

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #1

Do Not Mark in this Box

**FILED**

JUL 7 12 12 PM '94

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF PUBLIC HEARING ON A PROPOSED RULE**

AGENCY: Office of the Attorney General TITLE NUMBER: 142  
RULE TYPE: Legislative; CITE AUTHORITY: W. Va. Code Section 46A-6-105  
W. Va. Code Section 46A-7-102(T)(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: 25

TITLE OF RULE BEING PROPOSED: Legislative Rule Pertaining to the  
Prevention of Unfair or Deceptive Acts or Practices in Advertising and Sales

DATE OF PUBLIC HEARING: 8/10/94 TIME: 9:00 a.m.

LOCATION OF PUBLIC HEARING: Charleston Civic Center  
West Virginia Room 105  
200 Civic Center Drive  
Charleston, West Virginia 25301

COMMENTS LIMITED TO: ORAL x, WRITTEN \_\_\_, BOTH \_\_\_

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Tom Rodd, Director  
Consumer Protection Division

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

812 Quarrier Street  
Charleston, WV 25301

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Tom Rodd

Authorized Signature

5.60

**TITLE 142  
LEGISLATIVE RULE  
ATTORNEY GENERAL**

**SERIES 25  
LEGISLATIVE RULE PERTAINING TO THE  
PREVENTION OF UNFAIR OR DECEPTIVE ACTS OR  
PRACTICES IN ADVERTISING AND SALES**

**STATEMENT OF CIRCUMSTANCES**

West Virginia has little express law regarding advertising practices. Consumers are left with the difficult task of proving generalized deception or fraud in advertisement practices.

The proposed rule includes consumer protection for advertisement of law-away plans, service warranties, price comparison and prize give-aways. These are all areas which have been unregulated, and this has led to consumer abuse, by misleading the consumer into believing that he is purchasing a certain product, when such is not the case.

**APPENDIX B**

**FISCAL NOTE FOR PROPOSED RULES**

*Legislative Rule Pertaining to the Unfair or Deceptive Acts or Practices in Advertising and Sales*

Rule Title: \_\_\_\_\_  
 Type of Rule:  Legislative     Interpretive     Procedural  
 Agency: Office of the Attorney General Consumer Protection Division  
 Address: 812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301

1. Effect of Proposed Rule    *Not Applicable*

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:  
*No cost to State or local government.*

3. Objectives of these rules:    *Promotion of Consumer Protection*

**Rule Title:** Legislative Rule Pertaining to the Unfair or Deceptive Acts or Practices in Advertising and Sales

**4. Explanation of Overall Economic Impact of Proposed Rule.**

**A. Economic Impact on State Government.**

*Will promote private adjudication of consumer issues, reducing burden on state regulations.*

**B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.**

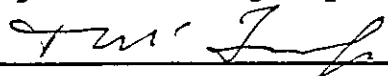
*Will promote consumer confidence and assist responsible businesses, leading to job growth.*

**C. Economic Impact on Citizens/Public at Large.**

*Will assist consumers and businesses with certainty in consumer law, promoting sustainable and responsible business development.*

**Date:** 6/30/94

**Signature of Agency Head or Authorized Representative**



**TITLE 142  
LEGISLATIVE RULE  
ATTORNEY GENERAL**

**SERIES 25  
LEGISLATIVE RULE PERTAINING TO THE  
PREVENTION OF UNFAIR OR DECEPTIVE ACTS OR  
PRACTICES IN ADVERTISING AND SALES**

**BRIEF SUMMARY**

The proposed legislative rule regarding advertising and sales covers areas which often lead to consumer abuse.

The proposed rule would make it unlawful to sell a product not as advertised, "bait and switch," not disclosing the seller's guarantee, advertise that the consumer can obtain "easy credit" when the credit terms are not so, abuses in repairs and services, misrepresentation and abuses in lay-away plans, substitute products, misrepresentation in pricing and labeling, misrepresentation in price comparison, not having ample advertised products for sale, misleading prizes, and availability of financing.

FILED

TITLE 142  
LEGISLATIVE RULE  
ATTORNEY GENERAL

JUL 7 12 12 PM '94

SERIES 25  
LEGISLATIVE RULE PERTAINING TO THE  
PREVENTION OF UNFAIR OR DECEPTIVE ACTS OR  
PRACTICES IN ADVERTISING AND SALES

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

§ 142-25-1. General

1.1 Rule Designation.--This rule is legislative

1.2 Scope.--This legislative rule covers certain unfair or deceptive acts or practices covering advertising and sales practices in West Virginia, its counties, and all political subdivisions.

1.3 Authority.-- W. Va. Code § 46A-6-103 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 Article 6 of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-6-101 et seq.

1.8 Construction.--This rule shall be liberally construed to effectuate the purpose of Article 6 of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-6-101 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 provision 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.

§ 142-25-2 Definitions.

2.1 "Act or Practice" An act or practice shall include any threat or attempt to perform such act or practice.

2.2 "Advertisement" means the publication, dissemination or circulation of any matter, oral or written, including labeling, which tends to induce, directly or indirectly, any person to enter into any obligation, sign any contract, or acquire any title or interest in any goods or services and includes every work device to disguise any form of business solicitation by using such terms as "renewal," "invoice," "bill,"

"statement" or "reminder," to create an impression of existing obligation when there is none, or other language to mislead any person in relation to any sought-after commercial transaction.

2.3 "Consumer" means a natural person to whom a sale is made in a consumer transaction.

2.4 "Consumer transaction" means a sale to a natural person or persons for a personal, family, household or agricultural purpose.

2.5 "Bait Advertising" is an alluring but insincere offer to sell a product which the advertiser does not intend or want to sell. Its purpose is to switch consumers from buying the advertised product in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying a product of the type so advertised.

2.6 "Blind Advertising" means an advertisement which has the tendency to induce consumers to contact the advertiser and which fails to reveal that the primary purpose of the advertisement is the sale of goods or services, and fails to reveal the identity of the advertiser.

2.7 "Clear and Conspicuous Disclosure" Without limiting any other provisions of law, disclosures required by these regulations shall be of such size or color contrast and so placed as to be readily noticeable to purchasers or prospective purchasers reading advertising, sales promotional literature, or invoices containing same, or reading any representation as to content on the container in which the product is packed, or inspecting a product before installation or with a minimum of disassembly after installation. A term is conspicuous when it is so written that a person against whom it is to operate ought to have noticed it. Language in the body of a form is "conspicuous" if it is in larger or contrasting type or color.

2.8 "Deceptive Warranty" includes

2.9.1 A guarantee or warranty that contains an affirmation, promise, description, or representation that is either false, fraudulent, or that in the light of all the circumstances would mislead the consuming public; or fails to contain the necessary information to avoid misleading the consuming public; or,

2.9.2 A guarantee or warranty created by the use of such terms as "guarantee" or "warranty" if the terms and conditions of such guarantee or warranty so limit its scope and application as to render the representation illusory, as where any costs or charges to the consumer attendant upon such work are prohibitive or approach the cost for the repairs absent any warranty or guarantee.

### **§ 142-25-3 False Advertising**

3.1 It shall be an unfair and deceptive act or practice to advertise in violation of this section. No advertisement containing an offer to sell a product shall be made when the offer is not a bona fide effort to sell the advertised product.

3.2 No statement or illustration shall be used in any advertisement which

creates a false impression of the grade, quality, make, value, currency of mode, size, color, usability, or origin of the product offered, or which may otherwise misrepresent the product in such a manner that later, on disclosure of the true facts, there is a likelihood that the buyer may be switched from the advertised product to another. Even though the true facts are subsequently made known to the buyer, the law is violated if the first contact or interview is secured by deception.

3.3 No act or practice shall be engaged in by an advertiser or seller to discourage the purchase of the advertised product as part of a bait scheme to sell another product. For example, among acts or practices which will be considered in determining if any advertisement is a bona fide offer are:

3.3.1 The refusal to show, demonstrate, or sell the product offered in accordance with the terms of the offer.

3.3.2 The disparagement by acts or words of the advertised product or disparagement with respect to the guarantee, credit terms, availability of service, repairs, or parts, or in any other respect, in connection with it.

3.3.3 The failure to have available at all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonable anticipated demands, unless the advertisement clearly and adequately discloses that supply is limited and/or the product is available only at designated outlets.

3.3.4 The refusal to take orders for the advertised product to be delivered within a reasonable period of time.

3.3.5 The showing or demonstrating of a product which is defective, unusable or impractical for the purpose represented or implied in the advertisement.

3.3.6 Use of a sales plan or method of compensation for salesmen or penalizing salesmen, designed to prevent or discourage them from selling the advertised product.

3.4 No practice shall be pursued by an advertiser or seller in the event of sale of the advertised product of obtaining or attempting to obtain a rescission of the sale of the purpose of selling another product in its stead. Among acts or practices which are relevant in determining if the initial sales is in good faith, and not a stratagem to sell another product are:

3.4.1 Accepting a deposit for the advertised product, then switching the buyer to a higher-priced product.

3.4.2 Failure to make delivery of the advertised product within a reasonable time or to make a refund.

3.4.3 Disparagement by acts or words of the advertised product, or disparagement with respect to the guarantee, credit terms, availability of service, repairs, or in any other respect, in connection with it.

3.4.4 The delivery of the advertised product which is defective, unusable or impractical for the purpose represented or implied in the advertisement.

Sales of the advertised product do not preclude the existence of a bait and switch scheme if the sales are a mere incidental by-product of the fundamental plan and are intended to provide an aura of legitimacy to the over-all operation.

#### § 142-25-4 Deceptive Advertising of Guarantees

It shall be an unfair and deceptive act or practice to advertise a guarantee in violation of this section.

4.1 In general, any guarantee in advertising shall clearly and conspicuously disclose:

4.1.1 The name and extent of the guarantee. This includes disclosure of what product or part of the product is guaranteed; what characteristics of properties of the designated product or part thereof are covered by, or excluded from, the guarantee; what is the duration of the guarantee; e;e; what, if anything, any one claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges; and

4.1.2 The manner in which the guarantor will perform. This consists primarily of a statement of exactly what the guarantor undertakes to do under the guarantee. Examples of this would be repair, replacement, refund. If the guarantor or the person receiving the guarantee has an option as to what may satisfy the guarantee this should be set out; and

4.1.3 The identity of the guarantor. The identity of the guarantor should be clearly revealed in all advertising, as well as in any documents evidencing the guarantee. For example, it should be made clear whether the manufacturer or the retailer is the guarantor.

4.2 As to those guarantees which are adjusted by the guarantor on a pro rata basis, the advertising relating thereto should clearly disclose this fact, the basis on which they will be pro rated, e.g., the time for which the guaranteed product has been used, and the manner in which the guarantor will perform.

If these guarantees are to be adjusted on the basis of a price other than that paid by the buyer, this price should be clearly and conspicuously disclosed.

Example: During the course of a sale, "A" sells to "B" for \$20 and with a 12 month guarantee a battery that he regularly sells for \$35. After 6 months the battery proves defective. If "A" adjusts on the basis of the price "B" paid \$20, "B" will only have to pay 1/2 of \$20, or \$10, for a new battery. If "A" instead adjusts on the basis of the regular selling price, "B" will owe 1/2 of \$25, or \$12.50 for a new battery. The guarantor would be required to disclose here the following: that this was a 12 month guarantee, that the regular selling price, rather than the actual sale price, would be used in the adjustment, that there would be an adjustment on the basis of the time that the battery was used and, if factual, that he would not pay the adjustment amount in cash, but would make an adjustment on a new battery.

4.3 "Satisfaction or your money back," "10 day free trial," or similar representations will be construed as a guarantee that the full purchase price will be refunded promptly at the option of the buyer.

If such guarantee is subject to any conditions or limitations whatsoever, they shall be set forth.

Example: A rose bush is advertised under the representation "Satisfaction or your money back." The guarantor requires return of the product within 1 year of purchase date before he will make refund. These limitations, i.e., "return" and "time" shall be clearly and conspicuously disclosed in the ad.

4.4 When a product is represented as "guaranteed for life" or as having a "lifetime" guarantee," the meaning of the term "life" or "lifetime" should be explained.

Example: "A" advertised that his transmission was guaranteed for "life", whereas his guarantee ran for the "life of the car" in which the transmission was originally installed. The advertisement is ambiguous and deceptive and should be modified to disclose the "life" referred to.

4.5 Advertisements which contain representations of guarantees that assure prospective buyers that savings may be realized in the purchase of the advertiser's products, such as "Guaranteed to save you 50%", shall include a clear and conspicuous disclosure of what the guarantor will do if the savings are not realized, together with any time or other limitations that he may impose. Guarantees of this type may constitute affirmative representations of fact.

4.6 A seller or manufacturer shall not advertise or represent that a product is guaranteed when he cannot or does not promptly and scrupulously fulfill his obligations under the guarantee.

A specific example of refusal to perform obligations under the guarantee is use of "Satisfaction or your money back" when the guarantor cannot or does not intend promptly to make full refund upon request.

4.7 Where guarantees are employed in such a manner as to constitute representations of material facts, the guarantor not only undertakes to perform under the terms of the guarantee, but also assumes responsibility under the law for the truth of the representations made.

Example 1: "Guaranteed for 36 months" applied to a battery is a representation that the battery can normally be expected to last for 36 months and should not be used in connection with a battery which can normally be expected to last for only 18 months.

Example 2: "Guaranteed to grow hair or money back" is a representation that the product will grow hair and should not be used when in fact such product is incapable of growing hair.

Example 3: "We guarantee you will earn \$500 a month" is a representation that prospective employees will earn a minimum of \$500 each month and should not be used unless such is the fact.

4.8 The term "unconditionally guaranteed" should not be used when a guarantee is restricted in any manner other than as to time and when there is a time limit, it should be clearly disclosed (e.g., "unconditionally guaranteed for three years"). An "unconditional guarantee" is considered as an undertaking on the part of the guarantor either to refund the full purchase price of the product so guaranteed or to repair or replace such product should it prove defective in any respect, all at

the option of the buyer.

(Note: The unqualified use of the word "guaranteed" shall be considered as a representation that an article so described is "unconditionally guaranteed".)

#### **§ 142-25-5 Deceptive Pricing and Misrepresentation**

5.1 It shall be an unfair and deceptive act or practice in advertising to make claim or representation by any means which has the capacity or tendency or effect of deceiving buyers or prospective buyers as to the value or the past, present, common or usual price of a product, or as to any reduction in price of a product, or any saving relating to product. savings or value claims utilized in connection with terms such as "originally," "formerly," "regularly," "usually," "comparable value," "list price" or other like terms, expressions, or representations must be based on facts provable by the claimant or advertiser by his own records; or by reasonably substantial competitive sales in the trading area where such claims or representations are made, under circumstances and conditions are represented or implied by the claims or representations.

5.2 It shall be an unfair and deceptive act or practice to make any claim or representation by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect. This prohibition includes, but is not limited to, representations or claims relating to the construction, durability, reliability, manner or time of performance, safety, strength, condition, or life expectancy of such product, or financing relating to such product, or the utility of such product or any part hereof, or the ease with which such product may be operated, repaired, or maintained or the benefit to be derived from the use thereof.

5.3 No advertisement shall be used which would mislead or tend to mislead buyers or prospective buyers, through pictorial representations or in any other manner, as to the product being offered for sale. Where price is featured in advertising, any picture or depiction utilized in connection therewith, shall clearly indicate the exact product being offered for sale at the advertised price.

#### **§ 140-25-6 Advertising or Offering to Sell on an "Easy Credit" Basis**

6.1 It is an unfair and deceptive act or practice for any seller to induce a consumer to enter into a transaction by advertising or offering to sell to such buyer on easy or lenient credit terms, or words to similar effect or meaning, when the facts demonstrate that the credit or repayment terms of the credit arrangement are neither lenient nor easy. Factors indicating that the credit terms are neither lenient nor easy are:

6.1.1 The seller does not in fact extend credit to persons whose ability to pay, or credit rating, is below generally prevailing standards of credit worthiness;

6.1.2 The down-payment and repayment periods are not as low as or are shorter than those extended to persons ordinarily determined to be credit worthy;

6.1.3 The true cost of the credit being charged by the seller is in excess of the average cost being charged by other sellers in the same general merchandise retail market;

6.1.4 The mark-up over the seller's acquisition cost for the goods or services which are the subject of the transaction exceeds the average mark-up being charged for similar or comparable goods or services by sellers in the same general merchandise retail market;

6.1.5 The seller pursues a policy of using rigorous collection practices against buyers who fall behind in their payments;

6.1.6 The seller negotiates, sells or discounts the instrument which is the evidence of the buyer's indebtedness to a third party without printing or stamping on the face "Consumer Note."

#### **§ 142-25-7 Repairs and Services Including Warranties and Service Contracts**

7.1 Repairs and Services. It shall be an unfair and deceptive act or practice to:

7.1.1 Fail to provide in advance to a customer upon request a written estimate of the cost to the customer of the anticipated repairs, or the basis upon which the charge to the customer will be made and the reasonably expected time to accomplish such repairs, including any charge for reassembly of any parts disassembled for inspection or any service charge to be imposed;

7.1.2 Make or charge for repairs which have not been authorized by the customer;

7.1.3 Fail to disclose, in the case of an in-home service call where the consumer has initially contacted the repairman, that a service charge will be imposed even though no repairs are effected, before the repairman goes to the consumer's home;

7.1.4 Represent that repairs are indicated to be necessary when such is not a fact;

7.1.5 Represent that repairs have been made when such is not a fact;

7.1.6 Represent that the goods being inspected or diagnosed are in a dangerous condition or that the customer's continued use of them may be harmful to him when such is not a fact;

7.1.7 Materially understate or misstate the estimated cost of repair services.

7.2 Warranties. It shall be an unfair and deceptive act or practice to fail to perform or fulfill any promises or obligations arising under a warranty. The utilization of a deceptive warranty is unlawful. Fail to provide the customer with an itemized list of repairs performed and the reason for such repairs including:

7.2.1 A list of parts and statements of whether they are new, used,

or rebuilt and the cost thereof to the customer; and the number of hours of labor charged and the name of the mechanic performing there service.

7.2.2 It shall be an unfair and deceptive act or practice to attempt to limit an implied warranty arising by operation of law, whether by language such as "as is" or by representing that a consumer's warranty is limited to an express warranty after which repairs are at the consumer's cost.

7.2.3 It shall be an unfair and deceptive act or practice to fail to make repairs that should be covered under an implied warranty.

7.3 Service Contracts. It shall be an unfair and deceptive trade practice to fail to disclose in writing, fully and conspicuously, in simple and readily understandable language that a service contract charge pays for, or that no charge may be made for that which an implied warranty should cover, or to charge the consumer a service contract charge for that which is covered by an implied warranty by operation of law.

#### **§ 142-25-8 Lay Away Plans**

It is unfair and deceptive act or practice:

8.1 To fail to disclose or to misrepresent in any way the store's policy with reference to a "lay away" plan;

8.2 To represent to a consumer who is purchasing on a "lay away" plan that the specific goods chosen by the consumer or an exact duplicate of such goods are being laid away for that buyer when such is not a fact;

8.3 To fail to disclose to the consumer that the specified goods or their exact duplicate will only be set aside for a certain period of time;

8.4 To deliver to the consumer after payments (pursuant to the lay away plan) are completed, goods which are not identical or exact substitutes to those specified, unless prior approval in writing has been received from the buyer;

8.5 To increase the price of the goods specified either by way of increasing the payments of substitution goods which are of a lower quantity of price;

8.6 To fail to deliver to the consumer on any date payment is made, a receipt showing the amount of that payment and the date thereof, and, upon request, the balance of payments made up to date;

8.7 To fail to disclose or misrepresent in any way the store's policy with reference to cancellations and repayments or non-repayment of payments already made, and in case payments are not refunded, to fail to disclose that fact in writing

#### **§ 142-25-9 New for Used, Substitution of Products, Failure to Deliver**

9.1 New for Used. It is unfair and deceptive trade practice to represent, directly, or indirectly, that a product is new or unused, or that any part of a product is new or unused when such is not the fact, or to misrepresent the extent of

previous use thereof. It is further an unfair and deceptive trade practice for a seller to offer for sale or sell any product which is used, contains used parts; is rebuilt, remanufactured, reconditioned, or contains, rebuilt, remanufactured, or reconditioned, or that it contains used, rebuilt, remanufactured or reconditioned parts, made to the buyer or prospective buyer.

The disclosure that a product has been used or contains used parts as required by the previous paragraph may be made by use of a word such as, but not limited to "Used," "Second Hand," "Repaired," "Remanufactured," "Reconditioned," "Rebuilt," whichever is applicable to the product involved.

**9.2 Substitution of Products.** It is an unfair and deceptive practice to make a substitution of products:

**9.2.1** By shipping, delivering, or installing products which do not conform to samples submitted or to specifications upon which the sale is consummated to induced, or to the representations made prior to securing the order, without advising the purchaser of the substitution and obtaining the consent thereto prior to making shipment, delivery, or installation;

**9.2.2** By falsely representing the reason for making the substitution in order to induce consent; or

**9.2.3** When there was no intention to deliver the original merchandise ordered.

**9.3 Failure to Deliver.** It is unfair and deceptive act or practice:

**9.3.1** To advertise or promise prompt delivery where delivery is neither prompt nor expeditious.

**9.3.2** To fail to deliver merchandise ordered by mail or otherwise on which payments has been made or undertaken, in the form of a deposit, down payment or total payment where a definite delivery date has been set unless the seller can show circumstances beyond his control and not within his knowledge at the time the order was accepted which prevented the seller from meeting the delivery date.

**9.3.3** To accept an order for goods, or service, where delivery is not, because of facts known to the seller, contemplated within four weeks, unless a later delivery date is specifically agreed upon by the consumer and the seller.

#### **§142-25-10 Disclosure of Material Representations**

**10.1** It is an unfair and deceptive act or practice for a seller to fail to clearly and conspicuously disclose in any advertisement any material representation, the omission of which would have the tendency or capacity to mislead reasonable buyers or prospective buyers. For purposes of these regulations, material representations which must be clearly and conspicuously disclosed shall include but are not limited to the following.

**10.1.1** The fact that a mandatory fee in addition to the advertised price will be charged for any service such as delivery, handling, installation, or an

initiation fee;

10.1.2 The amount of any handling, service or other additional fee for an admission ticket to an entertainment event charged to any purchaser who purchases such ticket through a ticket service or similar entity other than the box office for the facility holding such event when the advertisement refers to the price of such ticket;

10.1.3 The fact that the product advertised is available for the advertised price only after the purchaser receives a rebate from the manufacturer of the product;

10.1.4 The fact that the product advertised is used, rebuilt, remanufactured, reconditioned, imperfect, irregular or a second;

10.1.5 In case of hard goods, the fact that a hard good advertised has been discontinued by the manufacturer, if the seller knows: (1) that there is a significant risk that the product will not have replacement parts and supplies essential to the operation of the product available during its average useful life or for three years after purchase, whichever is less; or (2) that the product has been discontinued and either: (a) is the subject of a notice from the manufacturer that the manufacturer will voluntarily add a safety improvement to the product; or (b) lacks safety improvements that the manufacturer either has agreed to make or has been required to make by a regulatory agency.

10.2 In the case of hard goods, individually identified for sale in any advertisement, the manufacturer's name or trade name, the seller's proprietary trademark, or if a seller is prohibited by law or by contract from using the manufacturer's name or trade name in an advertisement, the phrase "famous brand names" or any similar phrase, and the model number of any hard goods, unless it is the only model of the hard good currently being sold in the trade area or the item is not customarily identified and distinguished by its model number, or it is being offered for sale at a price under \$25.

10.3 The fact that the product advertised at a stated price does not include parts, accessories or equipment customarily included and necessary or usual to the proper functioning, appearance, or use of such product.

10.4 With respect to tags, labels, and in-store signs:

10.4.1 a tag need only contain material representations regarding the price of an item;

10.4.2 a label need only contain material representations regarding the quality of an item;

10.4.3 an in-store sign need only contain material representations regarding the price or quality of an item.

#### **§ 142-25-11 Duration of Sale**

11.1 It is unfair and deceptive act for a seller to advertise a price comparison

for a period greater than twenty-one (21) days unless the product is being offered as part of an advertisement clearance sale in which the product will continue to be offered at a reduced price until it is sold.

#### **§ 142-25-12 Price Comparison and Savings Claims**

**12.1 Unidentified Price Comparisons.** It is unfair or deceptive act for a seller to state or imply that it is offering any savings as to any product by making a direct or indirect price comparison, unless the seller clearly and conspicuously describe the basis for the price comparison. Notwithstanding the foregoing, a seller claiming a savings or compare a higher and lower price without disclosing the basis for the comparison if the seller is comparing to its own former price.

**12.2 Comparison to Sellers's Own Former Prices.** It is an unfair or deceptive act for a seller to compare its current price with its former price for any product, unless such former price meets one of the following conditions.

**12.2.1** The former price is equal to or below the price(s) at which the seller made at least 30% of its sales of such products in any state in the twelve month period immediately preceding the measurement date of the advertisement; or

**12.2.2** The comparison is made during a 180-day period immediately following the establishment of the former price, and the product is not offered for sale at a lower price for more than 45 percent of that 180-day period. For purposes of this provision a former price is established by offering the product for sale at such price or a higher price openly and in good faith on each business day of a period of at least 14 consecutive calendar days immediately preceding the initial advertisement of the price comparison. A seller offers a product openly and in good faith when the seller's former price does not exceed the seller's usual and customary retail mark-up for similar merchandise, i.e., the former price is not an inflated or exaggerated price. The burden shall be on the seller to show that its former price is not an inflated or exaggerated price. The following factors may be considered in determining whether the seller has met such burden: (a) whether the seller compares its current price to its former price when the seller knows at the time it will be made at such former price; or (b) whether the former price substantially exceeds the price at which a reasonable number of non-discount sellers sell the product in the seller's trade area; or (c) where a "manufacturer's suggested retail price" or a "list price" exists for the product, whether the former price exceeds such price and by what amount; or (d) whether the product was openly and actively offered in the recent, regular course of business, such as by devoting reasonable display space to the product during the period(s) in which it was at the former price, maintaining reasonable inventory during former price periods, advertising the product at the former price periods, advertising the product at the former price; or

**12.2.3** The former price is equal to or below the price(s) at which the seller has offered the product for sale for less than 14 days, and the seller clearly and conspicuously, discloses in all advertisements for the product the specific period during which the seller offered the product at the former price.

**12.2.4** Unfair or deceptive act for a seller to advertise a sale with a duration of 4 days or less that involves a substantial portion of the products in a store or department.

12.2.5 It shall be an unfair or deceptive act for a seller to offer a product in accordance with an advertised price policy whereby prices are reduced by a set amount or percentage on a pre-set schedule.

#### **§ 142-25-13 Introductory Offers and Future Price Comparison**

13.1 Except for a catalog, it is an unfair or deceptive act for a seller to make an introductory offer or to compare its current price for a product with the price at which the product will be offered in the future, unless:

13.1.1 The future price takes effect immediately after the sale is over but not later than 60 calendar days after the dissemination date of the introductory offer or price comparison; and

13.1.2 Following the date the future price takes effect the product is offered openly and in good faith in the state at the future price for a period of time that is at least equal to the period of time that it was offered at the introductory price, but not less than 21 days, except where compliance becomes impossible because of unforeseeable circumstances beyond the seller's control which the seller is able to document.

#### **§ 142-25-14 Availability of Advertised Products**

14.1 It is an unfair or deceptive act for a seller to offer any product for sale when the seller does not have the product in stock or readily available for sale in sufficient quantities to meet reasonably anticipated demand at its retail locations in the trade area covered by the advertisement.

14.2 Notwithstanding the terms and provisions of 14.1 above, it shall not be an unfair or deceptive or practice to offer any product for sale if the seller does not have the product in stock or readily available for sale in sufficient quantities to meet reasonable anticipated demand at its retail location in the trade area covered by the advertisement when:

14.2.1 The seller clearly and conspicuously disclosed in the advertisement all specific exceptions, limitations or restrictions regarding the stores, products or prices applicable to the advertised offer, and: (1) States the minimum quantity of the product available in each store; or (2) States that the quantity is limited and that is the case; or rainchecks will be provided, if that is the case; or

14.2.2 The seller has acted in good faith by ordering the advertised product in adequate time for delivery and in sufficient quantities to meet reasonably anticipated demand and: (1) offers a comparable product at a comparable savings, acceptable to the reasonable consumer and to all prospective buyers unable to purchase the advertised product; or (2) provides a raincheck to each prospective buyer at the time of the attempted purchase, and the seller: (a) informs the consumer as to when the raincheck is more than sixty 60 days from the date of issuance advertisement that a longer period applies and specifically states the length of such time period; (b) discloses to the consumer at the time the raincheck is issued that: (1) for a product advertised for \$25 or more, the seller will make reasonable efforts to notify the consumer when the raincheck item is available; or (2) for a product

advertised for less than \$25, the seller will not notify the consumer when the raincheck product is available, if that is the seller's policy; and (c) allows the consumer a reasonable redemption period to purchase the item; or

14.2.3 The seller has acted in good faith by ordering the advertised product in adequate time for delivery and in sufficient quantity to satisfy reasonable anticipated consumer demand. Notwithstanding anything contained herein, a seller shall be presumed not to have acted in good faith if such seller has demonstrated a pattern or practice of failure to have the product in stock in sufficient quantities to satisfy reasonable anticipated consumer demand.

#### **§ 142-25-15 Disclosure of Expiration Dates**

15.1 It is an unfair or deceptive act for a seller to fail to disclose in an advertisement, other than a tag, label, or in-store sign, the earliest date upon which an offer terminates if the offer is for a limited period of time.

#### **§ 142-25-16 Prizes**

16.1 It is an unfair and or deceptive act for a seller to offer any product for free or at a reduced price (a "prize"), to a prospective buyer in conjunction with the prospective buyer's participation in a sales presentation or promotional contest, unless;

16.1.1 The seller clear and conspicuously discloses in the advertisement all material conditions or limitations imposed by the seller as a prerequisite to receipt of or on the use of the prize.

16.2 In every prize promotion in which there is a risk that each person satisfying the conditions or limitations disclosed in the advertisement will not receive the advertised prize:

16.2.1 The seller shall clearly and conspicuously disclose in the advertisement the quantity of each prize offered;

16.2.2 The seller shall clearly and conspicuously disclose the numerical odds of receiving each prize or if the odds cannot be reasonably calculated, the approximate number of individuals to whom the advertisement is disseminated or the fact that the odds of winning a prize are determined by the number of entries received; and

16.2.3 Within thirty (30) days of the award of the prize, the seller shall clearly and conspicuously disclose in each of its business locations and by mail, if so requested in writing, the manner by which a person may learn the name and the city or town of residence of each prize winner the date of receipt of the prize, the value of the prize, and the business location of the seller, if any, which the winner visited to qualify for the prize; and

16.2.4 The prize is provided to the entitled consumer at the time the conditions are met, unless: (a) The advertisement clearly and conspicuously discloses a specific later delivery date (for example, twenty days after the consumer satisfies the advertised conditions); or (b) The consumer agrees in writing to a

specific later delivery date.

#### **§ 142-25-17 Availability of Financing**

17.1 It is an unfair and deceptive act or practice for a seller to state or imply that financing is available at a specified rate of interest or upon other specified terms unless:

17.1.1 Financing at such rate or upon such terms is available to the public generally through the seller; or

17.1.2 The seller clearly and conspicuously discloses any special conditions, terms, or criteria other than general creditworthiness which a purchaser must meet in order to qualify for such financing.

17.2 Compliance with Truth-in Lending Requirements. It is an unfair or deceptive act for a seller who advertises any finance terms to fail to comply with federal Truth-In Lending laws, 15 U.S.C. §§ 1601, et seq., and regulations promulgated thereunder.

#### **§ 142-25-18 General**

18.1 It is an unfair and deceptive act or practice for a seller in a consumer transaction to fail to comply with existing statutes, rules, regulations or laws meant for the protection of the public's health, safety, or welfare promulgated by the state or any political subdivision thereof intended to provide the consumers of this protection or;

18.2 To comply with the Federal Trade Commission Act, the Federal Consumer Credit Protection Act or other Federal consumer protection statutes within the purview of West Virginia Code §46A-6-101 et seq.

#### **§ 142-25-19 Private Employment Agencies and Business Schemes**

19.1 It is an unfair and deceptive act or practice to make false or deceptive representations through advertisements or otherwise regarding the actual or probable earnings of the existence of opportunities or openings in any vocation, company, business, firm or other place of employment is an unfair and deceptive trade practice.

19.2 It is an unfair and deceptive act or practice to make any representations as to opportunities available in or to promote any activity, occupation or vocation as being profitable for one engaging in it if in fact the representations as to the opportunities available or profits to be made are untrue.

19.3 It is an unfair and deceptive act or practice in the sale or offering for sale of consumer goods or services for any person to represent or imply in advertising or otherwise that persons employed in a particular position in a trade or industry or who are self-employed in a particular position in a trade or industry who are self-employed earn a stated salary or income or that the goods or services offered or sold will enable the purchaser or prospective purchaser to earn the stated salary or income or "up to" the stated salary or income unless:

19.3.1 The salary or income is equal to or less than the average salary or income of persons employed less than five years in the indicated position in the state and the advertisement or representation states the basis for calculation of the average salary or income or the advertisement or representation states the basis for calculation of the salary stated and also discloses the average salary or income of persons employed less than five years in the indicated position in the State.

19.3.2 The advertisement or representation states any limitations, conditions, or other requirements such as union membership or service of an apprenticeship, which must be met before the stated salary or income can be earned; and

19.3.3 The advertisement or representation states clearly and conspicuously that no guarantee is made that a person who purchases the advertised goods or services will earn the stated salary income, unless the guarantee is actually offered by the seller.

The words "EARN \$...." or "EARN UP TO \$...." or word of similar import or meaning constitute a representation that a person who purchases the goods or services will earn the stated salary or income within the meaning of this Regulation.

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