

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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1999 SEP 19 PM 3:54
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Office of the Attorney General TITLE NUMBER: 142

CITE AUTHORITY Code 46A-103 and Code 46A-7-102(1)(e)

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 9

TITLE OF RULE BEING PROPOSED: Proposed legislative rule defining certain terms used within the West Virginia Consumer Credit and Protection Act.

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Charles G Brown

DATE: September 19, 1983
TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
FROM: Office of the Attorney General

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1983 SEP 19 PM 3:54
DEPARTMENT OF STATE

LEGISLATIVE RULE TITLE: Proposed legislative rule defining certain terms used within the West Virginia Consumer Credit and Protection Act.

1. Authorizing statute(s) citation _____
Code 46A-6-103 and 46A-7-102(1)(e)
2. a. Date filed in State Register with Notice of Hearing:
August 12, 1988
- b. What other notice, including advertising, did you give of the hearing?
Twenty copies of the proposed rule were mailed to trade association representatives whose members may be potentially affected by the rule.
- c. Date of hearing (s): September 15, 1988
- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached x No comments received _____
- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)
September 19, 1988
- f. Name and phone number of agency person to contact for additional information:
Robert Wm. Schulenberg III
Senior Assistant Attorney General
812 Quarrier Street, Sixth Floor
Charleston, West Virginia 25301

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.

N/A

b. Date of hearing: N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

STATEMENT OF CIRCUMSTANCES
REQUIRING THE RULE

September 19, 1988

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 AND 46A-7
SERIES 9

Title: Proposed legislative rule defining certain terms used within the West Virginia Consumer Credit and Protection Act.

Statement of Circumstances Requiring the Rule

This rule is not one mandated by an Act of this Legislature nor by order of the executive department. Rather, this rule is a discretionary rule proposed by the Attorney General to clarify his authority under the West Virginia Consumer Credit and Protection Act and to define unlawful conduct, or standards to be applied to determine whether the conduct is unlawful.*

The rule is designed to meet the following pressing needs:

(1) Create some standards for the application of non-specific terminology to generic applications;

(2) Prevent the sale of used or damaged goods as "new";
and

* West Virginia Code § 46A-6-103 allows the Attorney General the authority to clarify generally prohibited practices while Code § 46A-7-102(1)(3) allows the Attorney General to promulgate other rules which may be necessary under the West Virginia Consumer Credit and Protection Act.

(3) Complete the scheme of regulation for consumer transactions.

The provisions of this rule are not intended to create new causes of action for consumers when an underlying rule's or statute's limitation on action has expired. Nor is this rule intended to abrogate the bona fide error defense in private consumer actions.

Under consumer protection law, no state standards are in effect to justify or support a finding of unfairness, deception, or fraud. Also, no definition of "new" exists under West Virginia law to guide merchants in selling merchandise which may or may not be new without perhaps diminishing consumer rights and expectations. This rule is designed to create such standards.

SUMMARY OF PROPOSED
LEGISLATIVE RULE

September 19, 1988

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 AND 46A-7
SERIES 9

Title: Proposed legislative rule defining certain terms used within the West Virginia Consumer Credit and Protection Act.

SUMMARY OF PROPOSED LEGISLATIVE RULE

The Consumer Protection Division of the Office of the Attorney General is proposing the rule in order to define certain terms in the West Virginia Consumer Credit and Protection Act (hereinafter "the Act").

The rule is divided into seven sections. The first section fulfills the requirements imposed by the Secretary of State and addresses construction, scope, and severability of the rule.

Section two of the proposed rule offers an inclusive definition of the term unfair act or practice. Section three defines deceptive conduct.

Section four defines by exclusion products which may not be sold as new, and section five includes certain motor vehicles which, while not new within the meaning of section four, are to be considered as new within the meaning of Chapter 46A, Article 6A of the Code.

Section six of the rule describes conduct which constitutes repeated and willful conduct for possible imposition of civil penalties under the Act. Section seven clarifies and enlarges the definition of consumer credit sale within the Act.

For further information, please contact Robert Wm. Schulenberg III, Senior Assistant Attorney General, 812 Quarrier Street, Sixth Floor, Charleston, West Virginia 25301.

AGENCY APPROVED PROPOSED
LEGISLATIVE RULE

September 19, 1988

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 AND 46A-7
SERIES 9

Title: Legislative Rule defining certain terms
used within the West Virginia Consumer
Credit and Protection Act.

	Page
Section 1. General Provisions	1
2. Definition of Unfair Act or Practice	2
3. Definition of Deceptive	2
4. Definition of New or Original	2
5. Definition of New Motor Vehicle	3
6. Definition of Repeated and Willful	3
7. Definition of Consumer Credit Sale	3

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 AND 46A-7,
SERIES 9

FILED

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SECRETARY OF STATE

Title: Proposed legislative rule defining certain terms used within the West Virginia Consumer Credit and Protection Act.

Section 1. General Provisions.

1.1 Rule Designation - This rule is legislative.

1.2 Scope - This rule defines certain terms which appear within the Consumer Credit and Protection Act, W. Va. Code Sections 46A-1-101 et seq.

1.3 Authority - The authority for this rule is W. Va. Code Chapter 46A, Article 6, Section 103 and Chapter 46A, Article 7, Section 102(1)(e).

1.4 Filing Date -

1.5 Effective Date -

1.6 Repeal of Former Rule - This rule shall be construed in harmony with and shall not repeal the Damaged Goods Rule, 142 C.S.R. Series 6.

1.7 Penalties - No penalty exists for violating any provision of this rule.

1.8 Construction - This rule shall be deemed to be remedial and, therefore, shall be liberally construed to effectuate the purposes of the West Virginia Consumer Credit and Protection Act.

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.

Attorney General
Legislative Rule, 46A-6 & 46A-7
Series 9, Section 2

Section 2. Definition of Unfair Act or Practice.

For the purpose of Code Chapter 46A, Article 6, Section 104 and in addition to the conduct prohibited by Code Chapter 46A, Article 6, Section 102(f), an unfair act or practice shall include but shall not be limited to conduct which violates public policy; violates any state or federal statute or regulation designed to protect or promote the general health, safety, or welfare of the consuming public; causes substantial and reasonably unavoidable injury to consumers without countervailing benefit to consumers; or forces a consumer to bear a larger risk than an efficient market would require.

Section 3. Definition of Deceptive.

For the purpose of Code Chapter 46A, Article 6, Section 104 and in addition to the conduct prohibited by Code Chapter 46A, Article 6, Section 102(f), a deceptive act or practice shall include but shall not be limited to conduct which is likely to mislead the consumer acting reasonably in the circumstances or which forces a consumer to bear a larger risk than expected.

Section 4. Definition of New or Original.

For the purpose of Code Chapter 46A, Article 6, Section 102(f)(6), a good is not new or original in situations including, but not limited to, the following: (1) such good has been previously titled or transferred; (2) such good has been damaged in such a way that, were the damage not repaired, the value, usability, performance, or other characteristics or benefits of such good may be impaired; or (3) such good has been delivered to any person for personal or discretionary use. For the purpose of this section, when the cost of repair equals or exceeds the lesser of four hundred dollars or five percent of the selling price (exclusive of taxes or charges) or when any repairs do not fully cure any damage, such good shall be conclusively deemed to have suffered an impairment of value, usability, performance, or other characteristics and benefits, and such good may not be sold as new or original.

Attorney General
Legislative Rule, 46A-6 & 46A-7
Series 9, Section 5.

Section 5. Definition of New Motor Vehicle.

For the purpose of Code Chapter 46A, Article 6A, Section 1 et seq. (also known as the "Lemon Law"), a new motor vehicle includes any motor vehicle defined in Code Chapter 46A, Article 6A, Section 2 which has not been previously titled or which has been previously titled but which motor vehicle has been used by the manufacturer for the following or other similar purposes: (1) use for a short period designated for quality review; (2) use by a representative of a dealership as a demonstrator.

Section 6. Definition of Repeated and Willful.

For the purpose of Code Chapter 46A, Article 7, Section 111(2), a person has engaged in repeated and willful violations of the Consumer Credit and Protection Act when such person has engaged in conduct violative of the Act on more than one occasion and has voluntarily engaged in such violative conduct.

Section 7. Definition of Consumer Credit Sale.

For the purpose of Code Chapter 46A, Article 1, Section 102(12), a consumer credit sale shall include, but shall not be limited to (1) any conditional sale of goods; or (2) any arrangement, whether in the form of a lease or bailment, in which a consumer pays, agrees to pay, or may pay, at his or her option, an amount at least equal to the fair market value of the goods which are the subject of the arrangement, and in which the consumer may become the owner of the goods for no other or a nominal consideration.

REPORT OF PUBLIC HEARING
AND COMMENT PERIOD

September 19, 1988

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 AND 46A-7
SERIES 9

Title: Proposed legislative rule defining certain terms used within the West Virginia Consumer Credit and Protection Act.

REPORT ON PUBLIC HEARING AND PUBLIC COMMENT PERIOD

The public comment period with respect to this rule expired on September 15, 1988, and a public hearing on the proposed rule was held on that date, all pursuant to a notice filed with the State Register. The rule is intended to define terms within the West Virginia Consumer Credit and Protection Act.

The public hearing was conducted by Deputy Attorney General Robert J. Lamont and Senior Assistant Attorney General Robert Wm. Schulenberg III. The following persons spoke at the public hearing:

Mr. John N. Anderson
Charleston Area Chamber of Commerce

Harry Rubenstein, Esquire
Love, Wise and Woodroe

Leff Moore
Various Associations

Doug McElwee, Esquire
Robinson and McElwee

Claire Jarvis, State Director
American Association of Retired Persons

Ruth Lemmon, Executive Vice President
West Virginia Automobile and Truck Dealers
Association

Mike Ratz
Logan Motor Sales

George Miller
Apple Valley Chevrolet Olds

Jim Love
C&O Motors

Telford Cruickshanks
Telford's Chevrolet

Marvin Ware
Marvin Ware Chevrolet

Jim Pitrolo
James Chevrolet

Numerous written comments were also received during the period. Most of the comments adduced at the hearing and in writing were critical of the proposed rule in one way or another.

The commentators vehemently opposed the removal of any intent element from deceptive or conduct under the West Virginia Consumer Credit and Protection Act.* The commentators also opposed inclusion of certain vehicles within the lemon law. However, the commentators approved of the Attorney General's attempt to define what products may not be sold as new in this State.

* Intent to deceive has never been a required element of proof under Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)).

A transcript of the hearing will be forwarded upon receipt. However, copies of written comments are attached hereto.

For further information, please contact Robert Wm. Schulenberg III, Senior Assistant Attorney General, 812 Quarrier Street, Sixth Floor, Charleston, West Virginia 25301.

PUBLIC HEARING

OFFICE OF THE ATTORNEY GENERAL

SUBJECT: Proposed Legislative Rule - Definitional Rule (Series 9)

DATE AND TIME: September 15, 1988 - 9:00 a.m.

NAME:	REPRESENTING:	CHECK IF MAKING STATEMENT:
Steve Sydnor	Credit Bureau of Charleston	
Ken Watts	WV Credit Union League	
John R Anderson	Charleston Chamber	✓
Harry M. Rubenstein		✓
Thomas L. Thompson	Consumer	
Frank Lemmon	WV Auto Dealers Assoc	—
Jerry F. Fink	Apple Valley Co. of WV	—
Mano Waro	MARVIN WARE Char.	—
Michael Ratz	Logan Motor Sales	✓
Alton III	C to Motor Sales	✓
JAMES Pitrolo	JAMES CHEVROLET	✓
Jeff Coulson	Jeff's Chevrolet	—
Polly Diller	City of Charleston	
Larry F. Blidge	L & S	
Jay Moore	Various Steak Groves	✓
Doug ...	Blitzer + McCh...	—

RECEIVED

STONE & THOMAS

WILBUR S. JONES
PRESIDENT CO-CEO

ATTORNEY OFFICE
1030 MAIN STREET
WHEELING WV 26009
304-232-3344

September 12, 1988

RECEIVED

SEP 15 1988

C.P.D.

The Honorable Charlie Brown,
Attorney General
West Virginia State Capitol Complex
Charleston, West Virginia 25301

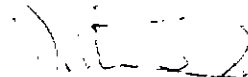
Dear Attorney General Brown:

I would like to reinforce Ted Ambrecht's letter dated September 6 regarding our inability to prepare a considered response to the proposed rules regarding consumer goods and services.

We would like to review the rules with our key executives who deal with the areas addressed by the proposed rules before attempting to prepare an answer. There are many complex and potentially far reaching issues involved. I would hope you would consider postponing any hearing until after October at the least.

Thank you for your consideration.

Very truly yours,



Wilbur S. Jones,
President, Co-CEO
STONE & THOMAS

WSJ:mrc



STATE OF WEST VIRGINIA
DEPARTMENT OF BANKING
CHARLESTON 25305

RECEIVED

SEP 15 1988

C.P.D.

M E M O R A N D U M

TO: Mr. Charles G. Brown, Attorney General
Capitol Building

FROM: David S. Mudie, Deputy Commissioner of Banking *D. S. Mudie*

DATE: September 13, 1988

RE: Public Hearing on Proposed Rule - Consumer Protection

This office would like to suggest that the public comment period on the proposed rule be extended beyond its termination date of September 15, 1988.

This office has received heavy response and interest in the proposed changes, mostly from within the industries we regulate. I believe an additional sixty day extension would be appropriate.

cc: Rob Schulenberg III

Rob Schmitt

Sears, Roebuck and Co.

CORPORATE GOVERNMENT AFFAIRS
DEPARTMENT 980-F
95 ANNEX
ATLANTA, GEORGIA 30395

STEPHEN P. GEORGESON
Regional Attorney
4041 885-3575

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SEP 09 1988
ATTY. GEN. OFFICE

September 7, 1988

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SEP 14 1988

C.P.D.

The Honorable Charlie Brown
Attorney General
State of West Virginia
Building One, Room E-26
Charleston, West Virginia 25305

Dear General Brown:

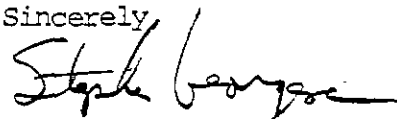
I wanted to write to you concerning the proposed legislative rules pertaining to the prevention of deceptive acts or practices in connection with the sale of consumer goods and services and also the proposed legislative rules defining certain terms used within the West Virginia Consumer Credit and Protection Act.

I have just received copies of these proposed rules and have had the opportunity to review them briefly. I am very concerned about the possible impact on Sears' advertising practices if these regulations are adopted in this form. While we certainly have in the past and will in the future continue to support any rule or regulation that seeks to discourage deceptive or practices, I believe that these proposed regulations go far beyond that and would severely impact legitimate advertising practices.

Because I have sent a copy of these proposed regulations to our Headquarters Law Department in Chicago for additional comments, I would like to request a postponement on the public hearing now scheduled for September 15. We will need the additional time to review these proposed regulations more thoroughly so that we can provide you with our input prior to adoption.

I know that other retailers throughout the state also share our serious concerns. I hope that you will give my request every consideration. I look forward to hearing from you.

Sincerely



Stephen P. Georgeson

SPG:mes



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SEP 14 1988

C.P.D.

PROSECUTING ATTORNEY

SUSAN B. TUCKER

MONONGALIA COUNTY COURT HOUSE

MORGANTOWN, WEST VIRGINIA 26505

CONSUMER PROTECTION DIVISION
(304) 291-7284MAIN OFFICE TELEPHONE
(304) 291-7250

September 13, 1988

Robert Wm. Schulenberg III
 Assistant Attorney General
 Office Of The Attorney General
 Charleston, WV 25305

Dear Mr. Schulenberg:

Thank you for providing us with copies of the proposed consumer legislation which your office has filed with the Secretary of State. These regulations are clearly very detailed and directed toward addressing as many consumer/creditor transactions as possible. We believe this proposed legislation is a positive step in providing guidelines to consumers and those who transact business with consumers.

Approximately ten years ago our office created a Consumer Protection Division to assist the residents of Monongalia County as well as consumers outside of the County who have dealings with Monongalia County businesses. The assistance offered by our Office is informal in nature, and is provided by informing inquiring consumers as to their rights under the consumer laws. Obviously your attempts to clarify and closely define these regulations and laws, make it easier for us to provide more beneficial information to those who seek advice from our Office.

Very truly yours,

Susan B. Tucker
 Prosecuting Attorney

Marcia L. Ashdown
 Assistant Prosecuting Attorney

SBT/MLA/tlb



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SEP 09 1988

ATTY. GEN. OFFICE

1014 VINE STREET
CINCINNATI, OHIO 45202
513/762-1146

JAMES D. MCINTIRE
DIRECTOR-PUBLIC AFFAIRS
THE KROGER CO.

September 6, 1988

The Honorable Charlie Brown
Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, West Virginia

Dear Attorney General Brown:

On August 12, 1988, your office published three proposed emergency rules pursuant to Chapter 46 of the West Virginia Code. These proposed rules would cover a wide variety of issues, and would cover such diverse areas as credit granting, debt collection, advertising, and other business practices. The rules, especially if adopted in their current form, could have a substantial impact on a broad range of conduct.

The Kroger Co. has the proposed rules under review and expects to comment on them either directly or through the West Virginia Retailers Association. Because of the complexity and breadth of the proposed rules, we would respectfully suggest that the comment period be extended beyond September 15, 1988. This would allow other businesses, especially small businesses, more time to fully consider the proposed rules and their impact.

Sincerely,

James D. McIntire

JDM:pan
cc: Paul McKown

**HOUSEHOLD
FINANCE**

HOUSEHOLD
INTERNATIONAL

Jeffrey B. Wood
Counsel

September 14, 1988

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SEP 15 1988

VIA AIRBORNE EXPRESS

C.P.D.

Office of the Attorney General
Consumer Protection Division
812 Quarrier Street
L and S Building, 6th Floor
Charleston, West Virginia 25301

Re: Proposed Legislative Rules, Series Numbers 9-11

Dear Consumer Protection Division:

As a corporate attorney for Household Finance Corporation, I appreciate the opportunity to comment on the proposed regulations, Series Numbers 9-11. Household Finance Corporation is a lender under the West Virginia Consumer Credit and Protection Act, under which these legislative regulations are proposed. Household operates offices in both Morgantown and Vienna, West Virginia.

The proposed regulations would have a very serious deleterious effect on the business that Household conducts in West Virginia. Although I will list a few very specific objections to separate provisions of the proposed regulations, my listing should not be interpreted as acceptance of the other proposed regulations, which, when taken as a whole, would significantly impair the furtherance of our business.

I have the following specific comments:

1. Series 9, Section 4 provides that an activity is "fraudulent" whenever a false representation is made, without regard to the intent of the person making the misrepresentation. If this rule were adopted, an aggrieved consumer would not even have to show that the person intended to make a false statement, much less that the person intended to harm the consumer. This is a "strict liability" standard for the making of statements - a legal theory that appears preposterous on its face.

2. Series 9, Section 7 provides that recovery of a civil penalty does not require specific intent to violate the Consumer Credit and Protection Act. Thus, a person who engaged in conduct, without knowing it to be a violation, under the mistaken legal assumption that it was not a violation, would be subject to the civil penalty. The risks would be great, since many acts now thought to be lawful could some day be determined by a court to be unlawful.

3. Series 10, Section 4.26 attempts to duplicate the advertising requirements of the Truth-in-Lending Act and Regulation Z promulgated thereunder, but goes far beyond those requirements. Reg. Z only requires disclosure of the annual percentage rate if a rate is advertised or a "trigger" term is provided. Reg. Z does not require stating whether an advertisement involves open-end credit or closed-end credit. Further, if creditors are already subject to the Truth-in-Lending Act, why is this section necessary?

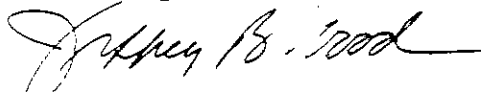
4. Series 10, Section 7.1 permits a consumer to recover attorneys' fees, although this is not authorized by Section 46A-6-106 of the West Virginia Consumer Credit and Protection Act.

5. The various provisions of Series 11 appear to render most debts uncollectible. For instance, Section 3.3.3 prohibits any communication with a debtor if the communication "may cause embarrassment" to the debtor. Section 3.11 prohibits any contact with a debtor except in relation to judicial proceedings. Section 3.19 prohibits creating a sense of urgency in the debtor's mind.

Although the intent of these proposed regulations is to benefit the consumer, if adopted, they would have a negative impact on consumers because consumers would not be able to easily obtain loans because many lenders will not be able to continue making loans. We recommend against the adoption of these proposed regulations.

Thank you for this opportunity to comment.

Sincerely,



Jeffrey B. Wood

JBW/sjf

cc: Ron Marien

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LAW OFFICES
LOVE, WISE & WOODROE

P. O. BOX 951

CHARLESTON, WEST VIRGINIA 25323

TELEPHONE (304) 343-4841
CHARLESTON NATIONAL PLAZA

CHARLES M. LOVE (1902-1987)
CHARLES C. WISE, JR. (1911-1982)
WILLIAM M. WOODROE (1906-1965)
JOHN O. KIZER
ROBERT S. MAGNUSON
THOMAS C. DAMEWOOD
GEORGE W. S. GROVE, JR.
MARIO J. PALUMBO
CHARLES E. BARNETT
WILLIAM W. BOOKER

STEVEN C. HANLEY
MARK A. SWARTZ
KEVIN A. NELSON
HOWARD G. SALISBURY, JR.
HARRY M. RUBENSTEIN
K. ALAN PEROUÉ

COUNSEL
ERNEST H. GILBERT

September 14, 1988

Mr. Roger A. Rumbaugh
Vice President - Compliance Officer
Charleston National Bank
Post Office Box 1113
Charleston, West Virginia 25324

Re: Proposed regulations under the West
Virginia Consumer Credit Protection Act

Dear Roger:

At your request, I have reviewed the proposed regulations issued by the Office of the West Virginia Attorney General, a copy of which is attached hereto, with regard to the Consumer Credit and Protection Act. As you know, the Attorney General has submitted three separate proposals bearing Rule Nos. 9, 10 and 11. The Attorney General relies upon West Virginia Code §§ 46A-6-103 and 46A-7-102(1)(e). These statutory provisions provide the Attorney General of the State of West Virginia with the authority to make rules and regulations interpreting and defining the provisions of § 46A-6-102 subject to "conforming to the rules, regulations and decisions of the Federal Trade Commission and Federal courts in interpreting the provisions of the Federal Trade Commission Act." Section 46A-7-102(1)(e) provides the Attorney General with the authority to "adopt, amend and repeal such reasonable rules and regulations in accordance with West Virginia Code § 29A-1-1, as are necessary and proper to effectuate the purposes of this chapter and to prevent circumvention or evasion thereof." Thus, the Attorney General appears to be acting within the scope of the statutory authority granted to him with regard to proposing regulations under the Act. However,

LOVE, WISE & WOODROE

Mr. Roger A. Rumbaugh
September 14, 1988
Page 2

an argument could be advanced that the proposed rules and regulations are not consistent with the FTC rules, regulations and interpretations and are not reasonable or necessary and proper to effectuate the purposes of the Act which prevent circumvention or evasion.

Rule 9 of the proposed regulations undertakes to define eight separate terms. A few of the proposed definitions such as "unfair act or practice," "deceptive," "fraudulent," and "repeated and wilful," delete the requirement that the seller or lender act with intent. Such a definition is inconsistent with the generally accepted legal concept of deceptive, fraudulent and wilful conduct. Further, these proposed regulations would in effect abrogate the bona fide error rule provided in § 46A-5-101(8) of the Act which provides that a creditor may establish by preponderance of the evidence that a violation is unintentional or the result of a bona fide error. Also, these proposed definitions may be inconsistent with the rules, regulations and interpretations of the Federal Trade Commission and, as such, fall outside the scope of the Attorney General's authority to promulgate such definitions.

At your request, I have also reviewed Rules 10 and 11 of the proposed regulations. Essentially, those regulations are significantly overbroad in scope with regard to regulating advertising and prohibiting debt collection practices. It is my impression that the Rule 10 regulations would, at times, impact upon banks with regard to advertising and that Rule 11 would directly impact upon collection actions taken on behalf of banks.

Based upon my September 14, 1988, telephone conversation with Debbie Sink, counsel for the West Virginia Bankers Association, it is my understanding that the hearing to be held on September 15 will only address Rule 9 and that the Attorney General's office will continue the public hearing with

LOVE, WISE & WOODROE

Mr. Roger A. Rumbaugh
September 14, 1988
Page 3

respect to Rules 10 and 11 in addition to extending the comment period for Rules 10 and 11. It is also my understanding that the West Virginia Bankers Association will submit written comments with respect to Rule 9 on September 14 and will submit written comments with respect to Rules 10 and 11 at such time as may be appropriate. In discussing this matter with Ms. Sink, I shared my thoughts with regard to Rule 9 with her and, in particular, my comments with regard to the impact the proposed regulations would have on the bona fide error rule. Ms. Sink advised me that she has undertaken to research and review the proposed regulations for approximately one week and that she has devoted significant time and effort to comparing the proposed regulations to the rules, regulations and interpretations of the Federal Trade Commission for the purpose of discerning inconsistencies. She is of the opinion that the proposed regulations in several instances are inconsistent with those FTC guidelines. Ms. Sink has agreed to provide me a copy of the written comments to be submitted on behalf of the Bankers Association and has invited me to participate in preparing written comments with regard to Rules 10 and 11 when appropriate.

If you have any questions concerning this matter or if you would like me to take additional action at this time, please feel free to contact me.

Very truly yours,

"Me"

Harry M. Rubenstein

HMR/sm
Enclosure

LAW OFFICES

Bowles McDavid Graff & Love

P. O. Box 1386 • Charleston, West Virginia 25325-1386 • Area Code (304) 347-1100

16th Floor • Commerce Square • Low Street • Charleston, West Virginia 25301 • Telecopier (304) 343-2867

4th Floor • United Center • 500 Virginia Street East • Charleston, West Virginia 25301 • Telecopier (304) 347-1196

PAUL W. BOWLES (1921-1966)
WILLIAM R. McDAVID
F. T. GRAFF, JR.
CHARLES M. LOVE, III
P. MICHAEL PLESKA
ROGER W. TOMPKINS, II
GARY G. MARKHAM
DAVID C. HARDESTY, JR.
CARL D. ANDREWS
RICKLIN BROWN
J. THOMAS LANE

GERARD R. STOWERS
P. NATHAN BOWLES, JR.
THOMAS B. BENNETT
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PHYLLIS M. POTTERFIELD

DEBORAH A. SINK
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THOMAS A. THEYWOOD
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SEP 15 1988

C.P.D.

September 14, 1988

HAND DELIVERY

Robert Wm. Schulenberg, III
Assistant Attorney General
Office of the Attorney General
Charleston, WV 25305

Dear Mr. Schulenberg:

Enclosed for your consideration are written comments submitted by the West Virginia Bankers Association regarding Proposed Legislative Rule Defining Certain Terms Used Within the West Virginia Consumer Credit and Protection Act. Please include these comments with those rendered at the public hearing as a part of the public record on the proposed rule.

Very truly yours,

Deborah A. Sink

DAS/jb
Enclosure
cc: Tom Winner ✓

COMMENTS SUBMITTED TO
THE OFFICE OF THE ATTORNEY GENERAL
STATE OF WEST VIRGINIA

REGARDING:

Title 142, Series No. 9: Proposed Legislative
Rule Defining Certain Terms Used Within the
West Virginia Consumer Credit and Protection Act

SUBMITTED BY:

WEST VIRGINIA BANKERS ASSOCIATION
SUITE 1212 COMMERCE SQUARE
CHARLESTON, WEST VIRGINIA 25301

September 14, 1988

BY COUNSEL:

BOWLES McDAVID GRAFF & LOVE
1600 COMMERCE SQUARE
CHARLESTON, WEST VIRGINIA 25301

WEST VIRGINIA BANKERS ASSOCIATION'S
COMMENTS REGARDING THE ATTORNEY GENERAL'S
PROPOSED LEGISLATIVE RULE DEFINING CERTAIN
TERMS USED WITHIN THE WEST VIRGINIA CONSUMER
CREDIT AND PROTECTION ACT (TITLE 142, SERIES NO. 9)

I. INTRODUCTION

The West Virginia Bankers Association, Inc. (the "Association"), is a non-profit corporation chartered to promote the general welfare and increased usefulness of banks and banking institutions to the citizens of the State of West Virginia. Its membership includes approximately 225 banks conducting business in West Virginia. One of the Association's stated purposes in its charter is "to obtain proper consideration of and action upon matters relating to financial and commercial usages, customs and laws affecting banking interests." The Association appreciates this opportunity to comment upon the proposed Legislative Rule under consideration by the office of the Attorney General relating to consumer protection issues. Specifically, the Association is submitting written comments on proposed Legislative Rule, Title 142, Series No. 9. This rule defines certain terms within the West Virginia Consumer Credit and Protection Act (the "Act"). The Association has certain concerns with the definitions contained in the proposed rule which are enumerated below. Most concerns are based upon the observation that the Attorney General has failed to follow statutory guidelines with regard to promulgation of the proposed rule.

The comments and recommendations detailed herein are founded upon the legitimate concern that the proposed definitions must conform to the legislative mandate, namely, that the consumer protection provisions of the Act, must complement the

body of federal law governing unfair, deceptive and fraudulent acts in order to protect the public without imposing undue burdens upon those engaging in consumer transactions.

In this regard, the West Virginia Legislature has specified that, in construing the general consumer protection provisions, the interpretations handed down by the federal courts of the same or similar federal acts are to serve as a guide in achieving the dual beneficial purposes of the Act, promoting fair competition and fair consumer practices. W. Va. Code § 46A-6-101 (1986 Replacement Vol.). Moreover, the Legislature has explicitly provided that the Attorney General's rules and regulations interpreting and defining Code § 46A-6-102 "shall conform as nearly as practicable with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the 'Federal Trade Commission Act,' as from time to time amended." W. Va. Code § 46A-6-103 (1986 Replacement Vol.). This latter provision is a self-executing preemption provision insofar as it prohibits issuance by the Attorney General of rules which do not substantially conform to the rules, regulations and decisions of the Federal Trade Commission (the "Commission").

The primary federal legislation prohibiting unfair and deceptive acts or practices is the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1938) (the "FTC Act"). Under the FTC Act, the Commission is given certain enforcement powers, including the authority to issue trade regulations that have the force of law. 15 U.S.C. § 57a. The FTC Act excludes from its rulemaking jurisdiction all banks which are within the jurisdiction of the Federal Reserve Board (the "FRB"), the Federal Deposit Insurance Corporation, or the Office of the Comptroller of the Currency. The FRB, however, has concurrent authority to issue rules prohibiting unfair trade practices by banks. 15 U.S.C. § 57a(f)(1).

Although banks are excepted from the FTC Act's coverage, they are not excepted from the Act passed by the West Virginia Legislature. Cf. Farmers & Merchants State Bank of Krum v. Ferguson, 605 S.W.2d 320 (1980). Thus, in commenting upon the proposed definitions submitted by the Attorney General, the West Virginia Bankers Association is justified in its expectation that those rules will substantially conform to the Commission's rules and regulations, as well as to the federal court decisions interpreting the FTC Act and the rules and regulations issued thereunder.

The Association's review of the proposed definitions, however, reveals several areas in substantial conflict with the federal authorities. The nature of the inconsistencies suggests that they were intentional, rather than inadvertent. This attempt to disregard the legislative mandate to follow the Commission's guidance is an abuse of authority by the Attorney General.

II. ANALYSIS

A. Section 2. Definition of "Unfair Act or Practice."

This section proposes a four part definition of an "unfair act or practice" for purposes of W. Va. Code § 46A-6-104 (1986 Replacement Vol.), which declares that such acts are unlawful. The proposed definition is in addition to the 16 acts specifically identified by the Legislature under W. Va. Code § 46A-6-102(f)(1)-(16) (Supp. 1988) as being unfair.

The four parts of the proposed definition prohibit any act which (1) violates public policy generally; (2) violates state or federal statutes and regulations enacted to promote the

consuming public's general welfare; (3) causes substantial injury to consumers without significant countervailing benefits; or (4) is deceptive, fraudulent or unconscionable.

The Association's primary objection to this proposed definition arises from the fact that part (3) of the proposed definition fails to reflect the decisions of the Commission and of the federal courts of appeals on the definition of "unfair." A secondary concern is that part (4) of the proposed definition apparently offers no greater protection to the consuming public than is provided under the definitional provisions of Code § 46A-6-102(f)(13), which clearly prohibits the use of fraudulent, deceptive and similar egregious conduct, and is, therefore unnecessary. An additional concern is that part (2) is not limited in scope; any technical violation of certain unidentified state or federal statutes or regulations will be deemed an "unfair act or practice."

1. Part (3) -- Substantial Injury, Without Significant Countervailing Benefits -- An Incomplete Definition.

In 1980, the Commission adopted the following standard for identifying "unfair practices": "To justify a finding of unfairness, the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in H.R. Rep. No. 156, Pt. 1, 98th Cong., First Sess. 33-40 (1983) (emphasis added). This standard became a binding norm on the Commission as a result of subsequent adjudications which adopted the three-part test set forth in the 1980 policy statement. See American Financial Services v. FTC, 767 F.2d 957, 970-71 (D.C. Cir. 1985); cert. denied, 475 U.S. 1011 (1986). Likewise,

pursuant to W. Va. Code § 46A-6-103, it became a binding norm on the Attorney General's administrative and enforcement authority under the Act. See N. Averitt, The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act, 70 Geo. L. J. 225, 284-286 (1981).

Despite this precedent, the Attorney General has ignored what is perhaps the most crucial factor for ascertaining unfairness -- whether the injury is one that the consumers themselves could not reasonably have avoided. Thus, whether as a result of an inadvertent oversight or a conscious effort to liberalize the Commission's rules and decisions, the Attorney General has abused his authority insofar as part (3) of the proposed definition does not include consideration of the reasonableness of the consumer's action relative to the injury.

In order to comply with the statutory mandate to follow federal policy in this area, the Attorney General should modify part (3) of the definition by adding language substantially similar to that found in the Commission's decisions, e.g., "causes substantial injury to consumers which is not outweighed by any countervailing benefits to consumers that the practice produces, and is an injury that the consumers themselves could not reasonably have avoided."

2. Part (4) -- W. Va. Code § 46A-6-102(f)(13) Provides Specific Protection.

As discussed above, the definition set forth in part (4) offers no greater protection to the consuming public than is found under the specific provisions of Code § 46A-6-102(f)(13). Additionally, this factor is duplicative of the analysis for determining the existence of an injury under the Commission's three-part test. An act which is deceptive, fraudulent, or unconscionable will likely result in an injury or violation of

public policy. Thus, there is no need to include this as a separate factor for ascertaining unfairness; part (4) should be deleted.

3. Part (2) -- Violation of Any State or Federal Statutes or Regulation Enacted to Promote the Consuming Public's Welfare---

This proposed definition would render an entity in violation of the Act, subject to injunctive action, and subject to a private cause of action by consumers in the event of any unintentional, technical violation of certain unidentified statutes. Such a result is beyond the scope of what the Act contemplates as an unfair act or practice.

B. Section 3. "Definition of Deceptive."

The Association's objection here is the same as expressed above -- the Attorney General's proposed definitions must substantially conform to federal law. The Commission, in 1983, issued a new standard for determining whether an act or practice will be found to be "deceptive" under the FTC Act, which replaces the old "tendency or capacity to mislead" test for deception. The new "reasonable consumer" standard provides, in part, as follows: "(T)he Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." (emphasis added).

This statement was prepared upon the request of the Committee on Energy and Commerce of the House of Representatives. S. Rep. No. 451, 97th Cong., Second Sess. 16 (1983); H. R. Rep. No. 156, Part I, 98th Cong., First Sess. 6 (1983), and is reprinted in 45 Antitrust & Trade Reg. Rep. (BNA) 689 (Oct. 27, 1983). Subsequent Commission decisions have made the 1983 policy statement on deception binding on the Commission. See, e.g.,

Cliffdale Associates, Inc., 103 F.T.C. 110 (1984); Amrep Corp. v. F.T.C., 768 F.2d 1171, 1178 (10th Cir. 1985), cert. denied, 475 U.S. 1034 (1986).

An excellent discussion concerning the significance of this standard is found in the case of Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 109 (1986), wherein the federal court of appeals summarized the effects of the new standard as follows:

Each of the three elements of the new standard challenged by petitioner imposes a greater burden of proof on the FTC to show a violation of Section 5. First, the FTC must show probable, not possible, deception ("likely to mislead," not "tendency and capacity to mislead"). Second, the FTC must show potential deception of "consumers acting reasonably in the circumstances," not just any consumers. Third, the new standard considers as material only deceptions that are likely to cause injury to a reasonable relying consumer, whereas the old standard reached deceptions that a consumer might have considered important, whether or not there was reliance.

758 F.2d at 1436. (emphasis in original). As the Commission stated in Cliffdale Associates, Inc., "the law should not be applied in such a way as to find that honest representations are deceptive simply because they are misunderstood by a few." 103 F.T.C. 110.

The Attorney General's proposed definition of "deceptive" ignores the Commission's new standard, even though it is binding upon him by the provisions of Code § 46A-6-103. The Commission's standard on "deception" must be adopted in place of the proposed definition, or, in the alternative, the proposed definition must be withdrawn.

C. Section 4. Definition of "Fraudulent."

The proposed definition states that it is promulgated to define the term "fraudulent" for the purpose of W. Va. Code § 46A-7-109 (1986 Replacement Vol.). Article 7 of Chapter 46A is an administrative, not substantive, article. Section 9 thereof gives the Attorney General injunctive authority to prohibit fraudulent conduct. Thus, the proposed "definition" of "fraudulent" is an attempt by the Attorney General to make an evidentiary rule regarding the burden necessary to obtain injunctive relief. Such a rule is unnecessary given that Code § 46A-7-109(2) specifically provides what a court must find, pursuant to that section, in order to grant injunctive relief. Additionally, the substantive provisions of the Act, e.g., Code § 46A-6-102(f)(13), should be referenced by the Attorney General for substantive determinations. This section should be deleted.

D. Section 7. Definition of "Repeated and Willful."

The proposed definition of "repeated and willful" violates the rudimentary tenet of statutory construction which provides that, "[i]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meanings." Syl. Pt. 1, Thomas v. Firestone Tire & Rubber Co., ___ W. Va. ___, 266 S.E.2d 905 (1980). The proposed definition of "repeated and willful" distorts the common, ordinary and accepted meaning of what constitutes a "willful" act.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Black's Law Dictionary, 1434 (5th ed. 1979) (emphasis added). Further, this definition is contrary to at least one provision in the Act, § 46A-5-101(8), in which intentional conduct is a necessary component of a violation. Consistent with statutory intent and the established meaning of "willful," the Attorney General should amend this section to provide that a person has engaged in "repeated and willful" violations of the Act when such person has engaged in conduct violative of the Act and on more than one occasion and has "engaged in such violative conduct voluntarily and intentionally and with the specific intent to violate the Act."

E. Section 8. Definition of "Consumer Credit Sale."

The Association objects to this section, as now written, in its entirety. Parts (1), (2) and (3) of the proposed definition are duplicative of one another, and part (1) is legally incorrect. Part (1) defines "consumer credit sale" to include "any credit 'sale of goods' [as defined in Code Chapter 46A, Article 1, Section 102(37)] in which a security interest may arise as defined by Code Chapter 46, Article 1, Section 201(37)." (emphasis added).

Use of the term "may" in this instance is objectionable to the extent that it is contrary to a proper application of the statutory definition of "security interest" where a lease or consignment is involved. While it is true that a "security interest" may arise where a lease or consignment is involved, West Virginia Code § 46-1-201(37) provides that the ultimate determination is to be made based on the facts of each case. Furthermore, the statute provides that:

[T]he inclusion of an option to purchase does not of itself make the lease one intended for security, and ... an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to

become the owner of the property for no additional consideration or for a nominal consideration does not make the lease one intended for security.

Thus, the use of the word "may" in the proposed definition is a surreptitious attempt to side step the statutory requirement that the intention of the parties govern the determination of whether a "security interest" was intended under the facts of the particular case.

The definition proposed by this section also expands the meaning of "consumer credit sale" in a manner which is inconsistent with the definition set forth in the Act. A "consumer credit sale" is defined by Code § 46A-1-102(12) as follows:

12(a) Except as provided in paragraph (b), "consumer credit sale" is a sale of goods, services or an interest in land in which:

(i) Credit is granted either by a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a seller credit card;

(ii) The buyer is a person other than an organization;

(iii) The goods, services or interest in land are purchased primarily for a personal, family, household or agricultural purpose;

(iv) Either the debt is payable in installments or a sales finance charge is made; and

(v) With respect to a sale of goods or services, the amount financed does not exceed twenty-five thousand dollars.

(b) "Consumer credit sale" does not include a sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card or similar arrangement.

RE TIVED

SEP 15 1988

C.P.D.

TO: Office of the Attorney General, Consumer Protection Division
FROM: West Virginia Retailers Association
SUBJECT: Comments Relating to Proposed Rules, Series 9,10,11
DATE: September 12, 1988

Not given adequate time to fully study the impact of the proposed rules (Series 9,10,11). I would like to make some general observations.

Some of the rules dealing with the sale of consumer goods and services seem to be particularly unrealistic and burdensome. The proposed advertising disclosure requirements would greatly increase the cost of advertising because of all the detailed disclosures which must be made. Also, a retailer would probably need a lawyer to review most ads.

Another example of unrealistic requirement imposed by rules is the Regulation 4.3 on page four (4). This rule makes it illegal to fail to deliver any product under advertised limitations, terms and conditions. This means that a retailer who in good faith runs out of a product that is out of production is suddenly acting illegal and may be subject to thousands of dollars in fines.

In the retail community we feel these proposed rules will cause serious problems for various segments of West Virginia's business community.

I would recommend that the Attorney General's office form a task force to study these regulations and address the real problems facing not only business but consumer concerns as well.

The WVRA strongly objects to the proposed regulations in their present form.

Paul W. McKown,
President WVRA

COMMENTS RELATING TO SERIES 9

The West Virginia Retailers Association wishes to file the following comments relating to proposed Rules: Series 9.

I would like to state for the record first of all, I do not feel we had adequate time to distribute and receive comments from various retailers throughout the state. A written request was made of Attorney General Brown to extend the period before the public comment period.

Proposed legislative rule defining certain terms used within the West Virginia Consumer Credit and Protection Act.

Comments:

Section 2 - Definition of "Unfair Act or Practice". The statement or other authoritative statement of public policy should be removed. It is an expression that exceeds the laws of the state of West Virginia and appears to give Attorney General unlimited power.

Section 3 - Should remove or has the tendency and remove regardless of the existence of any actual deception.

Section 4 - Delete last sentence of paragraph.

It appear these rules are intended to permit attorney's to bring WV Business to court at the State Court Level instead of at the Federal Level. What are we trying to do? (Perpetuate the Lawyer Business).

The scope of this section is very broad and compliance could be near impossible as many of the compliances criteria are subjective rather than objective.

Higher Education Assistance Foundation

A member of the HEAF group

P.O. Box 591
Charleston, West Virginia 25322
304-345-7211**RECEIVED**

SEP 15 1988

C.P.D.

September 13, 1988

Office of the Attorney General
Consumer Protection Division
812 Quarrier Street, 6th floor
Charleston, West Virginia 25301

Dear Sir:

The following is a brief comment on proposed rule 142 which is intended to support Code 46A-7-102(1)(e).

My name is Neil Bolyard. I live at 708 Park Street, Morgantown, West Virginia. I have been employed in various financial aid positions within the state of West Virginia since September of 1963. I am currently employed by the Higher Education Assistance Foundation, a non-profit corporation with responsibility for guaranteeing educational loans in West Virginia.

Financial Aid is essential if Higher Education in West Virginia is to continue at the current level or potentially increase as many organizations and agencies would like to see happen. Our college going rate in the mid thirties is among the lowest in the nation.

Approximately one-half of all students in the public sector and a much higher percentage in the independent sector receive some type of financial assistance. Unfortunately, the majority of financial aid dollars is loans.

Since I have been a consumer for more than half a century, I am very interested in protecting consumer rights. I do believe, however, that the proposed rule may create a situation where higher education in West Virginia could be adversely impacted to a degree which may take an extended period to recover.

The federal government is on a course to reduce defaults and proposals are currently being considered that would severely limit or eliminate totally an institution's ability to participate in all federally supported financial aid programs should default percentages on student loans exceed

Office of the Attorney General
September 13, 1988
Page 2

an established level. This would not only impact loans but prevent gift aid (Pell Grants or SSIG (State Grant Funds supported by federal dollars)) and College Work-Study dollars to be withdrawn at impacted institutions.

The proposed rules also appear to place restrictions on educational institutions that would prevent them from performing prescribed due diligence. If this is correct, you have a situation where the school is told you must do "x" by the Department of Education and state government saying you cannot do "x".

With the potential for such a dilemma to develop, it would seem advisable to explore fully the ramifications of the proposed rules and to work in the development of a reasonable solution.

I have been advised that federal consumer protection laws must be adhered to by all collection agencies and that federal regulations adequately protect the consumer. If this is the case, it would seem logical to adopt and ENFORCE a set of regulations that parallel the federal guidelines.

In any event, with the potential to inflict irreparable harm to higher education, it would seem advisable to secure informed counsel from experts prior to adopting rules without full consideration of what may be the undesirable result.

I would be pleased to respond to any question you may have relative to this issue.

Sincerely,



Neil E. Bolyard
Vice President

NEB/tlc

SEP 15 1988

C.P.D.

William F. Childress
Executive Director

September 15, 1988

The Honorable Charlie Brown,
Attorney General
Office of the Attorney General
Consumer Protection Division
812 Quarrier Street
L&S Building, Sixth Floor
Charleston, WV 25301

Dear General Brown:

RE: September 15, 1988 Hearing, Proposed Rule 10

Previously, the West Virginia Press Association requested a postponement of the Public Hearing regarding Proposed Legislative Rule 10, to allow time for an adequate review of the proposal. We also requested that the amount of time allocated for the hearing be expanded beyond the announced 45 minutes. Having received no response to our requests, we hereby submit written comments in opposition to the proposal.

We would like to stipulate, however, that the enclosed comments are based on the analysis we were able to accomplish in the brief time available prior to the hearing and do not necessarily represent our total response to the proposal.

Sincerely,



William F. Childress,
Executive Director

WEST VIRGINIA PRESS ASSOCIATION

101 Dee Drive • Suite 200
Charleston, West Virginia 24311

(304) 342-1011

COMMENTS: PROPOSED LEGISLATIVE RULE 10

Office of the Attorney General
September 15, 1988

Presented by W. F. Childress,
Executive Director, West Virginia Press Association

The West Virginia Press Association is a trade association representing daily and weekly newspapers in West Virginia.

The newspapers of West Virginia each day handle thousands of individual advertisements for the sale of goods and services. The advertising representatives, advertising managers and publishers of these newspapers, with guidance from their own lawyers, have frequent occasion to counsel advertisers on the legality, taste, propriety, etc. of individual advertisements. In this role, newspaper advertising personnel are conversant with the provisions of the West Virginia Consumer Protection Act, the Federal Trade Commission Act and various other state and federal statutes and regulations pertaining to the content of advertising.

The newspapers of West Virginia also are familiar with the effects on advertisers and purchases of advertising space resulting from enforcement procedures, particularly those involving statutes or regulations previously not the subject of enforcement actions.

From this perspective, the West Virginia Press Association strongly urges that Proposed Rule 10 be withdrawn and revised in such a manner as to avoid the adverse economic impact the proposed rule would be certain to produce if adopted in its present form.

We would like, also, to state for the record that this organization had requested a postponement in the date of this public hearing to allow time for an adequate review of Proposal Rule 10. Since this request was not granted, the comments in this document do not necessarily the total and final comments and analysis that this organization would have to offer.

We first cite several general points which we see as serious problems regarding Proposed Rule 10.

1. The proposed rule, taken as a whole, appears directed at regulating a variety of very specific advertising/marketing slogans and practices. This is an inappropriate approach to establishing regulations, considering the fact that, by the very nature of modern marketing techniques, advertising slogans and related practices change at frequent intervals. Yesterday's "Where's the Beef?" becomes today's "California Raisins." Regulations aimed at narrowly defined practices have the potential for becoming irrelevant within a matter of weeks. Further, the

interests of consumer protection could be jeopardized if enforcement actions are geared to narrowly defined regulations, because those who would be prone to engage in questionable practices would only have to alter their slogans or tactics slightly in many cases to be outside the scope of the regulations involved.

Rather than seek to address such specific advertising and marketing practices, we recommend that appropriate enforcement actions be taken under the present provisions of the Consumer Protection Act and any other appropriate statute, allowing the courts, as necessary, to determine whether a given practice may be in violation of the statute or statutes.

2. Although it is stated in Proposed Rule 10 that there will be no adverse economic impact on either revenues received by the State of West Virginia, business volume of affected industries or the public as a whole, we believe that an accurate and realistic appraisal of the effects of Proposed Rule 10 would disclose significant potential for serious loss of state tax revenue, serious reductions in corporate and personal income and consequent adverse financial impact on the citizens as a whole. For many years the newspapers of West Virginia have been in a position to observe the impact of state and federal regulatory and enforcement activities on the willingness of even the fully law-abiding merchants to advertise. The experience in such circumstances is highly predictable: advertising is either seriously reduced or ceased altogether by the affected parties. Such curtailment of advertising results in losses in personal income to commission-based advertising personnel and in losses in income to the newspaper companies involved. In both cases, there is the further result of a loss of personal and corporate income tax revenues to the state. Since advertising is a primary factor in business volume, curtailment of advertising reduces sales volume - which, in turn, reduces the state's income from the consumer sales tax.

3. To a certain degree, Proposal Rule 10 appears to be an effort to expand on provisions of the Consumer Protection Act, beyond the present scope of the statute. As one example, proposed paragraph 4.28 appears to be almost identical in wording to the main provisions of Senate Bill 128, which was introduced during the 1988 session of the state Legislature, but was not enacted. We urge that the proposed rule be revised so that it does not exceed the scope or the specific provisions of the statute. We further contend that the proper authority for enacting changes in or expanding specific provisions is the Legislature itself, and not the administrative rule-making process. It is our belief that provisions of Proposed Rule 10 are so sweeping in nature, command so much potential for adverse economic impact and represent such major changes in the way state government regulates business activity that a full and detailed legislative review under normal legislative processes is demanded.

4. Proposed Rule 10 also to a degree duplicates, but is not in full conformance with, various federal statutes and regulations, particularly as the proposed rule relates to the advertising of credit and financing details. This is unnecessary and potentially confusing.

In addition to general points, Proposed Rule 10 contains several specific provisions which we feel represent arbitrary, unjustified or excessively broad intrusions into the normal and lawful processes of commercial activity, including, but not limited to, the following:

1. Paragraph 1.10 would require "each seller" to review the content of its

advertising . . . and "possess information or reports which substantiate its claims. . ." Since a high percentage of the "sellers" engaged in retail activity are not locally owned but are outlets of national chains, much of the advertising material is generated at out-of-state corporate headquarters and the substantiation information is in the possession of the originating office. This information would be available in the event of enforcement action. It is unreasonable to require every individual outlet, "every seller" to be in possession of such documents relating to all advertisements.

2. Paragraph 1.11 would require the seller to maintain substantiation information for four years. This would create an unwarranted and excessive burden of paper work, one which create space and personnel requirements beyond the ability of many merchants. Also, the specified definition of a "seller" appears to include not only commercial enterprises but any private citizen who "sells or offers for sale any interest in any product. . ."

3. Paragraph 2.5 defines "regular price" as the "price at which any seller has sold more than one-half of the quantity of any product sold during the ninety days prior to any relevant date." This provision would require exhaustive, constant records-keeping, particularly for such businesses as grocery markets which stock hundreds or thousands of items. Since retail price changes most often are dictated by changes, both increases and decreases, in wholesale prices, retail price changes on a wide variety of consumer goods generally are frequent. Paragraph 2.5 would require that every seller in the state keep constant records of every item sold, at every price. Since the only way sellers who continue to advertise in any form could minimize their work loads in this regard would be keep optional price changes at a minimum, we believe that the most predictable actual effect of this provision would be to deny consumers price reductions that they now enjoy as a result of competition among a wide range of retailers. Furthermore, the requirement of paragraph 4.6.3 that sales prices be at least "10 percent" lower than the "lower of the last offered price or the regular price," adds additional burdens and confusion which would adversely affect consumer interests. There is no provision for establishing a "regular price" for an item which has not sold in any quantity during the specified period; yet, establishment of a "regular price" would be necessary for such an item to be advertised for sale. This circumstance could effectively prevent consumers from becoming aware of such price information, even when a merchant sharply reduces his prices to clear his shelves of goods which have not been selling.

The requirement of a 10 percent price reduction appears in several paragraphs of the proposed rule. It is our position that any specification of a required percentage discount is beyond the proper authority the Attorney General's Office.

Paragraph 4.28 would make it unlawful for a seller to advertise any product for sale when there is not "a sufficient quantity on hand to meet reasonably expectable public demand." This is a totally unreasonable requirement. Regarding a wide variety of products, merchants have no way of predicting what "reasonably expectable public demand" might be in a world where unreasonable occurrences daily alter consumer attitudes and purchasing practices.

Paragraph 4.35 would make it unlawful to "Advertise, promote, or support any lottery in connection with the promotion of any product . . ." In addition to being in conflict with federal statutes, regulations and case law, this clause would

eliminate any collateral promotion of the West Virginia Lottery and would require that state liquor stores engage in extensive and costly revision of signs and other materials. The economic impact on state revenues from this paragraph alone could be monumental.

Paragraph 4.50 would make it unlawful to "claim, represent or assert" that any motor vehicle is available for sale at a certain price unless that vehicle is either in stock or on order. This could eliminate - at least for purchases made in West Virginia - the special-ordering of specially-equipped vehicles by individuals. In addition to consumers who merely prefer particular options on automobiles, this could severely affect handicapped individuals who require vehicles with special equipment.

The West Virginia Press Association again would like to state that the comments contained herein do not necessarily represent the full and total comments and reaction this organization would have presented regarding Propose Rule 10, if adequate time had been allowed for analysis and preparation of comments.

The Advertising Code

(As adopted by the Advertising Federation of America)

1. **TRUTH:** Advertising shall tell the whole truth, and shall reveal material facts, the concealment of which might mislead the public.
2. **RESPONSIBILITY:** Advertising agencies and advertisers shall be willing to provide substantiation of claims made.
3. **TASTE AND DECENCY:** Advertising shall be free of statements, illustrations or implications that are offensive to good taste or public decency.
4. **DISPARAGEMENT:** Advertising shall offer merchandise or service on its merits and refrain from attacking competitors or disparaging their products, services, or methods of doing business.
5. **BAIT ADVERTISING:** Advertising shall be bona fide and the merchandise or service offered shall be readily available for purchase at the advertised price.
6. **GUARANTEES AND WARRANTIES:** Advertising of guarantees and warranties shall be explicit. Advertising of any guarantee and warranty shall clearly and conspicuously disclose its nature and extent, the manner in which the guarantor or warrantor will perform, and the identity of the guarantor or warrantor.
7. **PRICE CLAIMS:** Advertising shall avoid price or savings claims which are unsupported by facts or which do not offer bona fide bargains or savings.
8. **UNPROVABLE CLAIMS:** Advertising shall avoid the use of exaggerated or unprovable claims.
9. **TESTIMONIALS:** Advertising containing testimonials shall be limited to those of competent witnesses who are reflecting a real and honest choice.

List of Deceptive Advertising Activities

There are a number of deceptive advertising tactics which the Federal Trade Commission and other regulatory agencies regard as impermissible. The book, *Marketing Law*, by Joe L. Welch, offers this list:

- Deception by not disclosing important aspects of the product.
- Implications that the product possesses certain qualities.
- Ambiguous statements (Each statement may be true, but taken as a whole the message has the capacity to deceive.)
- Deceptive pricing ("Free" goods and "bait" advertising).
- False representations of approval or sponsorships (i.e., false endorsements or testimonials).
- Using a well-known name as one's own name.
- False disparagement of competing products.
- Deceptive guarantees.
- Deceptive demonstrations or mock-ups.

DISCUSSION OF AMENDMENTS

September 19, 1988

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 AND 46A-7
SERIES 9

Title: Proposed legislative rule defining certain terms used within the West Virginia Consumer Credit and Protection Act.

DISCUSSION OF AMENDMENTS

Meetings, conversations, written comments, and testimony have resulted in modification of the rule from its initially filed form to this, the agency approved rule. The sole change to Section 1 involved the avoidance of any repealer of the Damaged Goods Rule (142 C.S.R. Series 6) as discussed below.

Section 2, the definition of unfair act or practice was modified to inclusive language regarding violations of public policy,¹ conduct resulting in substantial and reasonably unavoidable consumer injury,² and the incorporation of the market efficiency/risk standard.³ The inclusion of the "sub-offenses" of deception, fraud and unconscionability have been deleted from the rule to avoid confusion, although certainly such conduct is, in fact, unfair. In other words,

¹ See Sperry & Hutchinson v. FTC, 405 U.S. 233 (1970); Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965); La Peyre v. FTC, 366 F.2d 117 (5th Cir. 1966).

² See Comments on the part of the West Virginia Bankers' Association, p. 5.

³ See American Financial Services Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985), cert. denied, 475 U.S. 1011 (1986).

simply the Attorney General has incorporated most of the existing Federal Trade Commission law into the agency approved rule.⁴

The Attorney General agrees, to an extent, that the "tendency or capacity" test may result in the inclusion of some innocent representations of merchants. Therefore, the proposed rule has been modified to incorporate the FTC's current deception standard⁵ and, as well, to incorporate the FTC's risk/expectancy test.⁶ Also, the provisions relating to fraudulent or unconscionable conduct have been deleted as unnecessary and duplicative.

The Attorney General has deleted prior Section 4⁷ as confusing and duplicative of Section 3. However, he still maintains that "constructive fraud" is the minimum standard required for recovery under the West Virginia Consumer Credit and Protection Act for fraudulent activity. Intent to defraud is not and never has been a requirement for finding a violation of § 5(a)(1) of the Federal Trade Commission Act.⁸

⁴ The FTC has acted under other statutes creating a public policy to prohibit violative conduct through their unfairness authority. See Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976).

⁵ See Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 109 (1986).

⁶ See American Financial Services Ass'n v. FTC, supra, at _____.

⁷ Definition of Fraudulent.

⁸ See FTC v. Algoma Lumber Co., 291 U.S. 67 (1934).

The definition of new or original has been reviewed in light of comments made at the hearing and in meetings with representatives of trade associations. The rule as proposed, with an inclusive definition, has been modified from the original so as to avoid conflict with the Damaged Goods Rule, 142 C.S.R. Series 6. Indeed, this rule further explains the Damaged Goods Rule in more concrete terms.⁹ Since this rule is of general application and not of limited application to one industry, this Division has modified the rule to give more definiteness to the amount of damage which would constitute a substantial impairment of the goods, rendering them no longer new or original. The rule modification includes setting a cost of \$400 or 5% of the selling price, whichever is less, as the standard for selling "damaged" goods as new. Also modified, the rule prohibits merchants from selling any "damaged" goods as new, as opposed to only goods damaged by catastrophe or act of God. Finally, the modification prohibits merchants from selling damaged but unrepairable goods from being sold as new.

The definition of new motor vehicle has been substantially altered as a result of the hearings, the industry members who testified were able to convince this office of legitimate, competitive concerns, and the probability of substantial price increases for certain motor vehicles currently available to consumers under substantial discount. The benefits hereby obtained do not outweigh the cost to consumers, particularly in light of the available remedies

⁹ In conjunction with this modification, the repealer notification of Section 1.6 has also been modified.

under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq. Clearly, too, a negative impact would be created for local schools if dealer withdrawal of driver's education cars is a result of this rule. Therefore, a new motor vehicle under the lemon law would include dealer demonstrators and manufacturer quality test vehicles, but would exclude factory representative cars, driver's education cars or factory lease cars.

The Attorney General has deleted the provision with regard to "specific intent" to violate the West Virginia Consumer Credit and Protection Act. Specific intent was never the standard to be utilized in imposing civil penalties since such a standard implies a requirement of proof of knowledge of the law. Rather, the penalty provision was designed to be imposed upon those persons who unfairly took advantage of others or who acted in bad faith toward others. In other words, the intent of the rule is not to impose civil penalties upon innocent actors but, also, not to allow persons who profess blissful ignorance to escape economic sanction. Such an analysis has been accepted in actions under the Federal Odometer Act, 15 U.S.C. §§ 1981 et seq., in discussing the element of "intent to defraud."

The definition of consumer credit sale has been modified to delete reference to a security interest. However, the definitions of (2) and (3) have been retained and renumbered as (1) and (2). Such a definition is consistent with the decisions of state courts under similar state law

and decisions of the federal courts under the presimplification Truth in Lending Act.

The definition of Section 9 has been deleted as unnecessary and duplicative.

Please feel free to contact Robert Wm. Schulenberg, Senior Assistant Attorney General, if you have any questions.



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STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

CHARLES G. BROWN
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CONSUMER HOT LINE
(800) 368-8808

January 6, 1989

The Honorable Ken Hechler
Secretary of State
Building 1, Suite 157-K
Charleston, West Virginia 25305

Re: Proposed Legislative Rule, Title 142, Series 9

Dear Secretary Hechler:

I am writing to formally advise your office that our agency is withdrawing the above-referenced proposed rule. Pursuant to West Virginia Code § 29A-3-14(a), I request that a notice of this action be filed in the State Register.

Thank you for your attention to this matter.

Sincerely,

CHARLES G. BROWN
ATTORNEY GENERAL

CGB/sc