



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

FILED
1987 MAY 14 PM 3:00
SECRETARY OF STATE

CHARLIE BROWN
ATTORNEY GENERAL

May 14, 1987

The Honorable Ken Hechler
Secretary of State
State Capitol, Suite 157-K
Charleston, West Virginia 25305

Re: Legislative rule pertaining to the prevention
of unfair or deceptive acts or practices in
home improvement transactions.

Dear Secretary Hechler:

Enclosed please find the final version of the above-referenced rule, modified to reflect the amendments approved during legislative consideration, together with the Promulgation History Abstract for the rule. Please note we have chosen a June 15, 1987, effective date.

Thank you for your cooperation. If you have questions, please contact me at your convenience.

Sincerely,

THOMAS L. HINDES, Director
Deputy Attorney General
Consumer Protection Division

TLH/lp

Enclosures



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

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ATTORNEY GENERAL

Title: Legislative rule pertaining to the prevention of unfair or deceptive acts or practices in home improvement transactions.

PROMULGATION HISTORY ABSTRACT

<u>Date</u>	<u>Action</u>
July 17, 1986	Original Filing of Proposed Rule for Inclusion in State Register
August 29, 1986	Public Hearing
August 29, 1986	Close of Public Comment Period
September 19, 1986	File Agency Approved Rule with Secretary of State and Legislative Rule-Making Review Committee
December 1, 1986	File Rule, as modified pursuant to Legislative Rule-Making Review Committee action, with Secretary of State and Legislative Rule-Making Review Committee
March 14, 1987	Passage of Senate Bill No. 748
June 15, 1987	Effective Date of Rule

For more information, please contact Thomas L. Hinds, Deputy Attorney General, Office of the Attorney General, Consumer Protection Division, 812 Quarrier Street, Sixth Floor, Charleston, West Virginia 25301 (304) 348-8986, or in West Virginia 1-800-368-8808.

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 and 46A-7
SERIES 5

Title: Legislative rule pertaining to the
prevention of unfair or deceptive acts or
practices in home improvement transactions.

- Section 1. General
2. Definitions
3. Home Improvement Transactions
4. Remedies
-

WEST VIRGINIA LEGISLATIVE RULES
ATTORNEY GENERAL
CHAPTER 46A-6 and 46A-7
SERIES 5

FILED
MAY 14 1987 3:00
SECRETARY OF STATE

Title: Legislative rule pertaining to the prevention of unfair or deceptive acts or practices in home improvement transactions.

Section 1. General

1.1 Rule Designation - This rule is legislative.

1.2 Scope - This legislative rule covers certain unfair or deceptive acts or practices covering home improvement transactions in West Virginia, its counties, and all political subdivisions but shall not cover new construction of single-family dwellings or rebuilding all or substantially all of an existing or preexisting single-family dwelling.

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

1.4 Filing Date -

1.5 Effective Date - June 15, 1987

1.6 Repeal of Former Rule - Not applicable.

1.7 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.

1.8 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.

1.9 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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SECRETARY OF STATE

Section 2. Definitions

2.1 "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 including but not limited to 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.

2.2 "Clear and Conspicuous" means that the statement, representation or term being disclosed is of such size, and/or color contrast and is so presented as to be readily noticeable and understandable to the person to whom it is being disclosed. A statement, representation or term contained in a written contract is not clear and conspicuous unless: (a) it appears in printed or typed face larger than the largest type used in the written contract, apart from the typeface used for other terms required to be clearly and conspicuously set forth by these rules, and (b) it appears in close proximity to the information which it modifies or to which the seller intended it to refer.

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

2.4 "Home Construction" means, for the purpose of this Rule, the repair, remodeling or the building of additions to existing single-family dwelling units, including single-family homes, condominium units or any other dwelling unit to be used by any persons primarily for personal or family use, but shall not include new single-family home construction or the rebuilding of all or substantially all of an existing or preexisting single-family dwelling.

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

2.6 "Home Improvement" means installing roofing, siding, paving, replacement windows, doors, awnings, heating and air-conditioning equipment, water softeners and purifiers, swimming pools, fire protection devices, or fixtures of any kind, performing substantial landscaping work involving earth-moving, large scale replanting or reseeding or engaging in the substantial remodeling or repair of any portion of an existing home or noncommercial structure or building.

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

Section 3. Home Improvement Transactions

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

3.1.1 Fail to provide the buyer a written contract, describing in a meaningful way, and in "plain language" as required by W. Va. Code § 46A-6-109, the goods or services purchased, the contract price together with all required financing information or credit terms and any other material terms as required by these rules or agreed to by the parties; provided, however, that where the contract price is to be calculated on a "cost plus" basis, this fact shall be clearly and conspicuously set forth along with the method of calculating additions to cost and a good faith estimate of the eventual contract price;

3.1.2 Fail to provide an approximate completion date for all construction or improvements in the written contract unless the contract clearly and conspicuously discloses that no completion date is provided;

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

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3.1.4 Fail to include the home improvement contractor's name, address, and telephone number on the contract;

3.1.5 Fail to include in the contract proper notification of the buyer's right to rescind if required pursuant to 15 U.S.C. § 1635 and 12 C.F.R. § 226.15;

3.1.6 Fail to include in the contract all affirmations of fact, promises or descriptions which constitute express warranties under the terms of W. Va. Code § 46-2-313, or would so constitute express warranties if the sale of goods only were involved;

3.1.7 Disclaim, exclude, modify or otherwise attempt to limit any warranty, including the warranties of merchantability and fitness for a particular purpose, or to exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied;

3.1.8 Fail to substantially perform the home improvement contract, absent material breach by the buyer, or to deviate from or disregard plans or specifications in any material respect without the written consent of the buyer;

3.1.9 Make any misrepresentation in the promotion, advertisement or sale of a home improvement contract or make any false promise of a character likely to influence, persuade or induce;

3.1.10 Represent to a prospective buyer that his dwelling or building is to serve as a lure for prospective buyers, "model home," "advertising job" or other similar inducement, and that a reduced price is offered for that reason, if such is not the case;

3.1.11 Violate the prohibition on referral sales in W. Va. Code § 46A-2-110;

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3.1.12 Fail to complete the home improvement by the completion date as stated in the home improvement contract unless such home improvement is delayed by events beyond the home improvement contractor's control or the buyer has agreed in writing to a later date;

3.1.13 Attempt to induce a buyer to sign any certificate or completion form before such home improvement is actually completed;

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

3.1.15 Unfairly or deceptively induce or persuade a buyer or 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;

3.1.16 Represent that the buyer or prospective buyer has been specially selected to receive a bargain, discount or other advantage which will reduce the cost of the improvements or goods, when such is not the case;

3.1.17 Fail to disclose to a buyer or prospective buyer orally prior to the time of sale, and clearly and conspicuously in the written contract required in § 3.1.1 of this Rule, that any promissory note or other instrument of indebtedness which must be executed by the buyer or prospective buyer, may be discounted, negotiated, or assigned to a finance company or other third party, and to clearly and conspicuously label any such instrument of indebtedness as a "Consumer Note";

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

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

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

3.1.21 Fail to clearly and conspicuously disclose that an advertised price or offer does not include delivery or installation;

3.1.22 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;

3.1.23 Gain entry or access to the prospective buyer's home or property under the false guise of performing a governmental, public utility or other official inspection, or to represent that the seller is acting on behalf of or as an employee of any such entity, when such is not the case;

3.1.24 Represent 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, when such is not the case;

3.1.25 Represent to a prospective buyer that the buyer is being given an introductory, confidential, closeout, going out of business, factory or wholesale price discount, that a price discount is being made due to "materials left-over from a nearby job," a test of the local market or a market survey or to otherwise falsely claim that the prices offered are discounted, when such is not the case;

3.1.26 Utilize preprinted or form contract documents in a transaction solicited by the seller which are structured in such a way as to characterize or constitute the buyer as the offeror, thereby requiring the buyer to sign or signify assent to a proposal before it is binding on the seller;

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Series 5, Sec. 3

3.1.27 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;

3.1.28 Include in any home improvement contract or written document evidencing such a transaction a clause requiring liquidated damages or the forfeiture of any deposit or any other amount already paid upon cancellation of the home improvement contract.

3.1.29 Fail to file a certificate in the office of the Clerk of the County Commission in the county in which the principal place of business of the seller is located, setting forth the assumed name in or by which the business is being conducted in conformity with the provisions of Chapter 47, Article 8, Section 2 of the Code of West Virginia, 1931, as amended.

3.2 In connection with any home solicitation sale of home improvement(s) and without in any way limiting the application of section 3.1 to such transactions, it is an unfair or deceptive act or practice to fail to provide the buyer a three-day right to cancel in all contracts where such notice is required by W. Va. Code § 46A-2-132 through 135, and 16 C.F.R § 429, and as provided herein:

3.2.1 A buyer shall have the right to cancel a home solicitation sale until midnight of the third business day after the day on which he has signed an agreement. Cancellation shall become effective when the buyer gives written notice of his intention to cancel to the seller at the address stated in the agreement. Notice of such cancellation, if given by mail, is given when it is deposited in a mailbox properly addressed and postage prepaid. Such notice of cancellation given by the buyer need not take any particular form and shall be sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the home solicitation sale. Notwithstanding any above-mentioned provision, a buyer may not cancel a home solicitation sale where he has required and the seller has provided

goods or services without delay because of a bona fide emergency and either the seller has in good faith made a substantial beginning of performance of the agreement before the buyer has give notice of cancellation, or in the case of goods, such goods cannot be returned to the seller in substantially as good condition as when they were received by the buyer.

3.2.2 No written agreement shall be effective until after it has been signed by the buyer and he has written the date of such signature on his own handwriting. The statement must appear under the conspicuous caption: "BUYER'S RIGHT TO CANCEL" and read as follows: "If this agreement was solicited at a place other than the seller's business establishment at a fixed location and you decide you do not want these goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want to goods or services and must be mailed before midnight of the third business day after you sign this agreement. The notice must be mailed to: (Name and mailing address of seller)." Until the seller has fully complied with this section, the buyer may cancel the home solicitation sale. Any written agreement which contains the form and content of notice of cancellation required by the federal trade commission and which provides information substantially similar to that required by this Rule shall be deemed to comply fully with this Rule.

3.2.3 Within ten days after a home solicitation sale has been cancelled, the seller shall tender to the buyer any payment made by the buyer to him and any note or other evidence of indebtedness taken in the transaction. A provision permitting the seller to keep all or part of any payment, note or other evidence of indebtedness is in violation of this section and unenforceable. If any down payment included goods traded in, the seller shall return the goods in substantially as good a condition as when he received them. If a seller has failed to tender goods as required by this section, the buyer may elect to recover an amount equal to the trade-in allowance on such goods as stated in the agreement. Until a seller has complied with all the obligations imposed by this section, a buyer may keep any goods delivered to him by the seller and he is hereby given a lien on such goods or the purpose of making any recovery to which he is entitled by this section.

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3.2.4 Within a reasonable time after a home solicitation sale has been cancelled, the seller may demand and receive any goods delivered by him to the buyer as a result of the home solicitation sale. The buyer shall not be obligated to tender such goods to the seller at any place other than the buyer's residence. If the seller fails to demand possession of goods within such reasonable time, such goods shall become the buyer's property without any obligation to pay for them. For the purposes of this section, twenty days shall be presumed to be a reasonable time. The buyer shall take reasonable care of such goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk. Where the seller has performed any service pursuant to a home solicitation sale prior to its cancellation or prior to giving the statement required in section 3.2.2 of this Rule, he shall not be entitled to any compensation for such performance.

3.3 Provided, however, that, if no written agreement is in fact executed by the parties, the requirements of §§ 3.1.1 through 3.1.6 of this Rule, and any other provision that implicitly requires a written contract, shall be inapplicable to home improvement transactions with a contract price under \$250.00 or which are necessitated by a bona fide emergency.

Section 4. Remedies

4.1 In the event of a violation of this Rule by a merchant or other person subject to its provisions, the Attorney General may bring a civil action to restrain any such violation, including an application for temporary relief pending final determination of the proceedings, and for other appropriate relief, including restitution for affected consumers and the costs and expenses incurred in the investigation and prosecution of such action to the extent permitted by statute.

4.2 In addition to an application for injunctive remedies and other appropriate relief, as aforesaid, the Attorney General may also bring a civil action to recover a civil penalty for the willful violation of this Rule, and if

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the court finds that a person has engaged in a course of willful and repeated violations of this Rule or any other applicable provision of West Virginia Code Chapter 46A, it may assess a civil penalty of no more than five thousand dollars for each such violation to the extent permitted by statute.

Senate Bill No. 381

(By Senator Tucker)

[Introduced February 5, 1987; referred to the Committee
on _____ ; then to
the Committee on the Judiciary.]

A BILL to amend article two, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto two new sections designated sections forty-six-a (six)(one hundred three) and forty-six-a (seven) (one hundred two) relating to authorizing the attorney general to promulgate legislative rules all relating to prevention of unfair or deceptive acts or practices in home improvement and home construction transactions.

Be it enacted by the Legislature of West Virginia:

That article two, chapter sixty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto two new sections, designated sections forty-six-a (six) (one hundred three) and forty-six-a (seven) (one hundred two), all to read as follows:

ARTICLE 2. EXECUTIVE AGENCY AUTHORIZATION TO PROMULGATE LEGISLATIVE RULES.

§64-2-46a(6)(103). Attorney general.

1 The legislative rules filed in the state register on the
2 nineteenth day of September, one thousand nine hundred eighty-
3 six, modified by the attorney general to meet the objections of
4 the legislative rule-making review committee and refiled in the
5 state register on the first day of December, one thousand nine
6 hundred eighty-six, relating to the attorney general (prevention
7 of unfair or deceptive acts or practices in home improvement and
8 home construction transactions) are authorized. These rules were
9 proposed by the attorney general pursuant to section one hundred
10 three, article six and section one hundred two, article seven of
11 chapter forty-six-a of this code.

12 §64-2-46a(7)(102). Attorney General.

13 The legislative rules authorized by the legislature in
14 section forty-six-a (six) (one hundred three) of this article
15 were also proposed by the attorney general pursuant to section
16 one hundred two, article seven, chapter forty-six-a of this code.
17

18 NOTE: The purpose of this bill is to authorize the Attorney
19 General to promulgate legislative rules relating to the
20 prevention of unfair or deceptive acts or practices in home
21 improvement and home construction transactions.

22
23 This section is new; therefore, strike-throughs and
24 underscoring have been omitted.

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H. B. 2614

(By Delegate Knight)
(Introduced February 4, 1987; referred to the
Committee on the Judiciary)

10 A BILL to amend article two, chapter sixty-four of the code of
11 West Virginia, one thousand nine hundred thirty-one, as
12 amended, by adding thereto two new sections designated
13 sections forty-six-a (six)(one hundred three) and forty-six-a
14 (seven) (one hundred two) relating to authorizing the
15 attorney general to promulgate legislative rules all relating
16 to prevention of unfair or deceptive acts or practices in
17 home improvement and home construction transactions.

18 Be it enacted by the Legislature of West Virginia:

19 That article two, chapter sixty-two of the code of West
20 Virginia, one thousand nine hundred thirty-one, as amended, be
21 amended by adding thereto two new sections, designated sections
22 forty-six-a (six) (one hundred three) and forty-six-a (seven)
23 (one hundred two), all to read as follows:

24 ARTICLE 2. EXECUTIVE AGENCY AUTHORIZATION TO PROMULGATE
25 LEGISLATIVE RULES.

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7 of unfair or deceptive acts or practices in home improvement and
8 home construction transactions) are authorized. These rules were
9 proposed by the attorney general pursuant to section one hundred
10 three, article six and section one hundred two, article seven of
11 chapter forty-six-a of this code.

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14 section forty-six-a (six) (one hundred three) of this article
15 were also proposed by the attorney general pursuant to section
16 one hundred two, article seven, chapter forty-six-a of this code.
17

18 NOTE: The purpose of this bill is to authorize the Attorney
19 General to promulgate legislative rules relating to the
20 prevention of unfair or deceptive acts or practices in home
21 improvement and home construction transactions.
22

23 This section is new; therefore, strike-throughs and
24 underscoring have been omitted.



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLIE BROWN
ATTORNEY GENERAL

NOTICE OF RULE MODIFICATION

LEGISLATIVE RULE: Proposed legislative rule pertaining to the prevention of unfair or deceptive acts or practices in home improvement and home construction transactions.

The above titled rule has been modified as a result of comments by the Legislative Rule-Making Review Committee and the attached modifications have been incorporated into the above-titled rule and filed in the Secretary of State's office on November 25, 1986.

A handwritten signature in dark ink, appearing to read "J. R. [unclear]".

DIRECTOR

FILED
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SECRETARY OF STATE

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 and 46A-7
SERIES 2

Title: Proposed legislative rule pertaining to the prevention of unfair or deceptive acts or practices in home improvement and home construction transactions.

- Section 1. General
- 2. Definitions
- 3. Home Improvement and Home Construction Transactions
- 4. Remedies

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 and 46A-7
SERIES 2

Title: Proposed legislative rule pertaining to the prevention of unfair or deceptive acts or practices in home improvement and home construction transactions.

Section 1. General

1.1 Rule Designation - This rule is legislative.

1.2 Scope - This proposed legislative rule covers certain unfair or deceptive acts or practices covering home improvement transactions, and home construction transactions in West Virginia, its counties, and all political subdivisions.

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

1.4 Filing Date -

1.5 Effective Date -

1.6 Repeal of Former Rule - Not applicable.

1.7 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.

1.8 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.

1.9 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.

Section 2. Definitions

2.1 "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 including but not limited to 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.

2.2 "Clear and Conspicuous" means that the statement, representation or term being disclosed is of such size, and/or color contrast and is so presented as to be readily noticeable and understandable to the person to whom it is being disclosed. A statement, representation or term contained in a written contract is not clear and conspicuous unless: (a) it appears in typeface at least 10% larger than size of the largest type used in the written contract, apart from the typeface used for other terms required to be clearly and conspicuously set forth by these rules, and (b) it appears in close proximity to the information which it modifies or to which the seller intended it to refer.

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

2.4 "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.

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Section 3. Home Improvement and Home Construction Transactions

3.1 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:

3.1.1 Fail to provide the buyer a written contract, describing in a meaningful way, and in "plain language" as required by W. Va. Code § 46A-6-109, the goods or services purchased, the contract price together with all required financing information or credit terms and any other material terms as required by these rules or agreed to by the parties; provided, however, that where the contract price is to be calculated on a "cost plus" basis, this fact shall be clearly and conspicuously set forth along with the method of calculating additions to cost and a good faith estimate of the eventual contract price;

3.1.2 Fail to provide an approximate completion date for all construction or improvements in the written contract unless the contract clearly and conspicuously discloses that no completion date is provided;

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

Attorney General
Legislative Rule, 46A-6 & 46A-7
Series 2, Sec. 3

3.1.4 Fail to include the home improvement or home construction contractor's name, address, and telephone number on the contract;

3.1.5 Fail to include in the contract proper notification of the buyer's right to rescind if required pursuant to 15 U.S.C. § 1635 and 12 C.F.R. § 226.15;

3.1.6 Fail to include in the contract all affirmations of fact, promises or descriptions which constitute express warranties under the terms of W. Va. Code § 46-2-313, or would so constitute express warranties if the sale of goods only were involved;

3.1.7 Disclaim, exclude, modify or otherwise attempt to limit any warranty, including the warranties of merchantability and fitness for a particular purpose, or to exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied;

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3.1.9 Make any misrepresentation in the promotion, advertisement or sale of a home improvement or home construction contract or make any false promise of a character likely to influence, persuade or induce;

3.1.10 Represent to a prospective buyer that his dwelling or building is to serve as a lure for prospective buyers, "model home," "advertising job" or other similar inducement, and that a reduced price is offered for that reason, if such is not the case;

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Attorney General
Legislative Rule, 46A-6 & 46A-7
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3.1.12 Fail to complete the home improvement or home construction by the completion date as stated in the home improvement or home construction contract unless such home improvement or home construction is delayed by events beyond the home improvement or home construction contractor's control or the buyer has agreed in writing to a later date;

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

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Attorney General
Legislative Rule, 46A-6 & 46A-7
Series 2, Sec. 3

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

3.1.21 Fail to clearly and conspicuously disclose that an advertised price or offer does not include delivery or installation;

3.1.22 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;

3.1.23 Gain entry or access to the prospective buyer's home or property under the false guise of performing a governmental, public utility or other official inspection, or to represent that the seller is acting on behalf of or as an employee of any such entity, when such is not the case;

3.1.24 Represent 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, when such is not the case;

3.1.25 Represent to a prospective buyer that the buyer is being given an introductory, confidential, closeout, going out of business, factory or wholesale price discount, that a price discount is being made due to "materials left-over from a nearby job," a test of the local market or a market survey or to otherwise falsely claim that the prices offered are discounted, when such is not the case;

3.1.26 Include in any preprinted or form document evidencing a home improvement transaction solicited by the seller, a clause acknowledging that the buyer has read and understood the contract;

3.1.27 Utilize preprinted or form contract documents in a transaction solicited by the seller which are structured in such a way as to characterize or constitute the buyer as the offeror, thereby requiring the buyer to sign or signify assent to a proposal before it is binding on the seller;

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3.1.28 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;

3.1.29 Include in any home improvement or home construction contract or written document evidencing such a transaction a clause requiring liquidated damages or the forfeiture of any deposit or any other amount already paid upon cancellation of the home improvement or home construction contract unless:

(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 rescision as stated in subsection 3.1.7 of this Rule and/or the buyer's right to cancel as stated in subsection 3.2 of this Rule.

3.2 In connection with any home solicitation sale of home improvement(s) or home solicitation sale of home construction, and without in any way limiting the application of section 3.1 to such transactions, it is an unfair or deceptive act or practice to fail to provide the buyer a three-day right to cancel in all contracts where such notice is required by W. Va. Code § 46A-2-132 through 135, and 16 C.F.R § 429, and as provided herein:

3.2.1 A buyer shall have the right to cancel a home solicitation sale until midnight of the third business day after the day on which he has signed an agreement. Cancellation shall become effective when the buyer gives written notice of his intention to cancel to the seller at the address stated in the agreement. Notice of such cancellation, if given by mail, is given when it is deposited in a mailbox properly addressed and postage prepaid. Such notice of cancellation given by the buyer need not take any particular form and shall be sufficient if it indicates by any form of written expression the intention of the buyer not to be bound

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by the home solicitation sale. Notwithstanding any above-mentioned provision, a buyer may not cancel a home solicitation sale where he has required and the seller has provided goods or services without delay because of a bona fide emergency and either the seller has in good faith made a substantial beginning of performance of the agreement before the buyer has give notice of cancellation, or in the case of goods, such goods cannot be returned to the seller in substantially as good condition as when they were received by the buyer.

3.2.2 No written agreement shall be effective until after it has been signed by the buyer and he has written the date of such signature on his own handwriting. The statement must appear under the conspicuous caption: "BUYER'S RIGHT TO CANCEL" and read as follows: "If this agreement was solicited at a place other than the seller's business establishment at a fixed location and you decide you do not want these goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want to goods or services and must be mailed before midnight of the third business day after you sign this agreement. The notice must be mailed to: (Name and mailing address of seller)." Until the seller has fully complied with this section, the buyer may cancel the home solicitation sale. Any written agreement which contains the form and content of notice of cancellation required by the federal trade commission and which provides information substantially similar to that required by this Rule shall be deemed to comply fully with this Rule.

3.2.3 Within ten days after a home solicitation sale has been cancelled, the seller shall tender to the buyer any payment made by the buyer to him and any note or other evidence of indebtedness taken in the transaction. A provision permitting the seller to keep all or part of any payment, note or other evidence of indebtedness is in violation of this section and unenforceable. If any down payment included goods traded in, the seller shall return the goods in substantially as good a condition as when he received them. If a seller has failed to tender goods as required by this section, the buyer may elect to recover an amount

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equal to the trade-in allowance on such goods as stated in the agreement. Until a seller has complied with all the obligations imposed by this section, a buyer may keep any goods delivered to him by the seller and he is hereby given a lien on such goods or the purpose of making any recovery to which he is entitled by this section.

3.2.4 Within a reasonable time after a home solicitation sale has been cancelled, the seller may demand and receive any goods delivered by him to the buyer as a result of the home solicitation sale. The buyer shall not be obligated to tender such goods to the seller at any place other than the buyer's residence. If the seller fails to demand possession of goods within such reasonable time, such goods shall become the buyer's property without any obligation to pay for them. For the purposes of this section, twenty days shall be presumed to be a reasonable time. The buyer shall take reasonable care of such goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk. Where the seller has performed any service pursuant to a home solicitation sale prior to its cancellation or prior to giving the statement required in section 3.2.2 of this Rule, he shall not be entitled to any compensation for such performance.

3.3 Provided, however, that, if no written agreement is in fact executed by the parties, the requirements of §§ 3.1.1 through 3.1.6 of this Rule, and any other provision that implicitly requires a written contract, shall be inapplicable to home improvement transactions with a contract price under \$250.00 or which are necessitated by a bona fide emergency.

Section 4. Remedies

4.1 In the event of a violation of this Rule by a merchant or other person subject to its provisions, the Attorney General may bring a civil action to restrain any such violation, including an application for temporary relief pending final determination of the proceedings, and for other appropriate relief, including restitution for affected consumers and the costs and expenses incurred in the investigation and prosecution of such action.

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4.2 In addition to an application for injunctive remedies and other appropriate relief, as aforesaid, the Attorney General may also bring a civil action to recover a civil penalty for the willful violation of this Rule, and if the court finds that a person has engaged in a course of willful and repeated violations of this Rule or any other applicable provision of West Virginia Code Chapter 46A, it may assess a civil penalty of no more than five thousand dollars for each such violation.

