurisdiction, or (c) other consumer goods or services, the telemarketer must register with the Secretary and comply with the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.~~

~~§ 119-301-39. Telemarketers based on continuous sales and gross sales to exempt persons:~~

~~39.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to any telemarketer in good standing (a) who has been providing telemarketing sales and services continuously for at least two years prior to the date of application under this rule, under the same name and ownership, and (b) who derives 50 percent or more of its gross telemarketing sales revenues from contracts with persons who are exempt from registration under sections 119-301-21 through 119-301-40 of this rule.~~

~~39.2 To claim this exemption, a telemarketer must annually file an application for registration with the Secretary and pay the applicable registration fee. If the claim of exemptions is allowed, the telemarketer will not be required to furnish a surety bond or other security.~~

~~39.3 "Telemarketer in good standing" means a telemarketer who, during the previous two years, has continually been engaged in the business of telemarketing and who has not been convicted, or pled guilty or nolo~~

~~contendere to racketeering, embezzlement, fraudulent conversion, misappropriation of property or any violation of State or Federal securities laws, a theft offence, or any consumer protection law or telemarketing law.~~

~~39.4 For purposes of this section "telemarketer" includes the owners, operators, officers, directors, partners, or other individuals engaged in management activities of a business entity that is subject to licensing and registration pursuant to this article.~~

~~§ 119-301-40. Annual sale of less than \$100 of food stuffs and edibles:~~

~~40.1 The provisions of article 6F, chapter 46A of the Code and this rule do not apply to a person soliciting the sale of food stuffs and edibles, except vitamins, if the solicitations neither intends to result in, or actually results in a sale or sales which costs the consumer in excess of \$100 annually to a single address as long as the sales are not solicited by a professional telemarketer.~~

~~40.2 If a person's telemarketing sales of food stuffs and edibles to a single address exceed \$100 annually to a single address, the telemarketer is subject to the provisions of article 6F, chapter 46A of the Code and this rule, unless another exemption applies.~~

~~40.3 If a person's sales of food stuffs and edibles are solicited by a professional telemarketer, the exemption provided in this section does not apply.~~

~~40.4 For purposes of this section:~~

~~40.4.1 "Food" means and includes all edible foodstuffs, beverages containing no alcohol and items commonly thought of as food, including by way of illustration and not by limitation, cereals and cereal products, meat and meat products, fish and fish products, poultry and poultry products, fresh and salt water animal products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, flour and flour products, sugar and sugar products, milk and milk products, cocoa and cocoa products, coffee and coffee substitutes, tea, herbs, spices, salt and salt substitutes, condiments, candy and confections, soft drinks, soft drink mixes and syrups, tenderizers, food coloring, bottled drinking water, sugar substitutes, oleomargarine, shortening, gelatins, baking and cooking ingredients, mushrooms, spreads, relishes, desserts, flavorings, chewing gum, edible seeds, nuts and berries.~~

~~40.4.2 "Food" does not include medicines, vitamins and dietary supplements whether in liquid, powdered, granular, tablet, capsule, lozenge, or pill form; spirituous, malt or vinous liquors or beer; tobacco or tobacco products.~~

~~40.4.3 "Professional telemarketer" means a person who in the ordinary course of business makes telemarketing solicitations for another or others.~~

~~Part IV Administration and Compliance~~

~~§ 119-301-51. Revocation or suspension of certificate:~~

~~51.1 The Secretary may revoke or suspend a telemarketer's registration certificate at any time during the registration year if the Secretary finds that the registrant:~~

~~51.1.1 Failed to provide security acceptable to the Secretary in the form and amount required by section 46A-6F-302 of the Code and this rule.~~

~~51.1.2 Failed to maintain the required security by timely providing replacement security or additional security before the security provided terminates, is cancelled or expires.~~

~~51.1.6 Failed to timely provide additional security after the amount of the security provided, falls below \$100,000 per business location of the registrant listed in the application form or \$500,000 for all business locations listed in the application form.~~

~~51.2 Before revoking or suspending a temporary registration certificate or an annual registration certificate before the day certificate expires due to passage of time, the Secretary must give written notice of his or her intent to revoke or suspend the certificate, the reason for the revocation or suspension, the effective date of the revocation or suspension, and the date, time and place where the registrant may appear and show cause why the registration certificate should not be suspended or cancelled.~~

~~51.3 The notice required by subsection 51.3 must be served as provided in section 56 of this rule.~~

§ 119-301-5212. Timely filing and paying - Delivery in person.

5212.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date, under authority of article 6F, chapter 46A of the Code or this rule, is delivered in person on or before the prescribed date to the Secretary of Tax and Revenue or to the Office of Telemarketing Registration, Department of Tax and Revenue, at Charleston, West Virginia, during normal business hours of the Department, it is deemed timely filed.

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East Charleston, WV 25305-0842

5212.2 Normal business hours. -- Normal business hours are 8:30 a.m. to 4:30 p.m. Monday through Friday unless the day is a legal holiday in this State.

5212.3 Meaning of document. -- The term "document" as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

5212.4 Last date for filing or payment. - The last date for timely filing or timely making payment includes any extension of time authorized by law or this rule and any extension of time granted in writing by the Secretary.

§119-301-5313. Timely filing and paying - Timely mailing.

5313.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of sections 46A-6F-301 through 303 of the Code or this rule is, after the prescribed period or date, delivered by United States mail to the Secretary, then the date of the postmark of the United States Postal Service stamped on the cover in which the document or payment is mailed is deemed to be the date of filing or the date of payment, as the case may be, provided the following mailing requirements are met.

5313.1.1 The postmark date falls within the prescribed period or on or before the prescribed date for filing (including any extension granted for such filing) of the document, or for making the payment (including any extension granted for such payment); and

5313.1.2 The document or payment was, within the time prescribed in subdivision 52.3.1, deposited in the United States mail in an envelope or other appropriate wrapper, postage prepaid, addressed as follows:

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
P.O. Box 963
Charleston, WV 25324-0963

or

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

5313.2 The term "document," as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

5313.3 **Postmarks not made by U.S. Postal Service.** - Subsection **5313.1** applies to postmarks not made by the United States Postal Service or a designated private delivery service only to the extent provided in the following subsections or section 54 **14** of this rule (pertaining to delivery by designated private delivery services).

5313.3.1 If the postmark on the envelope or wrapper is made other than by the United States Postal Service, (a) the postmark so made must bear a date on or before the last date, or the last day of the period, prescribed for filing or paying, and (b) the document or payment must be received by the Secretary not later than the time when a document or payment contained in an envelope or other appropriate wrapper which is properly addressed- and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Post Office on the last date, or the last day of the period, prescribed for filing document or making payment. However, if the document or payment is received after the time when a

document or payment so mailed and so postmarked by the U.S. Post Office would ordinarily be received, the document or payment will be treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received, if the person who is required to file the document or make payment establishes (i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the U.S. Post Office on or before the last date, or the last day of the period, prescribed for filing the document, (ii) that the delay in receiving the document was due to a delay in the transmission of the mail, and (c) the cause of the delay.

5313.3.2 If the envelope has a postmark made by the United States Postal Service in addition to the postmark not so made, the postmark that was not made by the United States Postal Service is disregarded, and whether the envelope was mailed in accordance with this ~~subsection 53.3.1~~ **this section** is determined solely by the postmark made by the United States Postal Service.

5313.4 Registered and certified mailing. - For purposes of this section:

5313.4.1 If any document or payment is sent by United States registered mail, the date of registration is deemed the postmark date.

5313.4.2 If any document or payment is sent by United States certified mail and the sender's receipt is postmarked by the United States Postal Service employee to whom the document is presented, the date of the postmark on the receipt is deemed to be the postmark date of the document or payment.

§119-301-5414. Timely mailing - Delivery by designated private delivery service.

5414.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of sections 46A-6F-301 through 303 of the Code or this rule is, after the prescribed period or date, delivered by a designated private delivery service ("PDS") to the Secretary, then the date recorded by the private PDS or marked, by the private PDS, on the cover in which document or payment is delivered is deemed to be the postmark date and the date of delivery or date of payment, as the case may be, provided the following requirements are met:

5414.1.1 The postmark date falls within the prescribed period or on or before the prescribed date for filing (including any extension granted for such filing) of the document, or for making the payment (including any extension granted for such payment); and

5414.1.2 The document or payment was, within the time prescribed in subdivision **5414.1**, delivered to a designated PDS in an envelope or other appropriate wrapper, postage prepaid, addressed as follows:

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

5414.2 The term "document," as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

5414.3 The term "designated delivery service" means any delivery service provided by a trade or business if the service is designated as a delivery service by the Internal Revenue Service, or by the Secretary of Tax and Revenue in an administrative notice. Until further notice, the following private companies and their specific service may be used:

5414.3.1 Airborne Express - Overnight Air Express Service, Next Afternoon Service, and Second Day Service;

5414.3.2 DHL World Express - DHL Same Day Service and DHL USA Overnight;

5414.3.3 Federal Express - FedX Priority Overnight, FedX Standard Overnight, and FedX 2 Day; and

5414.3.4 United Parcel Service - UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, and UPS 2 d Day Air A.M.

5414.3.5 Airborne, DHL, FedEx, and UPS are not designated with respect to any type of delivery service not identified above. Consequently, the "timely mailing as timely filing/paying" rule of subsection 5414.1 does not apply to any other type of delivery service offered by them.

5414.4 Special rule for determining postmark date when a designated PDS delivers the item.

5414.4.1 If the date on which the item is given to the designated PDS is recorded electronically to the data base of the PDS, the date recorded in the electronic data base of the designated PDS is treated as the postmark date for purposes of subsection 5414.1 of this rule.

5414.4.1.1 For items that are delivered after their due dates, there is a presumption that the postmark date is the day that precedes the delivery date by an amount of time that equals the amount of time it would normally take for an item to be delivered under the terms of the specific type of delivery service used (e.g., two days before the actual delivery date for a two day delivery service). This presumption applies to items sent by persons subject to this rule and, in appropriate cases, to items sent by the Secretary.

5414.4.1.2 Persons subject to this rule who wish to overcome this presumption will need to provide information that shows that the date recorded in the electronic data base is on or before the due date. For example, this information could be obtained in the form of a written confirmation produced and issued by the designated PDS before the expiration of the period for storing the date recorded in its electronic data base. If persons subject to this rule wish to maintain this type of proof for their records, they should make a timely request to receive this information from the designated PDS before expiration of its data storage period.

5414.4.2 If an electronically generated label is applied to the cover of all items delivered by the designated PDS, including those items that already have an airbill attached, the date on which an item is given to designated PDS for delivery is marked on the label. There are two types of labels (which are distinguishable from each other). One type of label is generated and applied to an item by an employee of the

designated PDS. The other type of label is generated (using computer software and/or hardware provided by the designated PDS) and applied to an item by a customer. The date that will be treated as the postmark date for purposes of subsection 54.1 of this section is determined under the following rules:

54.2-14.4.3 If an item has a label generated and applied by an employee of the designated PDS, the date marked on that label is treated as the postmark date for purposes of subsection 52.3, regardless of whether the item also has a label generated and applied by the customer.

54.2-14.4.4 If an item has a label generated and applied by a customer, the date marked on that label is treated as the postmark date for purposes of subsection 54.1, if the item is received by the Secretary within the normal delivery time. (Normal delivery time is one day for FedEx Priority Overnight and FedEx Standard Overnight, or two days for FedEx Way.)

54.2-14.4.5 If an item is not delivered within the normal delivery time, the person required to file the document or to make the payment must establish (a) that the item was actually either given to, or picked up by, an employee of the designated PDS on or before the due date and (b) the cause of the delay in delivery of the document or payment.

54.2-14.4.6 The information recorded electronically to the data base of designated PDS (in the regular course of its business) can be used to show that the item was actually either given to, or picked up by, an employee of the designated PDS on or before the due date when (a) an item has a label generated and applied by a customer or (b) an item has a label generated and applied by an employee of the designated PDS, but the date is illegible or otherwise unavailable.

54.3-14.5 **Private delivery service that is not a designated PDS.** - If any person subject to this rule uses a business that provides mailing services similar to those of a designated PDS, but the business itself is not a designated PDS, the person should be aware that the "timely mailing as timely filing/paying" rule in subsection 54.1 of this section will not apply unless the item is actually given to, or picked up by, a designated PDS on or before the due date. The person should take appropriate precautions to ensure that the item will be given to, or picked up by, a designated PDS on or before the due date.

§119-301-5515. Time for performance when last day falls on Saturday, Sunday or legal holiday in this State.

When the last day prescribed in sections 46A-6F-301 through 303 of the Code, or this rule, falls on a Saturday, Sunday or a legal holiday in this State, performance of the act is considered timely if it is performed on the next succeeding day that is not a Saturday, Sunday or legal holiday in this State.

III. Civil Administrative Civil Penalties,

[Present Section 119-301-56 through 119-301-57 have been moved and renumbered to Section 119-301-17 through 119-301-18]

§119-301-6316. Failure to register or meet security requirement; remedies.

6316.1 Any person subject to this rule is subject to imposition of a civil administrative penalty of

not more than \$5,000 per violation if the person does any of the following:

~~63.1.1~~ **16.1.1** Acts as a telemarketer without first registering with the Secretary as required by section 46A-6F-301 of the Code and ~~section 119-301-7 of this rule;~~

~~63.1.2~~ Acts as a telemarketer after the telemarketer's certificate of registration expires or is revoked;

~~63.1.3~~ **16.1.2** Acts as a telemarketer without first meeting the security requirements set forth in section 46A-6F-302 of the Code and ~~section 119-301-8 of this rule,~~ unless the telemarketer is exempt from the security requirements. For example, a "telemarketer in good standing" is required to register to claim exemption from furnishing the required security. If the Secretary finds that the telemarketer is in good standing, then the telemarketer will be exempt from furnishing the security otherwise required by section 46A-6F-302 of the Code;

~~63.1.4~~ **16.1.3** Acts as a telemarketer after failing to maintain a certificate of registration as required by section 46A-6F-301 of the Code;

~~63.1.5~~ **16.1.4** Acts as a telemarketer without furnishing the security required by section 46A-6F-302 of the Code;

~~63.1.6~~ Acts as a telemarketer without maintaining the amount of security required by section 46A-6F-302 of the Code;

~~63.1.7~~ **16.1.5** Includes any material information on a registration application, or on a renewal application, that is false or misleading; or

~~63.1.8~~ **16.1.6** Misrepresents that the telemarketer is registered with the Secretary.

~~63.1.9~~ **16.2** When determining the amount of penalty to assess, the Secretary must take the following into account:

~~63.1.10~~ **16.2.1** The seriousness of the violation;

~~63.1.11~~ **16.2.2** Any good faith efforts of the telemarketer to comply with applicable requirements of article 6F, chapter 46A of the Code and this rule;

~~63.1.12~~ **16.2.3** Any benefit obtained by person due to the act or omission; and;

~~63.1.13~~ **16.2.4** The past history of the telemarketer in filing the initial application for registration and subsequent renewals;

~~63.1.14~~ **16.2.5** Whether the cause of the delinquency was unavoidable, or was due to negligence or an intentional act of the telemarketer or an agent of the telemarketer;

~~63.1.15~~ **16.2.6** The opportunity and degree of difficulty to correct erroneous or incomplete information in the initial application or a renewal application;

6316.2.7 The cooperativeness and efforts made by the telemarketer or an agent of the telemarketer to correct the erroneous or incomplete information for which the penalty is to be imposed, in whole or in part;

6316.2.8 The cost to the Secretary and time involved in investigation and correspondence prior to the time the erroneous or incomplete information is actually corrected;

16.2.9 Any good faith belief by the telemarketer that it was exempt from the requirements of article 6F, chapter 46A of the Code or this rule, or that those requirements were otherwise inapplicable to the telemarketer;

16.2.10 Any lack of actual knowledge by the telemarketer of the requirements of article 6F, chapter 46A of the Code or this rule;

16.2.11 The telemarketer's business reputation and history, if offered by the telemarketer;

16.2.12 The telemarketer's good faith in any other relevant respect;

6316.2.913 Any other appropriate factor(s) established by rule by the Secretary.

6316.3 ~~No assessment may be levied pursuant to subsection 61.1 of this section until after the alleged violator is~~ The telemarketer shall be notified by certified mail or personal service of the ~~any~~ alleged violation. The notice must include:

6316.3.1 A reference to the provision(s) of W. Va. Code §§ 46A-6F-301, 302 and 303 and to any provision(s) of this rule that that the person allegedly violated;

6316.3.2 A concise statement of the facts alleged to constitute the violation;

6316.3.3 A statement of the amount of penalty ~~sought~~ to be imposed; and

6316.3.4 A statement of the alleged violator's right to ~~an informal~~ a hearing ~~if it desires to contest the proposed civil administrative penalty.~~

6316.4 **Request for hearing.** -- The alleged violator ~~shall have~~ has 20 calendar days from receipt of the notice within which to file with the Secretary a written request for a hearing.

6316.4.1 If the 20th calendar day falls on a Saturday, Sunday or legal holiday in this State, the written request is timely if it is filed on the next day that is not a Saturday, Sunday or legal holiday in this State.

6316.4.2 A written request for a hearing is filed timely when the request is delivered to the Secretary in person, or the request is timely mailed. Sections ~~119-301-53 and 54~~ 13 and 14 of this rule define timely filing for purposes of this rule.

119-301-5617. Service.

~~5617.1~~ Whenever the Secretary or another person is authorized or required to give any notice under this rule, unless a different method of giving such notice is expressly permitted or prescribed, the notice must be given either by personal delivery thereof to the Secretary or person to be notified, or by depositing the notice in the United States ~~certified~~ mail, postage prepaid, in an envelope addressed to such agency or person at the last known address of the Secretary or other person.

~~5617.2~~ Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the Secretary, or by affidavit of any person over eighteen years of age, naming the Secretary or other person to whom the notice was given and specifying the time, place and manner of the service.

~~§ 119-301-5718. Notice of hearing~~Administrative Procedures.

~~57.1~~ In any contested case, all parties will be afforded an opportunity for a hearing after at least ten (10) days written notice of the date, time and place of the hearing and a short and plain statement of the matters asserted. At this hearing, all parties will have an opportunity to present evidence and argument with respect to the matters and issues involved.

~~57.2~~ This notice of hearing must be given in the manner specified in section 56 of this rule. Any contested civil administrative penalty shall be treated in the same manner, and follow the same procedures, established for contested cases under article 5, chapter 29A of the Code, except as otherwise required by Section 303, Article 6F, Chapter 46A of the Code.

~~§119-301-19. Enforcement of Civil Administrative Penalty~~

Any civil administrative penalty proposed under this rule shall become enforceable upon the earliest of (a) a final order, pursuant to section 303(c), article 6F, chapter 46A of the Code, based upon the failure of the alleged violator to contest the penalty after receipt of notice and an opportunity to be heard under section 16 of this rule; (b) a final order or deposition based upon the failure of the alleged violator, without good cause, to attend a contested hearing after receipt of notice of such hearing; or (c) a final order or decision in accordance with section 3, article 5, chapter 29A of the Code.

~~§119-301-20. Relief from Final Assessment~~

Relief from the assessment of a civil administrative penalty may be granted upon the same grounds as relief may be granted from a judgment or order under Rule 60 of the West Virginia Rules of Civil Procedure.

~~§119-301-21. Stay of assessment of civil administrative penalty~~

The assessment of a civil administrative penalty may be stayed for good cause shown.

~~§ 119-301-58. Hearings:~~

~~58.1~~ All hearings must be conducted in an impartial manner by the Secretary or by a hearing examiner

~~designated to hold hearings for the Secretary, and duly authorized by the Secretary to hold the hearings.~~

~~58.2 For this purpose, the Secretary or the hearing examiner, as the case may be, has the power to:~~

~~58.2.1 Administer oaths and affirmations;~~

~~58.2.2 Rule upon offers of proof and receive evidence;~~

~~58.2.3 Regulate the course of the hearing;~~

~~58.2.4 Hold conferences for the settlement or simplification of the issues, by consent of the parties;~~

~~58.2.5 Dispose of procedural requests or similar matters; and~~

~~58.2.6 Take any other action authorized in this rule.~~

~~58.3 All of the testimony and evidence at any hearing must be recorded by electronic means or by a certified court reporter. All rulings on the admissibility of testimony and evidence must be reported.~~

~~58.4 The Secretary must prepare an official record, which includes the reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case. Reported testimony will not be transcribed unless required for purposes of rehearing or judicial review.~~

~~58.5 Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default.~~

~~58.6 Evidentiary depositions may be taken and read as in civil actions in Circuit Courts of the State.~~

~~58.7 The hearing in any contested case will be held in Kanawha County, West Virginia, unless another county is selected by the Secretary.~~

~~§ 119-301-59. Rules of evidence.~~

~~59.1 In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record. Any party to any such hearing may vouch for the record as to any excluded testimony or other evidence.~~

~~59.2 All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, must be offered and made a part of the record in the case. Factual information or evidence that is not part of the record may not be considered in the determination of~~

~~the case, unless the facts are of a type that may be judicially noticed in courts of this State.~~

~~59.3 Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.~~

~~59.4 Every party has the right to cross-examine witnesses who testify, and to submit rebuttal evidence.~~

~~59.5 The Secretary, or the designated hearing examiner, may take notice of judicially cognizable facts. All parties must be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed. The parties must be afforded an opportunity to contest the facts so noticed.~~

~~59.6 Upon motion, in writing served by any party as notice may be served pursuant to section two [§ 29A-7-2], article seven of this chapter, assigning error or omission in any part of any transcript of the proceedings and testimony taken at any hearing, the Secretary must settle all differences arising as to whether the transcript truly discloses what occurred at the hearing. If there are errors or omissions in the transcript, the Secretary, or the designated hearing examiner, must direct that the transcript be corrected and revised in the respects designated by the agency, so as to make it conform to the whole truth.~~

~~§ 119-301-60. Orders or decisions:~~

~~60.1 Every final order or decision rendered by the Secretary in a contested case must be in writing or stated in the record and must be accompanied by findings of fact and conclusions of law.~~

~~60.2 Prior to the rendering of any final order or decision, any party may propose findings of fact and conclusions of law. If proposed, all other parties will be given an opportunity to except to the proposed findings and conclusions. The final order or decision will include a ruling on each proposed finding.~~

~~60.3 Findings of fact, if set forth in statutory language, will be accompanied by a concise and explicit statement of the underlying facts supporting the findings.~~

~~60.4 A copy of the final order or decision and accompanying findings and conclusions will be served upon each party and on the party's attorney of record, if any. Service may be in person or by registered or certified mail, return receipt requested.~~

~~§ 119-301-61. Judicial review of contested cases:~~

~~61.1 Any party adversely affected by a final order or decision in a contested case is entitled to judicial review as provided in article 6, chapter 29A of the Code. However, this does not prevent other means of review, redress or relief provided by law.~~

~~61.2 Proceedings for judicial review must be instituted by filing a petition, at the election of the petitioner, in either the Circuit Court of Kanawha County, West Virginia, or in the Circuit Court of the county of this State in which the petitioner, or any one of the petitioners, resides or does business, within 30 days after the date upon which the party received notice of the final order or decision of the Secretary. A copy of the petition~~

~~must be served upon the Secretary and all other parties of record by registered or certified mail. The petition must state whether the appeal is taken on questions of law or questions of fact, or on both questions of law and questions of fact.~~

~~61.3 No appeal bond is required to effect any appeal under this section.~~

~~61.4 The filing of the petition will not stay enforcement of the Secretary's order or decision, or act as a supersedeas to the order or decision. The Secretary may stay the enforcement, and the appellant, at any time after the filing of the petition for judicial review, may apply to the Circuit Court for a stay of, or supersedeas to, the final order or decision. While the appeal is pending before the court, the court may grant a stay or supersedeas upon such terms as the court deems proper.~~

~~61.5 Within 15 days after the Secretary receives a copy of the petition, or within any further time allowed by the court, the Secretary must transmit to the Circuit Court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the Secretary in connection with the case, and a statement of matters officially noted. By stipulation of all parties to the review proceeding, the record may be shortened.~~

~~61.6 The expense of preparing such record will be taxed as a part of the costs of the appeal. The appellant must provide security for costs satisfactory to the court. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved.~~

~~61.7 Upon written demand by any party to the appeal, the Secretary must furnish, at the cost of the party requesting same, a copy of the record. In the event the complete record is not filed with the court within the time provided for in this section, the appellant may apply to the court to have the case docketed, and an order entered directing the Secretary to file the record.~~

~~61.8 Appeals taken on questions of law, fact or both, will be heard upon assignments of error filed in the cause or set out in the briefs of the appellant. Errors not argued by brief may be disregarded by the court. However, the court may consider and decide errors that are not assigned or argued. The court or judge will fix a date and time for the hearing on the petition. The hearing, unless by agreement of the parties, will not be held sooner than 10 days after the filing of the petition. Notice of the hearing date and time must be given promptly to the Secretary.~~

~~61.9 The review will be conducted by the court without a jury and will be upon the record made before the Secretary, except that in cases of alleged irregularities in procedure before the Secretary, not shown in the record, testimony on the alleged irregularities may be taken by the court. The court may hear oral arguments and require written briefs.~~

~~61.10 The court may affirm the order or decision of the Secretary or remand the case for further proceedings. The Court must reverse, vacate or modify the order or decision of the Secretary if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:~~

~~61.10.1 In violation of constitutional or statutory provisions, or~~

~~61.10.2 In excess of the statutory authority or jurisdiction of the agency, or~~

~~61.10.3 Made upon unlawful procedures, or~~

~~61.10.4 Affected by other error of law; or~~

~~61.10.5 Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or~~

~~61.10.6 Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.~~

~~61.11. The judgment of the Circuit Court is final unless reversed, vacated or modified on appeal to the West Virginia Supreme Court of Appeals in accordance with the provisions of article 6, chapter 29A of the Code.~~

~~§119-301-62. Appeal to West Virginia Supreme Court of Appeals:~~

~~Any party adversely affected by the final judgment of the Circuit Court under this chapter may seek review thereof by appeal to the Supreme Court of Appeals of this State, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally.~~

~~§119-301-64. Service of process on nonresident telemarketers:~~

~~64.1 Any nonresident person, except a nonresident corporation authorized to do business in the State of West Virginia pursuant to chapter 31 of the Code, who directs telemarketing solicitations to persons residing in this State is conclusively presumed in section 46A-6F-703 of the Code to have appointed the Secretary of Tax and Revenue as his, her or its attorney-in-fact with authority to accept service of notice and process in any action or proceeding brought against him, her, or it, arising out of a consumer credit sale, consumer lease or consumer loan. No act of a nonresident person appointing the Secretary as his, her, or its, attorney-in-fact is necessary.~~

~~64.1.1 If the nonresident person is a nonresident corporation that has a certificate of authority from the West Virginia Secretary of State authorizing R to do business in this State, the Secretary of State is the nonresident corporation's statutory attorney-in-fact, not the Secretary of Tax and Revenue.~~

~~64.2 A person is considered to be a nonresident person if he, she, or it, is a nonresident at the time the service of notice or process is sought.~~

~~64.3 An original of the process or notice must be served on the Secretary as statutory attorney-in-fact for the nonresident telemarketer along with two copies for each defendant and a fee of \$15 for each defendant to be served. The addresses for service on the Secretary are:~~

~~W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
P.O. Box 963 Charleston, WV 25324-0963~~

~~W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East Charleston, WV 25305-0842~~

~~64.4 Immediately after being served with or accepting any process or notice for a nonresident person who directs telemarketing solicitations to persons residing in this state, the Secretary must file in his or her office a copy of the process or notice, with a note thereon endorsed of the time of service or acceptance, as the case may be. The Secretary must then transmit one copy of the process or notice by registered or certified mail, return receipt requested, to the defendant at his address, which address must be stated in the process or notice.~~

~~64.4.1 The return receipt must be signed by the nonresident person, or by an agent or employee of such person if a corporation, limited liability company, professional limited liability company or other business entity.~~

~~64.5 If the process or notice sent by registered or certified mail by the Secretary is refused by the addressee and the registered or certified mail is returned to the Secretary bearing the stamp of the U.S. Postal Service showing that delivery was refused, the return receipt for registered or certified mail must be attached to the original process or notice and filed in the clerk's office of the court from which the process or notice was issued.~~

~~64.6 No process or notice may be served on the Secretary or accepted by the Secretary fewer than 10 days before the return date of the process or notice.~~

~~64.7 The provisions for service of process or notice provided in section 46A-6F703 of the Code are cumulative and are not to be construed as a bar to the plaintiff in any action from having process or notice in the action served in any other mode and manner provided by law.~~

~~Part V Definitions~~

~~§ 119-301-71. Definitions - General rules.~~

~~71.1 General. -- The definitions set forth in sections 101 through 114, article 6F, chapter 46A of the Code apply with full force and effect to all provisions and sections of this rule. Terms not defined in this rule or in article 6F, chapter 46A of the Code are construed in accordance with general principles of West Virginia law.~~

~~71.2 Singular and plural. -- A word importing the singular number only may be applied to several persons or things, as well as to one person or thing; a word importing the plural number only may be applied to one person or thing as well as to several; and a word importing the masculine gender only may be applied to females as well as males.~~

~~71.3 Specific terms defined. -- For purposes of this rule, the words or terms defined in following~~

~~subsection of this rule have the meanings ascribed to them. These definitions apply unless a different meaning is clearly required by the context in which the word or term is used in this rule.~~

~~71.4 Advertisement means the publication, dissemination or circulation of any matter, oral or written, including labeling, which tends to induce, directly or indirectly, any person to enter into any obligation, sign any contract, or acquire any title or interest in any goods or services and includes every word device to disguise any form of business solicitation by using such terms as "renewal," "invoice," "bill," "statement" or "reminder," to create an impression of existing obligation when there is none, or other language to mislead any person in relation to any sought-after commercial transaction.~~

~~71.5 Affiliate, when used in relation to a person, means a business entity including a sole proprietorship that is owned by, operated by, or under common control with another business entity or other person.~~

~~71.6 Agreement means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. A "consumer credit agreement" is an agreement where credit is granted.~~

~~71.7 Agriculture means the production of food, fiber and woodland products, by means of cultivation, tillage of the soil and by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, and the practice of forestry, silviculture, horticulture, or any other plant or animal production and all farm practices related, usual or incidental thereto, including the storage, packing, shipping and marketing, but not including any manufacturing, milling or processing of such products by other than the producer thereof.~~

~~71.8 Agricultural business means not less than five acres of land and the improvements thereupon, used or usable in the production of food, fiber or woodland products of an annual value of one thousand dollars, or more, by the conduct of the business of agriculture.~~

~~71.9 Agricultural purpose means a purpose related to the production, harvest, exhibition, marketing, transportation, processing or manufacture of agricultural products by a natural person who cultivates, plants, propagates or nurtures the agricultural products. "Agricultural products" includes agricultural, horticultural, viticultural and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.~~

~~71.10 Automatic dialing-announcing device includes any user terminal equipment that when connected to a telephone line can:~~

~~71.10.1 Dial, with or without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator; or~~

~~71.10.2 Disseminate a recorded message to the telephone number called, either with or without manual assistance.~~

~~71.11 Automated dialing machine includes, but is not limited to, any user terminal equipment that when connected to a telephone line can:~~

~~71.11.1 Dial, with or without manual assistance, telephone numbers; or~~

~~71.11.2 Disseminate a recorded message to the telephone number called, either with or without manual assistance. (Based on Missouri Code § 407.725.)~~

~~71.12 Bank and banking institution mean a corporation or association chartered to conduct a banking business under the laws of the United States or any State, territory, district or possession thereof, which is authorized in West Virginia to accept deposits that the depositor has a legal right to withdraw on demand and is authorized to engage in the business of commercial lending, and meets the criteria set forth in Section 2(c) of the Bank Holding Company Act, as amended, 12 U.S.C. § 1841 (c). Bank and banking institution embrace and include a savings bank, savings and loan association, trust company or an institution combining banking and trust company facilities, functions and services so chartered or authorized to conduct such business in this state.~~

~~71.13 Banking business means the functions, services and activities contained, detailed and embraced in sections 31A-4-13 and 31A-4-14 of the Code, and as elsewhere defined by law.~~

~~71.14 Cardholder means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.~~

~~71.15 Communication means a written or oral notification or advertisement transmitted from a telemarketer to a consumer by any means.~~

~~71.16 Consumer telephone call includes a call made by a telemarketer to the residence of a consumer for: (a) the purpose of soliciting the sale of any consumer good or service to the person called; (b) the purpose of soliciting an extension of credit for consumer goods or services to the person called; or (c) the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services to the person called or an extension of credit for that purpose.~~

~~71.17 Consumer or purchaser means a person who is solicited to become or does become obligated to pay for consumer goods or services offered by a telemarketer through telemarketing.~~

~~71.18 Consumer goods or services means:~~

~~71.18.1 Any property or services offered or sold to a natural person primarily for personal, family, household or agricultural purposes;~~

~~71.18.2 Any property or service offered or sold for the purpose of providing a profit or investment opportunity; or~~

~~71.18.3 Any property intended to be attached to or installed in any real property, without regard to whether it is so attached or installed, as well as timeshare estates and licenses, resort and campground memberships, and any services related to such property.~~

~~71.19 "Consumer Protection Division" means the Consumer Protection Division of the West Virginia Office of the Attorney General.~~

~~71.20 Corporation:~~

~~71.20.1 Domestic corporation means any corporation organized under the laws of West Virginia and certain corporations organized under the laws of the State of Virginia before June 20, 1863. Every other corporation is a foreign corporation.~~

~~71.20.2 Foreign corporation means any corporation that is not a domestic corporation.~~

~~71.20.3 "Nonprofit corporation" means a nonprofit corporation as defined by section 31-1-6 of the Code.~~

~~71.21 Credit means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.~~

~~71.22 Credit card means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor or other services on credit.~~

~~71.23 Credit services organization includes any person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide, any of the following services:~~

~~71.23.1 Improving a buyer's credit record, history or rating;~~

~~71.23.2 Obtaining an extension of credit for a buyer, or~~

~~71.23.3 Providing advice or assistance to a buyer with regard to paragraph 17.1 or 17.2.~~

~~71.24 Delegate in the phrase "or his or her delegate", when used in reference to the Secretary, means any officer or employee of the Department of Tax and Revenue duly authorized by the Secretary directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article 6F, chapter 6F of the Code or this rule.~~

~~71.25 Doing business in this State means making telemarketing solicitation of prospective purchasers from locations in this State, or making telemarketing solicitations of prospective purchasers who are located in this State from any location, whether with in or without this State.~~

~~71.26 Financial organization means a person which:~~

~~71.26.1 Is organized, chartered or holding an authorization certificate under the laws of this State or another State of the United States which authorizes the organization to make consumer loans; and~~

~~71.26.2 Is subject to supervision and examination with respect to such loans by an official or agency of this State or of the United States.~~

~~71.27 Goods includes goods not in existence at the time the transaction is entered into and gift and chattel certificates, but excludes money, chattel paper, documents of title and other instruments.~~

~~71.28 *Home solicitation sale* means a consumer credit sale in excess of twenty-five dollars in which the buyer receives a solicitation of the sale at a place other than the seller's business establishment at a fixed location and the buyer's agreement or offer to purchase is thereby given to the seller or a person acting for the seller. The term does not include a sale made pursuant to a preexisting open-end credit account with the seller in existence for at least three months prior to the transaction, a sale made pursuant to prior negotiations between the parties at the seller's business establishment at a fixed location, a sale of motor vehicles, mobile homes or farm equipment or a sale which may be rescinded under the federal Truth in Lending Act (being Title I of the federal Consumer Credit Protection Act). A sale which would be a home solicitation sale if credit were extended by the seller is a home solicitation sale although the goods or services are paid for, in whole or in part, by a consumer loan in which the creditor is subject to claims and defenses arising from the sale.~~

~~71.29 *Includes and including* when used in a definition contained in this rule is not be deemed to exclude other things otherwise within the meaning of the term being defined:~~

~~71.30 *Individual* means a single human being and does not mean a firm, association of individuals, corporation, partnership, joint venture, sole proprietorship, or any other entity.~~

~~71.31 *Investment opportunity* means anything tangible or intangible, that is offered for sale, sold or traded based, wholly or in part, on representations, either express or implied, about past, present or future income, profit or appreciation.~~

~~71.32 *Limited liability company* means a limited liability company organized under article 1, chapter 31 B of the Code, a predecessor law, or comparable law of another jurisdiction:~~

~~71.32.1 *Foreign limited liability company* means an unincorporated entity organized under laws other than the laws of this State which afford limited liability to its owners comparable to the liability under section 31 B-3-303 of the Code:~~

~~71.32.2 *Professional limited liability company* means a limited liability company organized under article 13, chapter 31 B of this Code for the purpose of rendering a professional service:~~

~~71.33 *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services:~~

~~71.34 *Partnership and partner:*~~

~~71.34.1 *Partnership* includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation or venture is carried on, and which is not a trust or estate, a corporation or a sole proprietorship or an unincorporated organization which under Section 761 of the Internal Revenue Code of 1986, as amended, and is not treated as a partnership for the taxable year for federal income tax purposes:~~

~~71.34.2 *Partner* includes a member in such a syndicate, group, pool, joint venture or other unincorporated organization that is a partnership:~~

~~71.34.3 *Limited partnership* means a limited partnership created under article nine, chapter of the Code, a predecessor law, or comparable law of another jurisdiction:~~

~~71.34.4 Limited partner means a limited partner in a limited partnership:~~

~~71.35 Parent and subsidiary corporations. A corporation which owns on average during the taxable year, that begins or ends within the telemarketer's registration year under this rule, more than fifty percent of the stock of all classes of another corporation is defined to be the parent corporation and the corporation which is so owned by the parent is defined to be a subsidiary corporation.~~

~~71.36 Person includes any individual, group of individuals, firm, association, corporation, partnership, joint venture, sole proprietorship, or any other business entity:~~

~~71.36.1 Person does not include a State agency or public corporation. Notwithstanding the definition in this section, the word "person" in a statute or ordinance, in the absence of an express provision to the contrary, does not include a state agency or a public corporation. City of Charleston v. Southeastern Construction Co., 134 W.Va. 666, 64 S.E.2d 676 (1950).~~

~~71.37 Person related to another person means:~~

~~71.37.1 With respect to an individual:~~

~~71.37.1.1 The spouse of the individual;~~

~~71.37.1.2 A brother, brother-in-law, sister or sister-in-law of the individual;~~

~~71.37.1.3 An ancestor or lineal descendant of the individual or his spouse; and~~

~~71.37.1.4 Any other relative, by blood or marriage, of the individual or his spouse who shares the same home with the individual:~~

~~71.37.2 With respect to an organization:~~

~~71.37.2.1 A person directly or indirectly controlling, controlled by or under common control with the organization;~~

~~71.37.2.2 An officer or director of the organization or a person performing similar functions with respect to the organization or to a person related to the organization;~~

~~71.37.2.3 The spouse of a person related to the organization, and~~

~~71.37.2.4 A relative by blood or marriage of a person related to the organization who shares the same home with him:~~

~~71.38 Principal means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor of a sole proprietorship, a trustee of a trust, an officer of a limited liability company a professional limited liability company, or any other individual with similar supervisory functions with~~

respect to any person:

~~71.39 "Professional service" means the services rendered by the following professions: Attorneys-at-law under article 2, chapter 30 of the Code, physicians and podiatrists licensed under article 3, chapter 30 of the Code, dentists licensed under article 4, chapter 30 of the Code, optometrists licensed under article 8, chapter 30 of the Code, accountants licensed under article 9, chapter 30 of the Code, veterinarians licensed under article 10, chapter 30 of the Code, architects licensed under article 12, chapter 30 of the Code, engineers licensed under article 13, chapter 30 of the Code, chiropractors licensed under article 16, chapter 30 of the Code and psychologists licensed under article 21, chapter 30 of the Code.~~

~~71.40 Purchaser or prospective purchaser means a person who is solicited to become or does become obligated to a telemarketer.~~

~~71.41 Registration year means a period of twelve calendar months beginning on the day the certificate of registration is issued and expiring on the one-year anniversary.~~

~~71.42 Registrant means any person who is issued a telemarketing registration certificate under article 6F, chapter 46A of the Code and this rule that has not expired, been revoked or surrendered.~~

~~71.43 Sale includes any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit.~~

~~71.44 Sale of goods includes any agreement in the form of a bailment or lease of goods if the bailee or lessee agrees to pay as compensation of use a sum substantially equivalent to or in excess of the aggregate value of the goods involved and it is agreed that the bailee or lessee will become, or for no other or a minimal consideration has the option to become, the owner of the goods upon full compliance with his obligations under the agreement.~~

~~71.45 Sale of an interest in land includes a lease in which the lessee has an option to purchase the interest and all or a substantial part of the rental or other payments previously made by him are applied to the purchase price.~~

~~71.46 Sale of services means furnishing or agreeing to furnish services and includes making arrangements to have services furnished by another.~~

~~71.47 Salesperson means any person who is:~~

~~71.47.1 Employed or authorized by the seller to sell, or attempt to sell, goods or services by telephone;~~

~~71.47.2 Retained by the seller to provide consulting services relating to the management or operation of the seller's business; or~~

~~71.47.3 Communicates on behalf of the seller with a consumer.~~

~~71.48 Salesperson means any individual employed, appointed or authorized by a telemarketer, whether~~

~~referred to by the telemarketer as an agent, representative, or independent contractor, who attempts to solicit or solicits a sale of consumer goods or services on behalf of the telemarketer. The principals of a telemarketer are themselves sales persons if they solicit sales on behalf of the telemarketer.~~

~~71.49 Secretary means the West Virginia Secretary of Tax and Revenue and includes his or her delegate.~~

~~71.50 Services includes: (a) Work, labor and other personal services; (b) privileges with respect to transportation, use of vehicles, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and (c) insurance.~~

~~71.51 "Sign" means to identify a record by means of a signature, mark or other symbol, with intent to authenticate it.~~

~~71.52 State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, and any foreign country or political subdivision thereof.~~

~~71.53 Telemarketing solicitation~~

~~71.53.1 Telemarketing solicitation means and includes any communication between a telemarketer and a prospective purchaser for the purpose of selling or attempting to sell the purchaser any consumer goods or services, if it is intended by the telemarketer that an agreement to purchase the consumer goods or services will be made after any of the following event occur:~~

~~71.53.1.1 The telemarketer makes an unsolicited telephone call to a consumer, attempting to sell consumer goods or services to the consumer, when the consumer has not previously expressed an interest to the telemarketer in purchasing, investing in, or obtaining information regarding, the consumer goods or services offered by the telemarketer; or~~

~~71.53.1.2 The telemarketer communicates with a consumer by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at some time during the course of one or more subsequent telephone communications with the consumer.~~

~~71.53.2 Telemarketing solicitation does not include:~~

~~71.53.2.1 Telephone calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer.~~

~~71.53.2.2 Telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations, unless the call is initiated by the customer in response to an advertisement relating to investment opportunities, goods or services described below, or advertisements that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit.~~

~~71.54 Telemarketer, except as otherwise provided in this subdivision, means any person who initiates or gives telephone calls to or from a consumer in this State for the purpose of making a telemarketing solicitation~~

~~as defined in this section. Telemarketer includes, but is not limited to, owners, operators, officers, directors, partners, or other individuals engaged in the management activities of a business entity that is subject to registration pursuant to section 46A-6F-301 of this Code and this rule:~~

~~71.54.1 A telemarketer may initiate or receive a communication that constitutes a telemarketing solicitation on his own behalf, through a salesperson, or through an automated dialing machine:~~

~~71.54.2 Telemarketer does not include:~~

~~71.54.2.1 Any person or entity exempt from registration pursuant to sections 46A-6F-201 through 220 of the Code and this rule:~~

~~71.54.2.2 A salesperson as defined in this section:~~

~~71.55 Telemarketer in good standing means a telemarketer who, during the previous two years has continually been engaged in the business of telemarketing and who has not been convicted, or pled guilty or nolo contendere to racketeering, embezzlement, fraudulent conversion, misappropriation of property or any violations of state or federal securities laws, a theft offense, or any consumer protection law or telemarketing law:~~

~~71.56 The Code means the Code of West Virginia of 1931, as amended:~~

~~71.57 This State means the State of West Virginia:~~

~~71.58 Unsolicited consumer telephone call means a consumer telephone call other than a call made: (a) in response to an express request of the person called; (b) primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of the call; or (c) to any person with whom the telemarketer has an existing business relationship:~~

~~71.59 Warranty means express and implied warranties described and defined in sections 46-2-313, 46-2-314 and 46-2-315 of the Code and expressions or actions of a merchant which assure the consumer that the goods have described qualities or will perform in a described manner:~~

~~71.60 Written or in writing include any representation of words, letters or figures, whether by printing, engraving, writing or otherwise. When the writing must be signed, the signature of the person must be in his or her own proper handwriting, or his or her mark, attested, proved or acknowledged. An electronic signature satisfies this signature requirement if the electronic signature meets the requirements of subsection 39-5-3(a) of the Code:~~

TITLE 119
EMERGENCY LEGISLATIVE RULE
SECRETARY OF TAX AND REVENUE

Series 301
REGISTRATION OF TELEMARKETERS

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Part I. General Information

119-301-1. General.

1.1. **Scope.** -- This emergency rule clarifies, explains and implements provisions of article 6F, chapter 46A of the Code that pertain to registration of telemarketers, bonding of telemarketers, penalties for failure to register or meet security requirements, and record keeping requirements.

1.2. **Authority.** -- The authority for this rule is W. Va. Code §§ 29A-3-15, 46A-6F-301 and 46A-6F-303.

1.3. **Filing Date.** - September ____, 1998.

1.4. **Effective Date.** - This emergency rule takes effect on the earlier of the day the Secretary of State approves the emergency rule, or the 42nd day after this emergency rule is filed in the West Virginia State Register.

1.5. **Official Citation.** -The official citation of this rule is title 119, series 301 of the West Virginia Code of State Rules. Sections of this rule may be cited as 119 W.Va.C.S.R. § ____, or 119 C.S.R. § ____.

§ 119-301-2. Statement of facts and circumstances constituting emergency.

2.1 Section 29A-3-15 of the Code permits promulgation of an emergency rule when an emergency exists. Subsection 29A-3-15(f) provides that an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest.

2.2 The West Virginia Legislature enacted Committee Substitute for House Bill 4267 on March 14, 1998. This bill takes effect June 12, 1998. Three requirements of this enactment relevant here are:

2.2.1 After June 12, 1998, no person may act as a telemarketer without first registering with the Secretary of Tax and Revenue.

2.2.2 A person who registers with the Secretary as a telemarketer must pay the application fee as established by the Secretary in a legislative rule, W. Va. Code § 46A-6F-301 (b).

2.2.3 A civil administrative penalty not to exceed \$5,000 is imposed for failure to comply with the requirements of sections 46A-6F-301 through 304 of the Code. Criteria for imposing and mitigating this penalty are to be established by promulgation of a legislative rule, W. Va. Code § 46A-6F-303(a).

2.3 Unless an emergency rule is promulgated, the Secretary of Tax and Revenue will not be able to implement or apply the provisions of W. Va. Code §§ 46A-6F-301 through 304 until after the Legislature authorizes promulgation of the similar proposed legislative rule during the 1999 Regular Session of the legislature and that rule takes effect as provided in W. Va. Code § 29A-3-13.

§ 119-301-3. Rules of Construction.

3.1 **General.** -- Without limiting the scope of any provision of article 6F, chapter 46A of the Code, or any other rule or law, this rule is to be liberally construed and applied to promote the general purposes and policies of article 6F, chapter 46A of the Code.

3.2 **Non-inclusive.** - This rule is not intended to cover all practices that violate article 6F, chapter 46A of the Code. Persons who believe they are the subject of consumer fraud, an abusive act or other act of a telemarketer that violates article 6F, chapter 46A of this Code should contact the Consumer Protection Division of the West Virginia Attorney General's Office by calling (304) 558-8986 or by writing to:

W. Va. Attorney General's Office
Consumer Protection Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301-2617

3.3 **Non-exclusive.** - This rule is in addition to, and does not affect, any other rights or obligations that may exist by statute or judicial decision.

3.4 **Preceding, succeeding or following.** - The words "preceding," "succeeding" or "following" used in reference to any section, subsection, subdivision or other part of this rule means next preceding, next succeeding or next following that in which such reference is made, unless a different interpretation be required by the context in which the term is used.

3.5 **Definitions.** -The definitions set forth in sections 101 through 114, article 6F, chapter 46A of the Code apply with full force and effect to all provisions and sections of this rule. Terms not defined in this rule or in article 6F, chapter 46A of the Code are to be construed in accordance with general principles of West Virginia law.

3.6 **Singular and plural.** - A word importing the singular number only may be applied to several persons or things, as well as to one person or thing; a word importing the plural number only may be applied to one person or thing as well as to several; and a word importing the masculine gender only may be applied to females as well as males.

3.7 **Exemptions.** - All exemptions, and all limitations and provisions thereof, of sections 201 through 220, article 6F of the Code apply with full force and effect to all provisions of this rule.

3.8 **Severability.** -The provisions of every section of this rule, whether adopted before or subsequent to the effective date of this rule, are severable from one another. If any provision of this rule, or any provision of article 6F, chapter 46A of the Code implemented, explained or clarified in this rule, is stayed or is held to be unconstitutional or void by a court of competent jurisdiction, the remaining provisions of this rule remain valid, unless:

3.8.1 The court finds that the valid provisions of article 6F, chapter 46A of the Code, or of this rule, are so essentially and inseparably connected with, and so dependent upon, the stayed or the unconstitutional void provision that the court cannot presume the Legislature would have enacted the remaining valid

provisions of article 6F, chapter 46A of the Code, or authorized this rule, without the stayed, unconstitutional or void provision(s).

3.8.2 The court finds that the remaining valid provisions of article 6F, chapter 46A of the Code, or of this rule, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 119-301-4. Scope and application of this rule.

4.1 Part II of this rule establishes application and renewal fees for the registration of telemarketers in accordance with section 46A-6F-301(b) of the Code. Part II also establishes regulations necessary for the Department of Tax and Revenue to administer the registration and security requirements of article 6F, chapter 46A of the Code. Part II applies to all telemarketers who are required to register or post security, or both, as the case may be, under the provisions of article 6F, chapter 46A of the Code.

4.2 Part III of this rule establishes the factors to be taken into account by the Department of Tax and Revenue in assessing civil administrative penalties under section 46A-6F-303 of the Code. Part III also establishes regulations necessary for the administration and assessing of such penalties by the Department. Part III applies to all persons against whom a civil administrative penalty may be assessed under section 46A-6F-303.

Part II. Registration of Telemarketers

§ 119-301-5. Registration of telemarketers required.

5.1 **Registration required.** -- Except as otherwise provided in this rule, no sole proprietor or business entity may act as a telemarketer after June 11, 1998, without first registering with the Secretary of Tax and Revenue.

5.2 **Initial application.** - Except as provided in subsection 5.3, a telemarketer must file an initial application for registration with the Secretary at least 60 days before the telemarketer: (a) begins offering consumer goods or services to West Virginia consumers, (b) begins offering consumer goods or services to consumers in other States from a physical location in this State, or (c) begins offering for sale consumer goods or services through any medium to West Virginia consumers, or from a physical location in this State to consumers wherever located.

5.3 Transition rule.

5.3.1 Prior to June 12, 1998, telemarketers were not required to obtain a telemarketing registration certificate from the State of West Virginia. Beginning June 12, 1998 no person may act as a telemarketer without first registering with the Secretary of Tax and Revenue. The Legislature imposed a registration fee to accompany each application for a telemarketing registration certificate but provided for the amount of the fee to be set by the Secretary in a legislative rule. The authority to set fees and implement this registration program takes effect June 12, 1998. This emergency rule was filed in the State Register on June 12,

1998, and takes effect on the day the Secretary of State approves its filing, or the 42nd day after it is filed in the State Register in the event the Secretary of State fails to act before that day.

5.3.2 To minimize disruption of a telemarketer's business and to avoid inconvenience to West Virginia consumers, the Secretary suspends until September 30, 1998 enforcement of the prohibition against engaging in telemarketing activity without a West Virginia Telemarketing Registration Certificate.

5.3.3 To facilitate compliance with this new registration requirement, the Secretary suspends until October 30, 1998, compliance with the requirement that an application for registration be submitted at least 60 days before the applicant begins offering consumer goods or services, or offering for sale consumer goods or services through any medium.

5.4 **Renewal of registration.** - After initial application for registration as a telemarketer is filed and a telemarketing registration certificate is issued by the Secretary, the registrant must annually file an application for renewal until the telemarketer ceases doing telemarketing activity in this State.

5.4.1 A telemarketer is deemed to be doing telemarketing activity in this State if the telemarketer solicits prospective consumers from a location(s) in this State, or solicits prospective consumers located in this State from an out-of-state location(s).

5.4.2 An application for renewal of registration must be filed 60 days before expiration of the current West Virginia telemarketing registration certificate.

5.5 **Certificate not to validate illegal activity.** -- Nothing in this rule, including, but not limited to, any payment of the registration fee imposed or issuance of any telemarketing registration certificate under the provisions of this rule, may be deemed to legalize any act, business activity or transaction which otherwise may be illegal or conducted in violation of law; or to exempt any person from any civil or criminal penalty prescribed for such illegal act or violation.

§ 119-301-6. Application forms and content.

6.1 **Application forms.** - Application for registration as a telemarketer and application for renewal of registration must be made in forms prescribed by the Secretary. These forms will require the applicant to provide the information required by subsection 46A-6F-301 (c) of the Code and other information reasonably required by the Secretary to administer sections 46A-6F-301 through 303 of the Code.

6.2 **Signature.** - Every application for a telemarketing registration certificate and every application for renewal of a telemarketing certificate must bear the signature, or the digital signature, of a responsible principal of the telemarketer.

6.3 **Verification.** - Every application for a telemarketing registration certificate or for renewal of a telemarketing certificate must be verified by a declaration signed by a responsible principal that it is made under penalty of perjury. This declaration must specify the date and location of the signing.

6.4 Registration on Internet. - An application filed over the Internet must be validated and authenticated either by the personal identification number entered and verified by the applicant or by digital signature.

§ 119-301-7. Place and method of filing of applications.

7.1 Place of filing. - The initial application for registration form and all applications for renewal required by article 6F, chapter 46A of the Code must be filed by hand delivery or mailing to the following address except as provided in subsection 7.2:

W. Va. Secretary of Tax and Revenue
Office of Telemarketer Registration
P.O. Box 963 Charleston
WV 25324-0963

W. Va. Secretary of Tax and Revenue
Office of Telemarketer Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

7.2 Registration over Internet. -- To facilitate compliance, the Secretary established on a secure server a telemarketing registration web page. At this site, the telemarketer may complete the required application for registration, validate and authenticate the application, pay the registration fee by credit card, and specify how the security requirement will be satisfied. When this is done, the applicant will be issued an electronic registration confirmation. This confirmation will serve as a temporary registration certificate, which is valid for a period of 30 days from date of issuance unless it is revoked by the Secretary or lapses due to failure to timely pay the registration fee or timely furnish the required security.

7.2.1 Applicants who register over the Internet will have 30 days after the date the temporary registration certificate is issued within which to submit the required security and any other papers or information necessary to complete registration.

7.3 Transition rule. - At present, the telemarketing registration web page will not accept a credit card number for payment of the registration fee or a digital signature. A telemarketer who registers at the telemarketing registration web page must print a copy of the completed registration form. After it is signed by a principal of the registrant, it must be filed with the Secretary along with payment of the registration fee and the required security. The personal identification number of the applicant must appear on (a) the hard copy of the registration form, (b) the remittance of the registration fee, e.g., a check, and (c) the security required by section 46A-6F-302. Once a credit card may be used to pay the registration fee, a telemarketer registering at the web page must pay the registration fee by credit card and may not pay the registration fee at the same time the required security is provided.

§ 119-301-8. Registration fees.

8.1 **General.** - The Secretary may charge reasonable application and renewal fees. These fees are deposited in the *Telemarketer Registration Fund* created in the State Treasury and used to administer and enforce the registration requirements of article 6F, chapter 46A of the Code and this rule.

8.2 **Fees.** --The Secretary hereby establishes the following fees:

8.2.1 **Initial application fee** - \$250.00

8.2.2 **Renewal fee** - \$250.00

8.2.3 **Discount.** - If the telemarketer registers at the Secretary's web site, or renews its registration at the Secretary's web site, the applicant will be allowed a \$50 discount.

8.3 **Refund of fee.**

8.3.1 No refund will be given, or credit established, for all or a portion of the registration fee if during the registration year the registrant: (a) goes out of business, (b) stops doing telemarketing activity in this State, or (c) has its telemarketing registration certificate revoked or suspended.

8.3.2 No refund will be given, or credit established, for all or a portion of the registration fee when the claim is for any other reason, except that a refund will be made if payment of the fee, or any portion of the fee, was erroneous at the time it was paid.

§ 119-301-9. Payment of registration fee.

9.1 The registration fee and other amounts payable under this rule may be paid in currency, or by check, bank draft, certified check, cashier's check, post-office money order, or express money order payable to the Secretary of Tax and Revenue, or by credit card when the person applies for a telemarketing registration certificate, or applies for renewal of its certificate, at the Internet web page maintained for that purpose by the Secretary.

9.2 If a check or money order tendered in payment of the registration fee or any other amounts payable under this rule is not duly paid, the person by whom the check or money order was tendered remains liable for payment of the face amount of the check or money order plus all bad check charges or other similar charges imposed on the Secretary, the Department of Tax and Revenue, or the State of West Virginia directly attributable to the check or money order not duly paid.

§ 119-301-10. Security requirement.

10.1 **Bond required.** - Except as otherwise provided in this rule, an application for registration or renewal of registration must be accompanied by a continuing surety bond executed by a corporation licensed to sell fidelity and surety insurance in the State of West Virginia.

10.2 Amount and form. - The amount and form of bond must be approved by the Secretary before a certificate of registration is issued.

10.2.1 A separate bond in the amount of \$100,000 may be filed for each telemarketing location, including each principal office and each branch office thereof, engaged in telemarketing activity in West Virginia, or a single bond in the amount of \$500,000 may be filed for all locations of the telemarketer.

10.2.2 This bond must provide that the telemarketer will pay all damages to this State or a private person resulting from any unlawful act or action by the telemarketer or its agent in connection with the conduct of telemarketing activities.

10.3 Revocation of registration certificate upon loss of security. -- The registration of any telemarketer is void upon termination of the bond of the surety company, or loss of the bond, unless, prior to such termination, a new bond is filed with the Secretary.

10.3.1 Subsection 10.3 does not apply to a *telemarketer in good standing* that is required to register with the Secretary but is exempt from furnishing a corporate surety bond or other security, as provided in section 46A-6F-219 of the Code.

10.4 Cancellation of surety bond. --The surety, for any cause, may cancel the bond upon giving 60-days written notice by certified mail to the telemarketer and to the Secretary. Unless the bond is replaced by that of another surety licensed by this State to sell fidelity and surety insurance, or other adequate security is furnished, before the expiration of the 60-day notice of cancellation, the registration of the telemarketer becomes void on the 61st day.

10.5 Duration of bond. - A surety bond must remain in effect for 36 months after the telemarketing business stops making telemarketing solicitation of West Virginia consumers.

10.6 Other allowable security.

10.6.1 Any business required under this rule to file a corporate surety bond with its registration application, may, in lieu of the surety bond, file the following in the same amount as required if a corporate surety bond were filed:

10.6.1.1 An irrevocable letter of credit, in the form prescribed by the Secretary, issued by a financial organization authorized to do business in this State or by a United States bank that is a member of the Federal Reserve System, with provision for automatic annual renewals;

10.6.1.2 A certificate of deposit issued by a State or National bank either in the name of the State of West Virginia, or in the "name of registrant or the State of West Virginia." A certificate of deposit issued in the "name of registrant and the State of West Virginia" will not be accepted as security;

10.6.1.3 Cash, which the Secretary must invest in an interest bearing account; or

10.6.1.4 One or more government bond(s) backed by the full faith and credit of the issuing government entity issued by the United States Department of the Treasury or any State and the bond(s) is issued in the name of the State of West Virginia, or in the "name of registrant or the State of West Virginia." A bond

issued in the "name of registrant and the State of West Virginia" will not be accepted as security.

10.7 Retention of alternative security. -- The Secretary must hold the letter of credit, cash, certificate or deposit or government bond to pay claims made by or on behalf of West Virginia consumers against the registrant for a period of 36 months after the date: (a) the registrant stops doing telemarketing activity in this State, (b) its registration lapses, or (c) its registration is revoked by the Secretary. At the end of the 36-months, any principal and accrued interest not required for payment of claims, will be returned to the registrant.

10.8 The registration of the telemarketer will be treated as lapsed if at any time, during the registration year or for 36 months thereafter the amount of the letter of credit, bond, cash, certificate of deposit or government bond falls below the amount required by this section.

10.9 If the license of any surety to sell fidelity and surety insurance in this State is terminated, all surety bonds given pursuant to section 46A-6F-302 of the Code and this rule upon which the surety company is surety are suspended as of the effective date of the termination of the license of the surety and the registrant must provide replacement security.

10.9.1 Whenever the license of a surety authorizing to transact fidelity and surety insurance in this State is terminated, the Insurance Commissioner must notify the Secretary of the name of the surety and the effective date of the termination.

10.9.2 Upon receipt of notification from the Insurance Commissioner, the Secretary must immediately notify each affected telemarketer of the termination and require that a new corporate surety bond be filed. This notice must be sent by registered or certified mail, return receipt requested, addressed to the telemarketer at his or its principal place of business as shown by the Secretary's records.

10.9.3 Failure of any telemarketer to file (a) a corporate surety bond with new or additional surety, or (b) acceptable alternative security, within 30 days after being advised in writing by the Secretary of the necessity to do so is cause for the Secretary to revoke the telemarketer's registration.

10.10 Action on bond or other security. -- An action may be brought in any court of competent jurisdiction upon the bond or other security by any person to whom the registrant fails to account and pay as set forth in section 46A-6F-302(b) of the Code. The aggregate liability of the surety company to all persons injured by a registrant's violations may not exceed the amount of the bond.

§ 119-301 -11. Time for which registration certificate granted.

11.1 Registration year. - A West Virginia Telemarketing Registration Certificate is for a period of one year beginning with the day the certificate is issued and expiring at 11:59 p.m. eastern time on the day before the beginning of the next registration year, unless it is suspended or revoked by the Secretary or surrendered by the registrant before the end of the registration year.

11.2 If a temporary registration certificate is issued, the one-year registration period begins with the

day the temporary registration certificate is issued by the Secretary.

§ 119-301-12. Timely filing and paying - Delivery in person.

12.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date, under authority of article 6F, chapter 46A of the Code or this rule, is delivered in person on or before the prescribed date to the Secretary of Tax and Revenue or to the Office of Telemarketing Registration, Department of Tax and Revenue, at Charleston, West Virginia, during normal business hours of the Department, it is deemed timely filed.

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East Charleston, WV 25305-0842

12.2 **Normal business hours.** -- Normal business hours are 8:30 a.m. to 4:30 p.m. Monday through Friday unless the day is a legal holiday in this State.

12.3 **Meaning of document.** -- The term "document" as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

12.4 **Last date for filing or payment.** - The last date for timely filing or timely making payment includes any extension of time authorized by law or this rule and any extension of time granted in writing by the Secretary.

§119-301-13. Timely filing and paying - Timely mailing.

13.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of sections 46A-6F-301 through 303 of the Code or this rule is, after the prescribed period or date, delivered by United States mail to the Secretary, then the date of the postmark of the United States Postal Service stamped on the cover in which the document or payment is mailed is deemed to be the date of filing or the date of payment, as the case may be, provided the following mailing requirements are met.

13.1.1 The postmark date falls within the prescribed period or on or before the prescribed date for filing (including any extension granted for such filing) of the document, or for making the payment (including any extension granted for such payment); and

13.1.2 The document or payment was, within the time prescribed in subdivision 52.3.1, deposited in the United States mail in an envelope or other appropriate wrapper, postage prepaid, addressed as follows:

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
P.O. Box 963
Charleston, WV 25324-0963

or

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

13.2 The term "document," as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

13.3 **Postmarks not made by U.S. Postal Service.** - Subsection 13.1 applies to postmarks not made by the United States Postal Service or a designated private delivery service only to the extent provided in the following subsections or section 14 of this rule (pertaining to delivery by designated private delivery services).

13.3.1 If the postmark on the envelope or wrapper is made other than by the United States Postal Service, (a) the postmark so made must bear a date on or before the last date, or the last day of the period, prescribed for filing or paying, and (b) the document or payment must be received by the Secretary not later than the time when a document or payment contained in an envelope or other appropriate wrapper which is properly dressed- and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Post Office on the last date, or the last day of the period, prescribed for filing the document or making payment. However, if the document or payment is received after the time when a document or payment so mailed and so postmarked by the U.S. Post Office would ordinarily be received, the document or payment will be treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received, if the person who is required to file the document or make payment establishes (i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the U.S. Post Office on or before the last date, or the last day of the period, prescribed for filing the document, (ii) that the delay in receiving the document was due to a delay in the transmission of the mail, and (c) the cause of the delay.

13.3.2 If the envelope has a postmark made by the United States Postal Service in addition to the postmark not so made, the postmark that was not made by the United States Postal Service is disregarded, and whether the envelope was mailed in accordance with this section 13.3.1 is determined solely by the postmark made by the United States Postal Service.

13.4 **Registered and certified mailing.** - For purposes of this section:

13.4.1 If any document or payment is sent by United States registered mail, the date of registration is deemed the postmark date.

13.4.2 If any document or payment is sent by United States certified mail and the sender's receipt

is postmarked by the United States Postal Service employee to whom the document is presented, the date of the postmark on the receipt is deemed to be the postmark date of the document or payment.

§119-301-14. Timely mailing - Delivery by designated private delivery service.

14.1 If any document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of sections 46A-6F-301 through 303 of the Code or this rule is, after the prescribed period or date, delivered by a designated private delivery service ("PDS") to the Secretary, then the date recorded by the private PDS or marked, by the private PDS, on the cover in which document or payment is delivered is deemed to be the postmark date and the date of delivery or date of payment, as the case may be, provided the following requirements are met:

14.1.1 The postmark date falls within the prescribed period or on or before the prescribed date for filing (including any extension granted for such filing) of the document, or for making the payment (including any extension granted for such payment); and

14.1.2 The document or payment was, within the time prescribed in subdivision 14.1, delivered to a designated PDS in an envelope or other appropriate wrapper, postage prepaid, addressed as follows:

W. Va. Secretary of Tax and Revenue
Office of Telemarketing Registration
Building 1, Room W-300
1900 Kanawha Boulevard, East
Charleston, WV 25305-0842

14.2 The term "document," as used in this section, means any application, security, claim or other document required to be filed within a prescribed time or on or before a prescribed date.

14.3 The term "designated delivery service" means any delivery service provided by a trade or business if the service is designated as a delivery service by the Internal Revenue Service, or by the Secretary of Tax and Revenue in an administrative notice. Until further notice, the following private companies and their specific service may be used:

14.3.1 Airborne Express - Overnight Air Express Service, Next Afternoon Service, and Second Day Service;

14.3.2 DHL World Express - DHL Same Day Service and DHL USA Overnight;

14.3.3 Federal Express - FedX Priority Overnight, FedX Standard Overnight, and FedX 2 Day;
and

14.3.4 United Parcel Service - UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, and UPS 2 d Day Air A.M.

14.3.5 Airborne, DHL, FedEx, and UPS are not designated with respect to any type of delivery

service not identified above. Consequently, the "timely mailing as timely filing/paying" rule of subsection 14.1 does not apply to any other type of delivery service offered by them.

14.4 Special rule for determining postmark date when a designated PDS delivers the item.

14.4.1 If the date on which the item is given to the designated PDS is recorded electronically to the data base of the PDS, the date recorded in the electronic data base of the designated PDS is treated as the postmark date for purposes of subsection 14.1 of this rule.

14.4.1.1 For items that are delivered after their due dates, there is a presumption that the postmark date is the day that precedes the delivery date by an amount of time that equals the amount of time it would normally take for an item to be delivered under the terms of the specific type of delivery service used (e.g., two days before the actual delivery date for a two day delivery service). This presumption applies to items sent by persons subject to this rule and, in appropriate cases, to items sent by the Secretary.

14.4.1.2 Persons subject to this rule who wish to overcome this presumption will need to provide information that shows that the date recorded in the electronic data base is on or before the due date. For example, this information could be obtained in the form of a written confirmation produced and issued by the designated PDS before the expiration of the period for storing the date recorded in its electronic data base. If persons subject to this rule wish to maintain this type of proof for their records, they should make a timely request to receive this information from the designated PDS before expiration of its data storage period.

14.4.2 If an electronically generated label is applied to the cover of all items delivered by the designated PDS, including those items that already have an airbill attached, the date on which an item is given to designated PDS for delivery is marked on the label. There are two types of labels (which are distinguishable from each other). One type of label is generated and applied to an item by an employee of the designated PDS. The other type of label is generated (using computer software and/or hardware provided by the designated PDS) and applied to an item by a customer. The date that will be treated as the postmark date for purposes of subsection 14.1 of this section is determined under the following rules:

14.4.3 If an item has a label generated and applied by an employee of the designated PDS, the date marked on that label is treated as the postmark date for purposes of subsection 52.3, regardless of whether the item also has a label generated and applied by the customer.

14.4.4 If an item has a label generated and applied by a customer, the date marked on that label is treated as the postmark date for purposes of subsection 54.1, if the item is received by the Secretary within the normal delivery time. (Normal delivery time is one day for FedEx Priority Overnight and FedEx Standard Overnight, or two days for FedEx Way.)

14.4.5 If an item is not delivered within the normal delivery time, the person required to file the document or to make the payment must establish (a) that the item was actually either given to, or picked up by, an employee of the designated PDS on or before the due date and (b) the cause of the delay in delivery of the document or payment.

14.4.6 The information recorded electronically to the data base of designated PDS (in the regular course of its business) can be used to show that the item was actually either given to, or picked up by, an

employee of the designated PDS on or before the due date when (a) an item has a label generated and applied by a customer or (b) an item has a label generated and applied by an employee of the designated PDS, but the date is legible or otherwise unavailable.

14.5 Private delivery service that is not a designated PIDS. - If any person subject to this rule uses a business that provides mailing services similar to those of a designated PIDS, but the business itself is not a designated PDS, the person should be aware that the "timely mailing as timely filing/paying" rule in subsection 54.1 of this section will not apply unless the item is actually given to, or picked up by, a designated PDS on or before the due date. The person should take appropriate precautions to ensure that the item will be given to, or picked up by, a designated PDS on or before the due date.

§119-301-15. Time for performance when last day falls on Saturday, Sunday or legal holiday in this State.

When the last day prescribed in sections 46A-6F-301 through 303 of the Code, or this rule, falls on a Saturday, Sunday or a legal holiday in this State, performance of the act is considered timely if it is performed on the next succeeding day that is not a Saturday, Sunday or legal holiday in this State.

**III. Civil Administrative Civil Penalties,
[Present Section 119-301-56 through 119-301-57 have been moved and renumbered to
Section 119-301-17 through 119-301-18]**

§119-301-16. Failure to register or meet security requirement; remedies.

16.1 Any person subject to this rule is subject to imposition of a civil administrative penalty of not more than \$5,000 per violation if the person does any of the following:

16.1.1 Acts as a telemarketer without first registering with the Secretary as required by section 46A-6F-301 of the Code and this rule;

16.1.2 Acts as a telemarketer without first meeting the security requirements set forth in section 46A-6F-302 of the Code and this rule, unless the telemarketer is exempt from the security requirements.

16.1.3 Acts as a telemarketer after failing to maintain a certificate of registration as required by section 46A-6F-301 of the Code;

16.1.4 Acts as a telemarketer without furnishing the security required by section 46A-6F-302 of the Code;

16.1.5 Includes any material information on a registration application, or on a renewal application, that is false or misleading; or

16.1.6 Misrepresents that the telemarketer is registered with the Secretary.

16.2 When determining the amount of penalty to assess, the Secretary must take the following into account:

16.2.1 The seriousness of the violation;

16.2.2 Any good faith efforts of the telemarketer to comply with applicable requirements of article 6F, chapter 46A of the Code and this rule;

16.2.3 Any benefit obtained by person due to the act or omission;

16.2.4 The past history of the telemarketer in filing the initial application for registration and subsequent renewals;

16.2.5 Whether the cause of the delinquency was unavoidable, or was due to negligence or an intentional act of the telemarketer or an agent of the telemarketer;

16.2.6 The opportunity and degree of difficulty to correct erroneous or incomplete information in the initial application or a renewal application;

16.2.7 The cooperativeness and efforts made by the telemarketer or an agent of the telemarketer to correct the erroneous or incomplete information for which the penalty is to be imposed, in whole or in part;

16.2.8 The cost to the Secretary and time involved in investigation and correspondence prior to the time the erroneous or incomplete information is actually corrected;

16.2.9 Any good faith belief by the telemarketer that it was exempt from the requirements of article 6F, chapter 46A of the Code or this rule, or that those requirements were otherwise inapplicable to the telemarketer;

16.2.10 Any lack of actual knowledge by the telemarketer of the requirements of article 6F, chapter 46A of the Code or this rule;

16.2.11 The telemarketer's business reputation and history, if offered by the telemarketer;

16.2.12 The telemarketer's good faith in any other relevant respect;

16.2.13 Any other appropriate factor(s) establish by rule by the Secretary.

16.3 The telemarketer shall be notified by certified mail or personal service of any alleged violation. The notice must include:

16.3.1 A reference to the provision(s) of W. Va. Code §§ 46A-6F-301, 302 and 303 and to any provision(s) of this rule that that the person allegedly violated;

16.3.2 A concise statement of the facts alleged to constitute the violation;

16.3.3 A statement of the amount of penalty sought to be imposed; and

16.3.4 A statement of the alleged violator's right to a hearing if it desires to contest the proposed civil administrative penalty.

16.4 Request for hearing. -- The alleged violator shall have 20 calendar days from receipt of the notice within which to file with the Secretary a written request for a hearing.

16.4.1 If the 20th calendar day falls on a Saturday, Sunday or legal holiday in this State, the written request is timely if it is filed on the next day that is not a Saturday, Sunday or legal holiday in this State.

16.4.2 A written request for a hearing is filed timely when the request is delivered to the Secretary in person, or the request is timely mailed. Sections 13 and 14 of this rule define timely filing for purposes of this rule.

§ 119-301-17. Service.

17.1 Whenever the Secretary or another person is authorized or required to give any notice under this rule, unless a different method of giving such notice is expressly permitted or prescribed, the notice must be given either by personal delivery thereof to the Secretary or person to be notified, or by certified mail, postage prepaid, in an envelope addressed to such agency or person at the last known address of the Secretary or other person.

17.2 Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the Secretary, or by affidavit of any person over eighteen years of age, naming the Secretary or other person to whom the notice was given and specifying the time, place and manner of the service.

§ 119-301-18. Administrative Procedures.

Any contested civil administrative penalty shall be treated in the same manner, and follow the same procedures, established for contested cases under article 5, chapter 29A of the Code except as otherwise required by section 303, article 6F, chapter 46A of the Code.

§119-301-19. Enforcement of Civil Administrative Penalty

Any civil administrative penalty proposed under this rule shall become enforceable upon the earliest of (a) a final order, pursuant to section 303(c), article 6F, chapter 46A of the Code, based upon the failure of the alleged violator to contest the penalty after receipt of notice and an opportunity to be heard under section 16 of this rule; (b) a final order or decision based upon the failure of the alleged violator, without good cause, to attend a contested hearing after receipt of notice of such hearing; or (c) a final order or decision after hearing, in accordance with section 3, article 5, chapter 29A of the Code.

§119-301-20. Relief from Final Assessment

Relief from the assessment of a civil administrative penalty may be granted upon the same grounds as relief may be granted from a judgment or order under Rule 60 of the West Virginia Rules of Civil Procedure.

§119-301-21. Stay of assessment of civil administrative penalty

The assessment of a civil administrative penalty may be stayed for good cause shown.

71.60 *Written or in writing* include any representation of words, letters or figures, whether by printing, engraving, writing or otherwise. When the writing must be signed, the signature of the person must be in his or her own proper handwriting, or his or her mark, attested, proved or acknowledged. An electronic signature satisfies this signature requirement if the electronic signature meets the requirements of subsection 39-5-3(a) of the Code.