

NOTICE OF AGENCY APPROVAL

LEGISLATIVE RULE: Prevention of unfair or deceptive practices in the course
of flood related recovery efforts in West Virginia

The attached legislative rule constitutes the official the official rule approved
by the Attorney General's Office

on 22 day of May, 1986 and filed pursuant to law with
the Secretary of State and the Legislative Rule-Making Review Committee.

Euni Choi

Euni Choi, for Charlie Brown,
Attorney General,
State of West Virginia

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WEST VIRGINIA EMERGENCY RULE
ATTORNEY GENERAL
CHAPTER 46A-6 and 46A-7
SERIES I

Title: Emergency rule pertaining to the prevention
of unfair or deceptive acts or practices
in the course of flood-related recovery
efforts in West Virginia.

- Section 1. General
2. Definitions
3. Door-to-Door Home Improvement
Transactions In The Flood Disaster
Region of West Virginia
4. Home Improvement and Home Construction
Transactions
5. Sale of Flood-damaged Goods

WEST VIRGINIA
SECRETARY OF STATE

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WEST VIRGINIA EMERGENCY RULE
ATTORNEY GENERAL
CHAPTER 46A-6 and 46A-7
SERIES I

Title: Emergency rule concerning the prevention of unfair or deceptive acts or practices in the course of flood-related recovery efforts in West Virginia.

Section 1. General

1.1 Scope - This emergency rule covers certain unfair or deceptive acts or practices covering door-to-door home improvement transactions, home improvement and home construction transactions, and the sale of flood-damaged goods.

1.2 Authority - W. Va. Code § 46A-6-103 and Code § 46A-7-102(e).

1.3 Filing Date - November 26, 1985

1.4 Effective Date - November 26, 1985

1.5 Repeal of Former Rule - Not applicable.

1.6 Penalties - Except as otherwise indicated, a violation of this rule constitutes a violation of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1 et seq.

1.7 Construction - This rule shall be liberally construed to effectuate the purposes of the West Virginia Consumer Credit and Protection Act, W. Va. Code 46A-1 et seq.

1.8 Severability - If, for any reason, any section, subsection, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, subsections, sentences, clauses, phrases, or provisions or its application to any other person or circumstance, and to this end each and every section, subsection, sentence, clause, phrase, or provision of this rule is hereby declared severable.

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Section 2. Definitions

2.1 "The Act" means the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1 et seq.

2.2 "Advertisement" (including the terms advertise and advertisement) means any oral, written or graphic statement made by the seller in any manner in connection with the solicitation of business and includes, without limitation because of enumeration, statements or representations made in a newspaper, magazine or other publication or on radio or television or contained in any notice, handbill, billboard, poster, display, bill, circular, brochure, pamphlet, sign, catalog, or letter, or printed on or contained in any tag or label attached to or accompanying any goods or services offered for sale. Advertisement includes any statement or representation disseminated within West Virginia even if such statement or representation was first disseminated outside West Virginia.

2.3 "Clear and Conspicuous" means that the statement, representation or term being disclosed is of such size, sound, and/or color contrast and is so presented as to be readily noticeable to the person to whom it is being disclosed. A statement, representation or term contained in a printed advertisement is not clear and conspicuous unless: (a) it appears in type at least 20% of the size of the largest type used in the advertisement, except for the type size of the seller's name, and (b) it appears in close proximity to the information which it modifies or to which the seller intended it to refer.

2.4 "Door-to-Door Sale" means a sale, lease, or rental of consumer goods or services with a purchase price of \$25 or more, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term "door-to-door sale" does not include a transaction:

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2.4.1 Made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis; or

2.4.2 In which the consumer is accorded the right of rescission by the provisions of the Consumer Credit Protection Act (15 U.S.C. 1635) or regulations issued pursuant thereto; or

2.4.3 In which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days; or

2.4.4 Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to the delivery of the goods or performance of the services; or

2.4.5 In which the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing or performing maintenance upon the buyer's personal property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion; or

2.4.6 Pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the Securities and Exchange Commission.

2.5 "Consumer Goods or Services" means goods or services purchased, leased or rented primarily for personal, family or household purposes.

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2.6 "Flood Disaster Region" shall mean the following twenty-nine (29) counties in the State of West Virginia: Barbour, Berkeley, Braxton, Calhoun, Doddridge, Gilmer, Grant, Greenbrier, Hampshire, Hardy, Harrison, Jefferson, Lewis, Marion, Mineral, Monongalia, Monroe, Morgan, Nicholas, Pocahontas, Pendleton, Preston, Randolph, Summers, Taylor, Tyler, Tucker, Upshur and Webster.

2.7 "Flood damaged" pertains to any goods, the value or use of which are impaired or otherwise diminished as a result of a flood.

2.8 "Home Construction" means constructing single family dwelling units including single family homes, condominium units or any other dwelling unit to be sold to any person primarily for personal or family use.

2.9 "Home Construction Contractor" means all persons, firms and corporations engaged in the trade or commerce of home construction.

2.10 "Home Improvement" means installing roofing, siding, paving, windows, doors, awnings, heating and air-conditioning equipment, water softeners and purifiers, swimming pools, fire protection devices or any other permanent installation or improvement attached or to be attached to an already existing home, noncommercial structure or building.

2.11 "Home Improvement Contractor" means all persons, firms and corporations, their officers, representatives, agents and employees engaged in the trade or commerce of home improvements.

2.12 "Person" or "party" includes a natural person or an individual, and an organization.

2.13 "Registration" shall mean the completion and filing of a Door-to-Door Home Improvement Contractor Registration Form with the Consumer Protection Division of the Office of the Attorney General, 1204 Kanawha Boulevard, East, Charleston, West Virginia 25301. See Appendix for a copy of the requisite form as available from the Office of the Attorney General.

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Section 3. Door-to-Door Home Improvement Transactions
In The Flood Disaster Region of West Virginia

Registration. It is an unfair or deceptive act or practice for door-to-door home improvement contractors engaged in trade or commerce in the flood disaster regions of West Virginia to fail to register with the Consumer Protection Division of the Attorney General's office. Such registration will expire, unless extended by amendment hereto, on September 1, 1986.

Section 4. Home Improvement and Home Construction
Transactions

4.1 In connection with any home improvement or home construction transaction, and without limitation by enumeration, it is an unfair or deceptive act or practice for any seller to:

4.1.1 Fail to disclose the exact nature, description, and price of the goods or services which are to be the subject of the transaction to the buyer or prospective buyers in advance of any attempt to induce the buyer or prospective buyer into (1) an agreement in writing, or (2) to pay any consideration to the seller;

4.1.2 Fail to provide a written contract to the home construction buyer or home improvement buyer at the time of sale;

4.1.3 Fail to provide an approximate construction completion date in the written contract unless the contract clearly and conspicuously discloses that no completion date is provided;

4.1.4 Fail to fill in all the relevant blank spaces in the construction contract before it is signed by the buyer;

4.1.5 Fail to include the contractor's name and address on the contract;

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4.1.6 Fail to include in the contract a description of the construction work to be performed;

4.1.7 Fail to include in the contract all financing information as required by federal and state law, including the right of rescission notification pursuant to 15 U.S.C. § 1635 and 12 C.F.R. § 226.15;

4.1.8 Fail to include in the contract all warranty agreements of the contractor for the benefit of the buyer;

4.1.9 Disclaim, exclude, modify or otherwise attempt to limit any warranty, including the warranties of merchantability and fitness for a particular purpose, pursuant to W. Va. Code § 46A-6-107;

4.1.10 Abandon or fail to honor without justification the construction contract required in subsection 4.1 with a home improvement or home construction buyer or to deviate from or disregard plans or specifications in any material respect without the consent of the buyer;

4.1.11 Make any misrepresentation in the procurement of a construction contract or make any false promise of a character likely to influence, persuade or induce;

4.1.12 Use any false or deceptive inducements or misrepresent or falsely state to a prospective buyer that his dwelling or building is to serve as a "prospective buyer" lure, or "model home" or advertising job" and that he will be paid a commission or other compensation for any other sales the seller may make in the vicinity or within a specified distance from the buyer's location and that in any way leads the buyer to believe that the cost of the improvement or installation will be fully paid or greatly reduced by reason thereof;

4.1.13 Fail to complete the construction before the completion date as stated in the construction contract unless such construction is delayed by unforeseeable acts of God, strikes or other events beyond the contractor's control;

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4.1.14 Attempt to induce a buyer to sign any certificate or completion form before such construction is actually completed;

4.1.15 Fail to disclose that the goods being offered need additional attachments or fixtures to perform the functions claimed for them by the seller;

4.1.16 Induce or persuade a buyer or a prospective buyer to sign any writing when the seller knows or has reason to know that the buyer or prospective buyer is unable to read or write, or does not understand the terms of the instrument;

4.1.17 Represent that the buyer or prospective buyer has been specially selected to receive a bargain, discount or other advantage when such, in fact, is not true;

4.1.18 Fail to disclose to a buyer or prospective buyer orally prior to the time of sale, and in writing on any conditional sales contract, promissory note, or other instrument of indebtedness executed by a buyer or prospective buyer, and with such conspicuousness and clarity as is likely to be observed and read by such a buyer or prospective buyer, that such instrument, which must have printed on the face thereof "Consumer Note," may be discounted, negotiated, or assigned to a finance company or other third party;

4.1.19 Represent that the goods that are being offered are current models, when, in fact, they are not current models, or are discontinued models;

4.1.20 Misrepresent the quality, capacity, character, nature, manufacturer, or composition of any goods;

4.1.21 Misrepresent or falsely state that the buyer's present equipment, materials or goods are dangerous or defective, or in need of repair or replacement;

4.1.22 Fail to disclose that the advertised price or offer does not include delivery or installation;

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4.1.23 Mislead the prospective buyer into believing that the down payment or some other figure constitutes the full amount the buyer will be obligated to pay, or to omit or exclude any other obligations, fees, charges or costs to the buyer;

4.1.24 Deceptively gain entry or access into the prospective buyer's home or onto his/her property under the guise of any governmental or public utility inspection, right or duty, or to misrepresent that the seller has such authority;

4.1.25 Misrepresent that the seller is an employee, officer or representative of a manufacturer, importer or any other person, firm or organization, or that such person, firm or organization will assume some obligation in fulfilling the terms of the contract;

4.1.26 Misrepresent to a prospective buyer that (s)he is being given an introductory, confidential, closeout, going out of business, factory or wholesale price or discount or any other concession, or that a concession is made due to "materials leftover from a nearby job" or a test of the local market or a market survey;

4.1.27 Include in any contract or written document evidencing such a transaction a clause of acknowledgement of having understood and/or read the document;

4.1.28 Include in any contract or written document evidencing such a transaction a clause that the document is not binding upon the seller except upon acceptance;

4.1.29 Include in any contract or written document evidencing such a transaction a clause stating or suggesting that the seller's oral representations, promises, assurances, or the like, are not binding unless expressly included in the written document;

4.1.30 Include in any contract or written document evidencing such a transaction a clause requiring liquidated damages or the like for cancellation of the contract unless:

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(a) Such provision is reasonable and does not constitute a penalty; and

(b) Such provision clearly and conspicuously discloses that it does not take effect until seller has fully complied with the right of rescission as stated in subsection 4.1.7 and/or the buyer's right to cancel as stated in subsection 4.2.1.

4.2 In connection with any door-to-door home improvement or home construction transaction, and without in any way limiting the application of section 4.1 to such transactions, it is an unfair or deceptive act or practice to fail to provide the buyer a three-day right to cancel pursuant to W. Va. Code § 46A-2-132 through 135, and 16 C.F.R § 429.

Section 5. Sale of Flood-damaged Goods

In connection with the sale of flood-damaged goods, and without limitation by enumeration, it is an unfair or deceptive practice to:

5.1 Represent, directly or indirectly, that a product is new or undamaged, or any part of a good is new or undamaged, when such is not the fact, or to misrepresent the extent of flood damage thereof.

5.2 Offer for sale or sell any good which is flood damaged, contains flood-damaged parts, is rebuilt, remanufactured, reconditioned, or contains rebuilt, remanufactured, or reconditioned parts due to flood damage, or has the appearance of being new when it is flood damaged, unless there is given to the buyer or prospective buyer clear and conspicuous prior disclosure that such a good has been flood damaged, rebuilt, remanufactured or reconditioned due to flood damage, or that it contains used, rebuilt, remanufactured or reconditioned parts due to flood damage.



APPENDIX

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLIE BROWN
ATTORNEY GENERAL

File Number _____

DOOR-TO-DOOR HOME IMPROVEMENT CONTRACTOR REGISTRATION FORM

Name of Your Business _____

Main Address of Your Business _____

City/State _____

Other Addresses of Your Business _____

City/State _____

Telephone Numbers of Your Business _____

Names, Home Addresses, and Telephone Numbers of Principal
Officers/Owners/Managers

Name _____

Name _____

Street _____

Street _____

City/State _____

City/State _____

Telephone () _____

Telephone () _____

Title _____

Title _____

Name _____

Name _____

Street _____

Street _____

City/State _____

City/State _____

Telephone () _____

Telephone () _____

Title _____

Title _____

Have you or your business operated under any other name(s)?
(please circle) YES NO If Yes, what names(s):

What is the nature of your business? _____

How many years have you been in this business? _____

How many employees do you have? _____ Part time _____ Full Time

Are you incorporated? (please circle) YES NO

If Yes, on what date were you incorporated? _____

In which state are you incorporated? _____

If you are incorporated in a state other than West Virginia,
are you registered with the Secretary of State as a foreign
corporation? (please circle) YES NO

Are you registered with the State Tax Department? (please circle)
YES NO

Do you have a principal place of business in West Virginia? (please
circle) YES NO

If No, have you registered with the Department of Labor as
a Transient Merchant? (please circle) YES NO

Do you engage in door-to-door solicitation sales? (please circle)
YES NO

If Yes, do you provide buyers with a three-day right to cancel
notice? (please circle) YES NO

Do you use a pre-printed form contract? (please circle) YES NO

If Yes, please provide a copy of the contract you use.

If No, please explain the nature of your contract(s):

Please provide a copy of two (2) of your most recently executed contracts.

What express warranties, either written or oral, do you offer with your work? _____

Is your company covered by liability insurance? (please circle)
YES NO

If Yes, please provide the name, address, telephone number and policy number _____

Does your company carry Workers' Compensation coverage on employees? (please circle) YES NO Account No. _____

Has your company ever filed for bankruptcy? (please circle)
YES NO

If Yes, please list district court in which action was filed _____

Have you, or any officers/owners/managers of your company, ever been convicted of a crime? If so, please explain: _____

Please list any trade associations of which you are a member.

Please furnish the name(s) of the bank(s) in which you currently carry an account:

Name	Address	Account #

Please provide three (3) credit references (i.e., suppliers with whom you have an account):

Name	Address	Telephone #

Please provide three (3) work performance references (i.e., homeowners for whom you have completed jobs in the last twelve [12] months in West Virginia):

Name	Address	Telephone #
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Name	Address	Telephone #
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Name	Address	Telephone #
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I UNDERSTAND THAT THIS INFORMATION WILL BE VERIFIED BY THE OFFICE OF THE ATTORNEY GENERAL AND MAY BE RELEASED TO LAW ENFORCEMENT OFFICIALS AND THE GENERAL PUBLIC.

I FURTHER STATE THAT THIS INFORMATION IS TRUE AND ACCURATE TO THE BEST OF MY RECOLLECTION AND BELIEF.

SIGNATURE

DATE

YOU WILL NOT BE REGISTERED WITH THE ATTORNEY GENERAL'S OFFICE UNTIL YOU RETURN THIS FORM TO:

Office of the Attorney General
Consumer Protection Division
1204 Kanawha Boulevard, East
Charleston, West Virginia 25301

BEFORE THE CONSUMER PROTECTION DIVISION OF THE
ATTORNEY GENERAL'S OFFICE
STATE OF WEST VIRGINIA

IN THE MATTER OF:

PROPOSED LEGISLATIVE RULE ON THE
AGENCY-APPROVED EMERGENCY RULE
CONCERNING THE PREVENTION OF UNFAIR
OR DECEPTIVE ACTS OR PRACTICES IN THE
COURSE OF FLOOD-RELATED RECOVERY EFFORTS
IN WEST VIRGINIA.

Transcript of proceedings in the above-styled
cause on the 28th day of February, 1986, at 10:00 a.m.,
at 1204 Kanawha Boulevard, East, Charleston, Kanawha
County, West Virginia, pursuant to notice issued by
the Department to all interested parties.

BEFORE: EUMI L. CHOI, Assistant Attorney General,
Consumer Protection Division,
Attorney General's Office,
Charleston, West Virginia.

MRS. SHERRY CARPENTER, Secretary of the
Director of Consumer Protection Division.

MS. CHOI: Good morning. It's 10:00 a.m., on Friday, February 28, 1986. My name is Eumi Choi and I'm an Assistant Attorney General with the Consumer Protection Division of the Attorney General's Office of the State of West Virginia.

This is a hearing being held to receive comments from the public respecting the proposed Rules and Regulations. The proposed legislative rule deals with the prevention of unfair or deceptive acts or practices in the course of flood-related recovery efforts in West Virginia.

The regulation submitted for public comment and review are required and authorized by the provision of West Virginia Code Section 46A-6-103 and Code Section 46A-7-102e.

Due to the sudden floods in early November, the Office of the Attorney General filed an emergency rule with the Office of the Secretary of State, Ken Hechler, on November 26, 1985. Also on that date this agency approved emergency rule was properly filed with the Legislative Rule-making Review Committee. Thereafter in compliance with the procedures set by the Secretary of State's Office, we filed a notice for public hearing on the proposed legislative rule made effective as an

emergency rule on January 27th, 1986. It stated that a hearing would be held in the Office of the Attorney General, Consumer Protection Division, 1204 Kanawha Boulevard, East, Charleston, West Virginia.

Mrs. Carpenter, after identifying yourself for the record, would you please state for the record your knowledge of the facts concerning the filing of the emergency rule and whether any copies were provided to any parties who may be interested in the promulgation of these regulations?

MS. CARPENTER; I'm Sherry Carpenter. I am the secretary for the Director of the Consumer Protection Division of the Attorney General's Office.

The Director of our office at that time filed this proposed legislative rule as an agency-approved emergency rule by hand delivering said rule on November 26, 1985, to the Secretary of State's Office. Our office also provided copies of the proposed legislative rule to certain groups; such as public officials, social service agencies and disaster coordinator offices in the 29 flood counties, and consumers or businesses who requested copies of the same.

MS. CHOI: Thank you, Mrs. Carpenter. If anyone wishes to make comments now being present in this hearing,

would they please identify themselves for the record.

There being no comments and there being no persons present wishing to speak, I close this public hearing.

(WHEREUPON, the hearing was concluded.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, Sybil J. Martin, Certified Court Reporter,
do hereby certify that the foregoing is, to the best of
my skill and ability, a true and accurate transcript of
all the testimony adduced or proceedings had in the
aforementioned case as set forth in the caption hereof.

Sybil J. Martin

Certified Court Reporter