

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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**OFFICE OF WEST VIRGINIA
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 W. Va. Code Section 46A-6-103 & W. Va. Code Section
46A-7-102(1)(e)

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

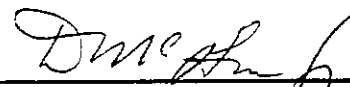
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

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

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.



Authorized Signature

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**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

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

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	THIRDAFTER
<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

Tom Lutz

DATE: August 15, 1994

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
Darrell V. McGraw, Attorney General
Building 1, Room E-26, Charleston, West Virginia 25305

FROM: Title 142 Series 25 Prevention of Unfair or Deceptive Acts
or Practices in Advertising & Sales

LEGISLATIVE RULE TITLE: _____

1. Authorizing statute(s) citation _____

W. Va. Code Section 46A-6-103; 46A-7-102(e)

2. a. Date filed in State Register with Notice of Hearing

July 7, 1994

b. What other notice, including advertising, did you give
of the hearing?

Press release giving date of hearing and agency phone number

for additional information.

c. Date of Hearing(s) August 10, 1994

d. Attach list of persons who appeared at hearing,
comments received, amendments, reasons for amendments.

Attached ☒ No comments received ☐

e. Date you filed in State Register the agency approved
proposed Legislative Rule following public hearing:
(be exact)

August 15, 1994

f. Name and phone number(s) of agency person(s) to
contact for additional information:

Darrell V. McGraw, Jr., Attorney General

558-2021

3. If the statute under which you promulgated the submitte
rules requires certain findings and determinations to b
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: _____

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

d. Attach findings and determinations and reasons:

Attached _____

**TITLE 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.

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

§ 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 W. Va. 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 purposes of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1 et seq.

1.9 Severability.--If, for any reason, any section, subsection, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, subsections, sentences, clauses, phrases, or 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, or the advertisement of goods after which the merchant steers consumers responding to the advertisement of other goods by disparaging the advertised goods or otherwise discourage their purchase. 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 include, but not limited to:

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 sale 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, anyone 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 prorated, 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 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 include, but not limited to:

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 substitute 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 an 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 how 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 describes the basis for the price comparison. Notwithstanding the foregoing, a seller may claim 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 It shall be an 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 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 that rain checks 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 rain check to each prospective

buyer at the time of the attempted purchase, and the seller: (a) informs the consumer when the rain check 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 rain check is issued that: (1) for a product advertised for \$25 or more, the seller will make reasonable efforts to notify the consumer when the rain check item is available; or (2) for a product advertised for less than \$25, the seller will not notify the consumer when the rain check 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 clearly 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 state protection or;

18.2 To fail 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.

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 and the representor does not have a verifiable and legitimate basis for believing they were true.

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 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.

§ 142-25-20 REMEDIES

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

20.2 In addition to an application for injunctive remedies and other appropriate relief, as aforesaid, the Attorney General may also bring a civil action for the willful violation of this Rule, and if the court finds that a person has engaged in a course of willful and repeated violations of this Rule or any other applicable provisions of the West Virginia Consumer Credit and Protection Act, W. Va. Code 46A-1-101 et seq., it may assess a civil penalty of no more than five thousand dollars for each such violation. The Attorney General may also take such administrative and other action authorized by law and regulation.

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4 CONSUMER PROTECTION REGULATIONS HEARING
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9 Hearing held beginning at 9:19 a.m., on
10 August 10, 1994, in Room 105 of the Charleston Civic
11 Center, Charleston, West Virginia.
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20 APPEARANCES: ATTORNEY GENERAL DARRELL V. MCGRAW, JR.
21 THOMAS W. RODD, Deputy Attorney General
22 ANDREW MAIER, Asst. Attorney General
23
24

1 MR. RODD: Good morning. We're
2 about to begin. For a few remarks, the Honorable
3 Darrell V. McGraw, Jr., the Attorney General.

4 DARRELL MCGRAW: Good morning.

5 I'm glad you were able to come. I'm glad that
6 we're going to be able to hear from you with respect
7 to the regulations which have been prepared by the
8 task force that we designed to initiate the
9 promulgation of regulations which we are required
10 under the law to promulgate.

11 I must share with you a secret in my heart of
12 hearts. Indeed, I had a long conversation about
13 this very issue earlier today with relation to an
14 entirely different proposition than these
15 regulations.

16 In my heart of hearts I'm always concerned
17 about more regulations and more laws. For quite a
18 long time, even perhaps 20 years, it has been that
19 the Attorney General's office is empowered to,
20 indirectly, to promulgate regulations in these
21 fields that we have chosen to address; and it has
22 also been that others have probably shared the view
23 which I have, which is that, that it's possible for
24 regulations to just be piling on.

1 I'm not here today to say that that is true
2 with respect to any particular or specific
3 regulation that we are addressing here, but I do
4 want you to know that in my heart of hearts that I
5 approach these things as a matter of duty directed
6 by the law to, to proceed; and it is a duty with
7 which I had some philosophical concern.

8 I was riding yesterday with a prominent person
9 familiar with the law who said that he had heard me
10 say many years ago that there are already quite
11 enough laws to address probably anything that we
12 want to talk about, and this was a long time ago.
13 And in my judgment, things haven't changed quite a
14 lot since that day to this, except that there have
15 been more, always more.

16 So, we're here to address this, but we want to
17 do this in a, in a way that responds to the needs of
18 the community in a way that strives to bring
19 fairness to all parties concerned in transactions
20 which these rules address, recognizing all the
21 while, recognizing all the while, that we live in a
22 society which requires to some degree the exercise
23 of individual responsibility by all people who
24 choose to participate in whatever function it is

1 that the society allows engagement in.

2 And so, I want to express to you my particular
3 heart-felt appreciation that you've come here to
4 share your views of these things, recognizing all
5 the while that this is a part of the process which
6 will culminate in legislative approval of these
7 regulations finally.

8 And so, again, thank you for coming; and I am
9 depending upon you to express your view with respect
10 to these regulations as we go forward in an effort
11 to promulgate fair and proper regulations.

12 Thank you very much.

13 MR. RODD: Thank you, Judge
14 McGraw.

15 I'm Tom Rodd, the Director of the Consumer
16 Protection & Antitrust Division of the Attorney
17 General's office, and this is the public hearing
18 that was announced in the State Register with
19 respect to the draft regulations filed with the
20 Secretary of State's office by the Division pursuant
21 to West Virginia law.

22 I have the sign-up sheets for the public
23 hearing; and the first two sign-up sheets -- which
24 seem to be the completed ones -- and I see that we

1 have about 30 people who have indicated a desire to
2 speak.

3 As I said earlier, at the end of the speaking
4 of those folks who have signed up we may have time
5 to have other people speak, but that's not a
6 certainty. So, if -- it's in the interest of anyone
7 who thinks that they might want to speak today to go
8 ahead and sign up on the sign-up sheet to be
9 guaranteed time.

10 I'm going to just take a second and consult
11 with my colleague, Andrew Maier, also from the
12 office here, on the question of time; and I'll be
13 right back to make a few remarks about the time, and
14 then we'll begin with the first speaker.
15 (Short recess.)

16 MR. RODD: We have concluded that
17 at an appropriate time limit, which, quite frankly,
18 we will be somewhat flexible in administering, is
19 five minutes for peoples' comments; and, of course,
20 we can accept written comments as well. If people
21 begin to go significantly over five minutes, we'll
22 indicate to them that they are at that point. If
23 they really want to deliver a 15- or 20-minute
24 speech, we may have to ask them to give their first

1 five minutes and then fall back to the end of the
2 line and address whoever remains here at the end of
3 the procedure.

4 Mr. Maier is going to keep a watch on the time,
5 and he'll -- I think he'll show people -- he'll show
6 folks when they have got a minute remaining of those
7 five minutes; but as I say, we'll be flexible. This
8 is not a formal judicial process or anything like
9 that.

10 Do I have any questions before we actually
11 begin to hear from the witnesses?

12 LEFF MOORE: We have a process
13 question. Your notice of public hearing indicated
14 that you were not taking written comments, and you
15 limited the notice in the federal -- the State
16 Register to oral comments only. Was that an error
17 or am I to understand that you've changed the
18 procedure?

19 MR. RODD: Well, I have stated
20 that we will take written comments today. So, I
21 would --

22 LEFF MOORE: (Interposing) Is that
23 only today?

24 MR. RODD: The comment period will

1 end today.

2 LEFF MOORE: Well, your notice to
3 the public indicated that oral would only be
4 accepted. So, many of us did not prepare written
5 comments, in view of your notice to the public.

6 MR. RODD: I'm sorry, my
7 impression was that the notice to the public -- and
8 I haven't got that in front of me -- indicated that
9 there was a 30-day comment period following the
10 promulgation of the regulations, and in fact we have
11 been receiving written comments during the 30-day
12 standard comment period; that this hearing comes at
13 the end of that comment period.

14 LEFF MOORE: I would urge you to
15 read the notice as it appeared in the State Register
16 and on the front of the rules; and if I am wrong in
17 that, in that note, in my interpretation of the
18 notice, then I'll stand corrected. It's my -- the
19 way I read the notice is that there was a public
20 hearing scheduled for today with oral comments only,
21 and that the box that indicated written comments was
22 not checked on that -- the front of this rule. But
23 in view of that, I would request that you would
24 extend for at least 24 hours the opportunity to

1 submit written comments --

2 MR. RODD: (Interposing) I will.

3 LEFF MOORE: (Continuing) -- after
4 today's date.

5 MR. RODD: I will.

6 LEFF MOORE: Thank you.

7 MR. RODD: Your name, sir?

8 LEFF MOORE: My name is Leff
9 Moore.

10 MR. RODD: And is your address on
11 the sign-up sheet, Mr. Moore?

12 LEFF MOORE: Yes.

13 MR. RODD: Thank you for calling
14 that to my attention, Mr. Moore; and I apologize for
15 any inconvenience that that may have caused to
16 anyone else here.

17 TOM WINNER: Tom, just procedure.
18 Are you going to take these series-by-series-by-
19 series or just lumping everything together or --

20 MR. RODD: (Interposing) No. I
21 was going to go in the order of the, of the sign-up
22 sheets.

23 Other questions?

24 Okay, we'll begin with Richard Gallagher from

1 Clarksburg, West Virginia.

2 RICHARD GALLAGHER: First, let me
3 thank Judge McGraw for the opportunity to address
4 these regulations as they have been proposed.

5 My name is Richard Gallagher. I'm here on
6 behalf of the West Virginia Automobile & Truck
7 Dealers Association. I'll try to be as brief as
8 possible.

9 First, I'd like to address the Series 27
10 regulations regarding motor vehicle repairs.

11 The 3.1 regulation limits the -- or requires
12 only a \$50 anticipated repair before a written
13 repair order is required. In today's market \$50
14 doesn't go very far, as I think we're all aware. We
15 would request that this be increased to at least
16 \$200.

17 In that section also there is consent required
18 to be given by the consumer. We believe that in
19 this provision, as well in a number of other
20 provisions, the consent language should be changed
21 to permit consent from the consumer or any adult
22 member of the consumer's immediate household,
23 because many times you'll have a situation where the
24 consumer, if it's a husband at work, is unable to be

1 reached; and the spouse can call in and say, "We
2 need this done" or "Yes, you have our approval to do
3 that." Under these regulations that would not be
4 feasible or appropriate.

5 A number of places through the regulations --
6 for instance, in Section 4.2.1, it requires
7 conspicuous notice of language. That's a term which
8 is subject to different interpretations, a
9 subjective term. We would request that any notice
10 requirements clearly state the language that's
11 required, as well as have it stated in the size
12 print that's required. That would eliminate the
13 subjective terms, because our concern is that the
14 more subjectivity that's involved in it, the more
15 difficult to comply with it, and the more it breeds
16 litigation.

17 The same type of language is used in Section
18 4.3.1, which we contend should be, should be
19 replaced.

20 In regard to 4.3.1, there is an alternative
21 form there that provides three alternatives. That's
22 something that's new. We don't think that's
23 anything that's required under the authority of
24 46A-6-101, but we could contend that alternative

1 three should be amended so that it reads, "I do not
2 want an estimate, dash, just fix my car," so that
3 people can understand what the point of that is.

4 Under the waiver language under Section 4.4.1,
5 it permits a written revocation as long as the
6 person has four or more cars. Again, under 46A-6-01
7 (sic) we believe that that limitation is unnecessary
8 and should not be there.

9 In regard to the charges provisions under
10 Section 4.5, the provision should be amended to
11 recognize that estimates for repairs at times can't
12 be made in advance, because some problems with
13 engines, for instance, you have to tear the engine
14 down to see what the problem is before you can
15 prepare a meaningful estimate. So, that language
16 should be addressed to, to take care of that
17 problem.

18 Under the "Authorization to Proceed," the
19 primary concern is -- or one of the primary concerns
20 is the fact that only the consumer can give that
21 authorization. That language should permit any
22 adult member of the consumer's immediate household
23 to provide authorization.

24 In regard to Section 6.1, the "Return of

1 Parts," that creates a number of problems. We
2 believe that the provision should be amended to
3 require the consumer to request the parts, if they
4 would like that; or at least request an opportunity
5 to inspect the parts. The language as it's
6 currently drafted creates environmental problems,
7 because some problems -- some parts that are removed
8 from vehicles could create environmental hazards;
9 and what that provides -- what that regulation
10 requires, that these parts be provided to the
11 consumer. So, if that were to take place, the
12 consumer could be held responsible under a different
13 scenario of facts. But the regulation needs to be
14 amended to address those problems.

15 In regard to invoicing, Section 7.1.1 through
16 7.1.5, to the extent the provision requires labor to
17 be itemized under warranty work, this request should
18 be eliminated because it serves no useful purpose.
19 This is, again, in regard to warranty work.

20 "Prohibited Practices," there's a typographical
21 error in 8.1 where it requires misrepresentation,
22 which of course is a, is a mistake; and that just
23 needs to be corrected.

24 8.1.5, the language is vague, needs to be

1 addressed.

2 One of the problems through both this and the
3 section on sales is that there is -- there are
4 varying standards required. A "good faith basis" is
5 the standard that's required in several of these
6 regulations. We believe the regulations should be
7 consistent in the standard of conduct that's
8 required. That "good faith basis" requirement
9 should be inserted throughout the regulations, and I
10 don't have time to identify each and every
11 regulation where it's referenced, but that needs to
12 be addressed as well.

13 With regard to Series 28, "Motor Vehicle
14 Sales," there in 2.6 reference is made to the
15 vehicle in normal usage and for a reasonable time.
16 Again, those are subjective terms which result in
17 varying interpretations of what is normal, what is
18 reasonable. That would breed litigation. We
19 contend that it would be much better and much fairer
20 for all concerned if there are specific limitations.
21 If they are to be imposed, they should be set forth
22 specifically so there can be no subject to
23 interpretation which would only breed litigation.

24 As you go through that section, again words

1- such as "conspicuously" -- again, that's a
2 subjective term. If that's to be required, then the
3 language, we contend, should be stated, and it
4 should be required to a certain degree of -- that --
5 the size of the print so, again, there is no
6 interpretation involved, and it's easier for all to,
7 to understand what the point is.

8 Section 5.2.3 relates to a document- -- to the
9 extent that relates to documentary fee, forbidding
10 that being charged, the statute is on point that it
11 permits that. So, we contend to the extent it
12 contradicts the -- this regulation contradicts the
13 statute, that should be addressed and changed.

14 In regard to a number of regulations which,
15 which require the dealer to control the actions of
16 the manufacturer to be responsible for problems with
17 the manufacturer delivering vehicles, we contend
18 that that's unfair to the dealer, because the dealer
19 has no authority to control the manufacturer. So,
20 that language should be amended.

21 Sections 5.9/5.10 include and involve vague
22 terms that again are subject to various
23 interpretations and will breed litigation. That
24 should be, that should be addressed so that it can

1 be specifically understood what's required by these
2 regulations.

3 In regard to "Advertising And Sales
4 Presentation Requirements," there are provisions
5 there again which are vague. 6.3.3 should be
6 eliminated. 6.3.2 forbids a consumer's question to
7 be answered if in fact the answer could reflect
8 negatively on the vehicle. So, that should be
9 changed. That would prevent a customer's questions
10 from being answered if it in any way would reflect
11 negatively on a vehicle.

12 Section 6.5 should be eliminated.

13 I'm almost finished. I just ask you to bear
14 with me.

15 MR. RODD: Please take your time.
16 You're doing -- take your time.

17 RICHARD GALLAGHER: Okay. Thank
18 you.

19 MR. RODD: Complete your report.

20 RICHARD GALLAGHER: The Section
21 6.1.3, the language is too vague. It should be
22 eliminated. 6.1.4, the language should be
23 eliminated in its entirety. It requires
24 substantially new record-keeping purposes which have

1 not been required in the past. There are a number
2 of regulations, jumping back to the repairs portion,
3 which require new language should be attached or
4 inserted on certain repair orders. That would
5 involve, in essence, throwing away substantial
6 amounts of forms that could be used. That would
7 cost the dealers a substantial amount of money,
8 depending on the circumstance.

9 We contend that there should be a phase-in
10 period for that sort of thing so that within a
11 24-month period those old forms could be used up;
12 that until those forms are used up, the -- during
13 this phase-in period, the required language could
14 just be stapled onto the repair orders in order to
15 permit the consumer to be advised of the new
16 regulation.

17 Series 24, the "Repossession" statute, others
18 will address that. One section in particular is
19 troubling. It's 3.2.7 which forbids a vehicle to be
20 repossessed if it would result in an undue hardship.
21 Again, that's a subjective term, subjective phrase.
22 That will result in, I would anticipate, a great
23 deal of litigation, because there's no specific
24 guidelines set, and the subjectivity of that will

1 invite litigation. We contend that that's not the
2 purpose of these regulations, and that can be
3 avoided.

4 There are a number of comments. We also intend
5 to file some written follow-up comments because our
6 time has been limited here, as by necessity, because
7 of the number of folks here, but we do appreciate
8 the opportunity to address you. Thank you.

9 MR. RODD: Thank you,
10 Mr. Gallagher.

11 The second speaker is Bill Minsker from
12 Buckhannon.

13 MR. MINSKER: Because Rick pretty
14 much covered everything that we had, I'm going to
15 waive my time, Mr. Speaker.

16 MR. RODD: Thank you very much,
17 Mr. Minsker.

18 The third person signed up is Jack Albert of
19 Belle.

20 JACK ALBERT: I also thank you for
21 the opportunity to speak regarding these proposed
22 regulations.

23 My name is Jack Albert, but I'm here to speak
24 as a volunteer on behalf of the West Virginia State

1 Legislative Committee of the American Association of
2 Retired Persons.

3 I wish to speak in favor of the proposed new
4 Consumer Protection regulations, Legislative Rules
5 Series 23 through 30, Title 142. My statement is
6 regarding the general intent, not any specific item
7 in the regulations.

8 The AARP has over 262,470 members in the state
9 of West Virginia.

10 DARRELL MCGRAW: How many?

11 JACK ALBERT: 226,470. Almost 50
12 percent of the people over 50 years of age in West
13 Virginia belong to AARP. Consumer Protection
14 regulations are especially important to the aging
15 population of West Virginia. According to the
16 U. S. Census Bureau, West Virginia ranks third in
17 the nation with a population between the ages of 65
18 and 74.

19 The state ranks tenth with the population of 75
20 and over. This 75-and-over age group makes up 6 1/2
21 percent of the total population of West Virginia.
22 So, we're talking about over a 117,230 people who
23 are primary targets of those who are involved in
24 unfair and deceptive practices.

1 The position of the AARP regarding unfair or
2 deceptive acts or practices statutes is that they
3 are among the most effective tools to fight consumer
4 fraud and abuse at the state level. These statutes
5 provide effective remedies for consumers, encourage
6 merchants to resolve disputes fairly, and they -- it
7 deters misconduct.

8 The AARP believes that states should enact
9 statutes that, one, prohibit unfair and deceptive
10 practices in trade and commerce and, two, give the
11 state enforcement and regulatory authority.

12 Therefore, we urge that the West Virginia State
13 Legislature to approve these legislative rules,
14 Title 142, Series 23 through 30 inclusive, as
15 outline by the office of Attorney General of West
16 Virginia.

17 Thank you very much.

18 MR. RODD: Thank you, Mr. Albert.

19 The next person signed up is Bill Gossett from
20 Wheeling.

21 BILL GOSSETT: Good morning.

22 My position is Housing Resources Coordinator
23 for Florence Crittenton Home & Services which is
24 based in Wheeling, but we do provide a variety of

1 social services to low-income women and their
2 families throughout West Virginia. We have over
3 1,000 families throughout the state in our current
4 case load.

5 I'm here today to speak in support of the
6 Series 26 regulations governing practices in
7 tenant-landlord transactions.

8 Substandard housing conditions are a major
9 concern that we face every day with our clientele.
10 It is a major problem. Public housing is often
11 unavailable or there's a long wait to get into
12 public housing. So, many of our clients are left to
13 rent on the private market, often finding units that
14 are barely affordable, yet often substandard.

15 We feel that consumer law protection is right
16 on target in terms of the tenant-landlord
17 relationship, because what is a landlord but a
18 provider of a good or, if you will, a service in the
19 public marketplace. And I think it's well
20 established under consumer law that a provider of a
21 good or service should not provide a good or service
22 which is hazardous to health or safety.

23 There are a couple of inadequacies in the
24 current law concerning consumer protections, and it

1 comes under the general heading of "Code
2 Enforcement." Code enforcement is either unavailable
3 in rural areas or small towns; and even in the
4 larger towns the major problems with code
5 enforcement and making landlords live up to building
6 code standards, fire code standards, health code
7 standards, it's reactive in nature, and many times
8 it's a lengthy and complicated process that our
9 clientele, because of their limited education, just
10 their unfamiliarity with how the system works, are
11 unable to negotiate. It's difficult even with the
12 assistance of our case managers who often do try to
13 intervene on their behalf.

14 Another problem of a reactive nature of code
15 enforcement is in the time delays that are involved
16 often our clients incur a fairly large financial
17 burden in situations, such as poor building
18 construction where heating bills are very high or a
19 problem with plumbing where water bills are run up,
20 where the bills are in the names of the clients.
21 So, even if they are doing what they're supposed to
22 do in terms of trying to rectify the situation under
23 building code enforcement, they're still running up
24 those water bills, still running up those heating

1 bills. And often what results, quite frankly, is
2 they choose to pay the utility bill so that their
3 utility service is not cut off, they don't find that
4 they have the money to pay the rent, so they're
5 subject to what is a very fast eviction process in
6 West Virginia.

7 In closing I'd just like to say I myself am a
8 landlord, so I can speak from that, that
9 perspective. I own four units and three different
10 properties in the Wheeling area. And as I look
11 through the proposed regulations, I did have to
12 smile and ask myself am I in compliance with all of
13 these provisions of the proposed regulations in
14 terms of the complying with the building code and
15 all its details and also in terms of what can be
16 done with deposits, security deposits, and things
17 like that. And I had to admit that I wasn't in
18 compliance with the proposed letter of the Code, but
19 I don't think it's unduly burdensome to bring my
20 properties and my practices into compliance, and I
21 would suggest that this is a fundamental consumer
22 protection law and not overly burdensome to
23 landlords who, you know, are doing this as a
24 business as a serious investment in the public

1 marketplace.

2 In conclusion, I'd just like to say that I
3 think that these proposed regulations are fair and
4 reasonable; and based on our experience and the
5 experience that, you know, we've garnered through
6 dealing with over a thousand families throughout the
7 state, that they're, they're timely needed and
8 overdue. Thank you very much.

9 MR. RODD: Thank you, Mr. Gossett.

10 The next person signed up is James Rice from
11 New Martinsville.

12 JAMES RICE: Hello. I also thank
13 you for the opportunity to speak today. I'm Jim
14 Rice from AAA Mobile Homes in New Martinsville. Our
15 business is -- consists of both sales of
16 manufactured homes and the rental of 356 lots.

17 I have several concerns with the proposed rules
18 on Series 23. I'll limit it to one, because of your
19 statements earlier.

20 MR. RODD: Let me encourage you to
21 identify all areas that you have some concerns, even
22 though you may limit how much you discuss.

23 JAMES RICE: One section I'm
24 wanting to mostly state involves 3.1 and 5.2. This

1 is regulating the restriction of the vendor when
2 renting the lot -- when renting the space to a
3 manufactured home.

4 Many hours of hard work and investment went
5 into the business, went into the preparation of the
6 sites that we rent. We feel that, you know, that it
7 is our property and that we should have the
8 opportunity to limit the sales going into it.

9 The same way with many of the items in this
10 proposal, we feel that the tenants are being given
11 more control over the parks than we are. Thank
12 you.

13 MR. RODD: Thank you very much,
14 Mr. Rice.

15 The next speaker signed up is Alvin McCorkle
16 from Charleston.

17 Alvin McCorkle from Charleston.

18 ALVIN McCORKLE: I just thought we
19 were signing up as we came in.

20 MR. RODD: That's fine. Excuse
21 me.

22 Let me correct what may be a misapprehension,
23 perhaps because the information was not clearly put
24 on the sign-up sheet. If there are folks who have

1 signed up but don't intend to make a presentation at
2 this time or make comments, I'll, unless the people
3 find it embarrassing, go ahead and read their name,
4 because there may have been some confusion in that
5 regard, and then they can indicate that they don't
6 intend to make a presentation or, if you'd like, you
7 can step forward and speak to Mr. Maier, and he'll
8 write down your name, and he'll make sure that I
9 don't call on you.

10 Thank you.

11 The next name that I have on the sign-up sheet
12 is A. D. McCorkle, IV.

13 ALVIN McCORKLE: Good morning. My
14 name is Alvin McCorkle. I'm president of Quality
15 Properties, a property management. We manage almost
16 a hundred units in the valley.

17 My concerns are mainly the landlord-tenant
18 transactions. The -- the first thing I would like
19 to address is Section 5.2.3 under 142-26-5, the
20 security deposits, requiring landlords to keep these
21 in a separate interest-bearing account.

22 And my understanding -- and I'm not a lawyer,
23 thank God -- is that by definition of what you-all
24 define here as a trust account and that also by law

1 a trust account cannot be interest-bearing, which
2 would seem to be contradictory. (sic)

3 The -- the next, 5.2.4, "the eviction or
4 exclusion of a tenant from the premises, other than
5 by judicial eviction procedures," I'm assuming
6 you-all -- you people mean going into court,
7 magistrate or otherwise.

8 I'm totally opposed to that. I think there's a
9 lot of legal evictions that take place that do not
10 involve magistrate court or higher.

11 The -- under 142-26-6, 6.3, again this is --
12 addresses what I was talking about before concerning
13 paying interest on security deposits. I think it's
14 a highly unusual practice to publicize your account
15 number and bank that you, that you deal with.

16 Under that same heading, 6.4, only allowing 20
17 days to return a security deposit when it's a one
18 full month -- one full rental period for an eviction
19 process, but you're -- in 20 days, if there's
20 repairs needed to be done to the apartment -- and a
21 lot of times you cannot come up with a decent,
22 reasonable price within 20 days as to how much those
23 repairs are going to cost. If there's a sanitary
24 lien involved, you cannot get the proper account

1 status from the Sanitary Department in 20 days from
2 the time of, like, from the time that the apartment
3 was vacated.

4 6.5, same, same concerns.

5 MR. RODD: Mr. McCorkle.

6 ALVIN McCORKLE: Yes.

7 MR. RODD: May I ask, do you have
8 a time that you would care to specify as to what you
9 consider to be more appropriate for the return of
10 security deposits? I mean, you don't have to come
11 up with something, but I just wondered.

12 ALVIN McCORKLE: I would say 60
13 days.

14 MR. RODD: Thank you.

15 ALVIN McCORKLE: Under
16 142-26-7, "Evictions and Termination of Tenancy,"
17 quite frankly 7.2, "Commence summary process for
18 possession of a dwelling unit before time period
19 designated in a 30-day notice," I'm not real sure
20 what you mean. I mean, does that mean that they
21 have to violate the lease for 30 days before you're
22 allowed to do anything? In which case, I would like
23 the same consideration as a landlord: that if a
24 tenant deems an apartment uninhabitable, then I have

1 30 days before he can declare it such, which I think
2 either way is probably a little ridiculous.

3 Again 7.3, the judicial eviction process.

4 7.4, "Provide for an acceleration of rent
5 payments in the event the tenant defaults," I'd like
6 a little more explanation on that. Again, what
7 would be provided to -- once you provided this, this
8 payment schedule, what would enforce it?

9 And, in closing, the title of this is "Landlord
10 Tenant Transactions," but every, every heading
11 starts with "it will be an unfair or deceptive act
12 or practice for a landlord to." I see nothing in
13 here as to what the tenant agrees to when he signs
14 that lease and what is unfair and deceptive for the
15 tenant to do.

16 Mr. Rodd, I consider myself a consumer; I
17 consider myself, if needed, would be protected by
18 your division. My idea of a tenant-landlord
19 association is contractual. I am not selling
20 anything. I'm entering into a contract with a
21 tenant. And I think both sides of that contract
22 ought to be defined in your legislative rule. Thank
23 you.

24 MR. RODD: Thank you very much,

1 Mr. McCorkle.

2 The next person signed up, if I read this
3 right, is Pat Hose.

4 PAT HOSE: Thank you, gentlemen.
5 My name is Pat Hose, and I am what I consider a
6 small landlord. I just have a few properties.

7 I especially want to -- I don't want to talk
8 about the ones that Mr. McCorkle just spoke about,
9 but I do have concerns of those same numbers, but
10 especially I want to talk about 142-26-7 on
11 the "Evictions and Termination of Tenancy."

12 I'm concerned about this 30-day notice. If you
13 have a tenant that has not paid the rent and you
14 have to give a 30-day notice before you can start
15 proceedings, that means when you come into court it
16 will be 10 days before they have to appear in court,
17 and it will be at least another 10 days before they
18 have to move out. So, you're already into a two
19 months' loss of rent.

20 I just went through an experience which, to me,
21 was a nightmare. The girl quit her job and did
22 not -- was not paying her rent. I tried to get her
23 out. It took four months to get her out, and in the
24 meantime she's brought in a cat with kittens that

1 are using the carpets for a bathroom, all of which
2 all had -- and I had just carpeted before she moved
3 in. So, her place was -- you could hardly stand to
4 get in it, let alone show it to anyone. We had to
5 redo the carpets; we had to seal the floors. In the
6 meantime her rent, which was 350 for a one-bedroom
7 apartment -- it included all her utilities, which I
8 paid for that the whole time.

9 I think there should be some way that if we do
10 happen to have an apartment where we're paying the
11 utilities, that we don't have to keep that up if we
12 can't get someone out. If she were paying her own
13 gas and electric, it would have been terminated
14 within a month; but because I was doing it, I had
15 to, I had to keep on paying that.

16 I think maybe a more fair way would be if
17 there -- if they haven't paid their rent in ten days
18 and they tell you they're not going to pay it, you
19 could give them their notice, but you should be able
20 to go to court and start it so that at least by the
21 end of the 30 days you could have them out.

22 I'm not sure what you mean on this 7.4 either
23 about an acceleration of rent payments. I do think
24 that we should be able to have something in the

1 contract; that if they haven't paid the rent in
2 three to five days, that there is a late payment
3 charge.

4 Some of our tenants can be very good, and I
5 don't think there's any problem. I often give rent
6 refunds when someone moves. They don't have to wait
7 anytime if they've paid their rent on time and taken
8 good care of the apartment. But I think there
9 should be exceptions when they haven't paid the rent
10 on time and when they haven't taken good care of
11 it. Thank you.

12 MR. RODD: Thank you very much,
13 Ms. Rose.

14 The next signer is Melody Douglas.

15 MELODY DOUGLAS: I don't have
16 anything.

17 MR. RODD: Thank you. Excuse me.

18 MELODY DOUGLAS: That's fine.

19 MR. RODD: The next signer is Guy
20 Ponter (sic)?

21 GUY PORTER: Porter.

22 MR. RODD: Porter, Jr. Excuse me.

23 GUY PORTER: My name is Guy C.

24 Porter, Jr. I'm from Charleston. I'm a Certified

1 Property Manager. We manage around 120 units for
2 various customers, clients, owners. And I am
3 opposed to the tenor of your regulations where you
4 are only restricting the landlord more and there is
5 no mention of tenant obligation. I certainly think
6 in a general way that our present statutes are
7 adequate to protect just about every situation.

8 Let me speak specifically to the item of
9 security deposits. The purpose of a security
10 deposit, as far as I'm concerned, is to make sure
11 that the tenant pays his last sanitary bill and also
12 pays for any damages that might have occurred. Now,
13 the Sanitary Department in Charleston charges the
14 owner of the property, if the tenant does not pay
15 the sanitary bill. And in order to get a final bill
16 from the Sanitary Board, it usually takes three to
17 four weeks. That bill is then sent to the address,
18 forwarded onto the tenant in whatever state he might
19 be living in now; and by the time that he has a
20 reasonable time to pay it, at least six weeks have
21 expired on the sanitary bill alone.

22 MR. RODD: May I interrupt you and
23 ask a question?

24 GUY PORTER: Yes, sir.

1 MR. RODD: Can you give some
2 indication of the typical amount of the sanitary
3 bills that you are referring to, the range?

4 GUY PORTER: The range will be
5 anywhere from, oh, \$8 to \$25.

6 MR. RODD: And that would be a
7 monthly bill?

8 GUY PORTER: Yes, sir. And they
9 may be behind --

10 MR. RODD: (Interposing) That's
11 right. I was going --

12 GUY PORTER: (Interposing) They
13 may be behind with the Sanitary Board, so it could
14 be several hundreds of dollar.

15 MR. RODD: But typically the range
16 for one month's sanitary bill is \$8 to \$25?

17 GUY PORTER: Yes.

18 MR. RODD: Thank you.

19 GUY PORTER: Now, I would
20 certainly suggest that instead of 20 days, you have
21 60 days in there. This seems to be a normal
22 procedure in most leases at this point in time.

23 The other problem I see is the business of
24 interest on security deposits. We turn security

1 deposits directly over to the owner and along with
2 their rental income, net rental income. This would
3 be a tremendous bookkeeping arrangement, and I
4 question whether or not we can get any of the banks
5 to pay interest on this type of a deposit.

6 I'm also concerned about the eviction procedure
7 that you have provided, and I'm also concerned about
8 the fact that no provision is made in your
9 regulation for the disposal of personal property
10 that has been abandoned by the tenant and left in
11 the unit, and the tenant is -- you're unable to find
12 the tenant. What do you do with the abandoned
13 property? There is no provision in your regulation
14 for that.

15 So, I think we need to be fair on both sides of
16 the coin. This is a contract between a landlord and
17 a tenant. We're not a store. We're creating a
18 contractual situation, and both parties should be
19 equal. Thank you very much.

20 MR. RODD: Thank you, Mr. Porter.

21 The next name I have signed up is Neal Walters.

22 Neal Walters from Eleanor?

23 We'll pass on to the next person. If someone
24 sees Neal Walters, you might tell him that I called

1 his name.

2 Kathryn Maddox from Charleston.

3 KATHRYN MADDOX: Thank you very
4 much for this opportunity. I'm Kathryn Maddox from
5 Charleston. I'm president of the West Virginia
6 Landlords Association, which is composed of
7 approximately 125 members. Many of our members own
8 a hundred pieces of property, rental properties or
9 rental units. We are all dedicated to fair and safe
10 housing. We have a variety of rental types, some
11 for low-income and some for the -- more expensive
12 housing units.

13 We are concerned about several of these items
14 as an organization. First, 3.5 under 142-26-3, the
15 conditions and maintenance of the dwelling unit. It
16 says "Failure within a reasonable time after
17 receiving notice from a tenant to make repairs."
18 Many times the tenant may notify a landlord that
19 there are damages to the unit which were caused by
20 the tenant themselves. And if you rent to
21 low-income -- families of low income, then the
22 landlord is responsible for repairing those damages,
23 because the unit could be declared unfit for
24 habitation.

1 We feel that there should be something stated
2 about what caused those damages. Now, if they were
3 existing, that's one thing. But if the tenant
4 caused the damages or if they had a breaking and
5 entering, which many times turns out to be the
6 boyfriend of the girl living in the unit who breaks
7 and enters, then should the landlord be responsible
8 for repairing door locks and doors that have been
9 kicked open?

10 3.7, in that "fail to reimburse the tenant
11 within a reasonable time for service or supplies,"
12 our policy is pretty much that we don't require the
13 tenants to do any repairs or maintenance, and we
14 have -- our experience is that we run into more
15 trouble if we do that, because sometimes they'll
16 paint woodwork that is natural woodwork. They might
17 paint it black. I just had that last week to --
18 happen. So, if there is any kind of an agreement
19 for painting or anything else, it should be in
20 writing. This says it should be reimbursed by the
21 tenant after any representation from the
22 reimbursement (sic).

23 So, if any kind of an agreement like that is
24 made, it should definitely be in writing.

1 Under the next section of rental agreements,
2 5.2.3, about the interest-bearing account for the
3 deposits, we feel very strongly that this should not
4 be. If you have a hundred rental units and you have
5 deposits from a hundred tenants, think of the
6 bookkeeping that is going to take. Plus, if you'd
7 have to have a separate account for each one of
8 those, I don't think you would find a bank anywhere
9 that would let you set up a hundred different
10 accounts.

11 And we certainly don't think that the account
12 number should be given out. Keeping a separate
13 account for deposits is understandable, but not
14 interest-bearing, because the banks don't do it that
15 way; and it would be a horrendous thing if you had
16 to give -- pay this out at the end of every year, if
17 you have tenants staying. It would just take too
18 much time, and you'd lose too much money.

19 The next item, 6.4, the 20 days for termi-,
20 termination of the occupancy, as stated by several
21 other members we feel it should be 60 days, because
22 that -- many times your repairs are much more
23 extensive, and you can't get it done within a 30-day
24 period of time. So, a 60-day refund of the tenant's

1 deposit, we feel, would be much more reasonable.

2 No. 6.6 --

3 DARRELL MCGRAW: (Interposing)

4 When you say "reasonable," does that -- can I
5 translate that to be an acceptable 60 days?

6 KATHRYN MADDOX: Yes.

7 DARRELL MCGRAW: All right.

8 MR. RODD: I'm sorry, the number
9 you had just stated?

10 KATHRYN MADDOW: 60 days instead
11 of 20 days.

12 MR. RODD: I'm sorry. You were
13 moving on.

14 KATHRYN MADDOX: The next one is
15 6.6.

16 MR. RODD: Your number is.

17 KATHRYN MADDOX: 6.6. The normal
18 wear and tear, it says, for the tenant -- normal
19 wear and tear is not to be included when you give
20 the reimbursement -- their deposit. Many times this
21 requires us videotaping or taking pictures when the
22 tenant moves in and also taking pictures when the
23 tenant moves out, because there could be a
24 difference of opinion on this. We have checklists

1 that they can itemize. We itemize things. Like, if
2 new carpet is put in, then when the tenant moves
3 out, if the carpet is very badly damaged, that's
4 really not normal wear and tear at the end of one
5 year. So, it needs to have a definition of what is
6 normal wear and tear.

7 The next one under "Eviction and Termination,"
8 again we feel that the 30-day process for giving a
9 written notice -- if the tenant has not paid their
10 rent, you can now go to magistrate court within ten
11 days and file, if they have not paid their rent; and
12 we feel that that should still remain, that the
13 landlord should be able to go after a period of ten
14 days. Because it's going to take more than 30 days
15 to -- in order to get a process and in order to
16 sometimes even get an appointment, because the
17 tenant can postpone the hearing. If the magistrate
18 sets up the hearing date ten working days -- now, if
19 you have a holiday, that's excluded. Weekends are
20 excluded. So, that's ten working days which
21 sometimes can amount to 20 days before you can get a
22 hearing. Then the tenant can postpone that --
23 sometimes one, two times. You can already be into
24 60 days before you can even get a hearing, a legal

1 hearing on an eviction notice. So, we feel that the
2 30-day notice is too long a time if they fail to pay
3 their rent.

4 Again, as we get into utilities, this kind of
5 ties in together, but some of the tenants and
6 elderly people can receive assistance when they
7 aren't able to pay utilities; and sometimes if they
8 aren't able to pay their rent, they can get an
9 assistance for, like, for one month's rent. But
10 many times this extends the period of time also for
11 an extra 60 days before you can have court
12 proceedings, because you have to sign a paper after
13 they get a little slip that says they -- that the
14 landlord will refuse to evict them for another 30
15 days if they get assistance. And so, sometimes that
16 can drag out to be three months.

17 Under utilities --

18 MR. RODD: (Interposing) Do you
19 have a number that you're referring to?

20 KATHRYN MADDOX: For the
21 eviction?

22 MR. RODD: For what you're about
23 to speak about.

24 KATHRYN MADDOX: Okay, we feel

1 that after ten days, that they have --

2 MR. RODD: (Interposing) No. I
3 meant the number of the regulation. I thought you
4 were changing to another regulation.

5 KATHRYN MADDOX: All right. This
6 is 7.2, was the --

7 MR. RODD: (Interposing) Thank
8 you.

9 KATHRYN MADDOX: (Continuing) --
10 summary payment as to the 30-day notice.

11 MR. RODD: And it's helpful for
12 the record --

13 KATHRYN MADDOX: (Interposing) Okay.

14 MR. RODD: (Continuing) -- if you
15 identify it by number, if you can, the --

16 KATHRYN MADDOX: (Interposing) All
17 right.

18 MR. RODD: (Continuing) --
19 regulation that you're commenting on, if it's easy.

20 KATHRYN MADDOX: And also 7.3
21 then, which says the judicial eviction procedure
22 only, a court procedure, Mr. McCorkle, I think, made
23 mention also of this, that there -- that you should
24 not have to go to court each time you are going to

1 evict a tenant, and this is what this regulation
2 states, 7.3.

3 Under the next heading of "Utilities,"
4 142-26-8, if the -- again, to refer, if the tenant
5 then -- if the landlord is paying utilities, we do
6 not feel that the landlord should continue to have
7 to pay utilities when a tenant has not paid their
8 rent. Again, if it is a hardship case, the tenant
9 can go to different agencies, several different
10 agencies and receive assistance in paying
11 utilities. But if the landlord is signed up to pay
12 the utilities, then the landlord, according to this,
13 would have to continue paying the utilities, even
14 when a tenant for three months or more hasn't paid
15 rent. So, that can be very, very expensive, because
16 usually you're going to have a big damage bill
17 besides that.

18 DARRELL McGRAW: I have a question
19 about that kind of a scenario. If, if you had a
20 circumstance where a tenant did not pay, for
21 example, gas in the wintertime --

22 KATHRYN MADDOX: (Interposing)
23 Yes.

24 DARRELL McGRAW: (Continuing) --

1 and the landlord were to not pay the gas, and the
2 gas would be turned off, how would you see who is
3 responsible for the ensuing damage to the property
4 that might occur as a consequence of freezing or
5 whatever. Who, who would you sue as responsible for
6 that?

7 KATHRYN MADDOX: Well, I think the
8 tenant would be responsible, but in 99 percent of
9 the cases the tenant has no income whatsoever when
10 this happens. I think there is also a regulation
11 that states that the utility company is not allowed
12 to turn off a tenant's utility in the severe winter
13 months.

14 DARRELL MCGRAW: I see.

15 KATHRYN MADDOX: However, if the
16 landlord is paying the utilities, there's no such
17 provision; the landlord has to continue pay it. So,
18 they're just going to be out the money. If the
19 utility would be shut off, the tenant would, more
20 than likely, not have the money to pay for any of
21 the damages.

22 DARRELL MCGRAW: I see. Thank
23 you.

24 KATHRYN MADDOX: So, we've all

1 concluded that we shouldn't be paying utilitis. We
2 should have it signed so that the tenants are paying
3 the utilities.

4 DARRELL MCGRAW: Thank you.

5 KATHRYN MADDOX: That's the best
6 solution to that, we feel.

7 Again, we are very interested in maintaining
8 our property and keeping it up, and we want to work
9 cooperatively in every way, but we feel strongly
10 that there should be some provision in here for
11 tenant's responsibilities in a landlord-tenant
12 agreement. Thank you.

13 MR. RODD: May I ask you one
14 question to clarify one of your remarks?

15 KATHRYN MADDOX: Uh-huh.

16 MR. RODD: It's entirely possible
17 that you may say, "I don't think I can comment on
18 that," and I can accept that response as well, I
19 assure you. But on the question of security
20 deposits, and I address this because you said you
21 were president of the Landlords Association, so
22 presumably you're familiar with the position of some
23 landlords, is there a suggestion that your
24 association or you would make which would accomplish

1 the result that tenants would reflect -- somehow
2 accomplish the benefit of having their money held
3 and set aside, losing value in the deposit form,
4 other than the idea of an interest-bearing account;
5 and secondly, isn't it true in your standing that
6 many states do require, and landlords live with your
7 requirement, of returning deposits to tenants with
8 interest? Can you -- do you have any comments on
9 that?

10 KATHRYN MADDOX: I know that when
11 I talk to the bank for any business, that the bank
12 had a regulation that they do not pay interest on a
13 business account. And so, therefore, unless the
14 banks have changed that ruling, the banks will not
15 pay interest on a business account. We do have
16 separate accounts to keep the deposits in, but
17 they're noninterest-bearing accounts.

18 So, I think that's the solution; that we would
19 make that a, just make that a provision that it
20 would be deposited in a noninterest-bearing account
21 and would be reimbursed to the tenant after the
22 damages have been deducted or any rent that had not
23 been paid.

24 MR. RODD: Doesn't it seem unfair

1 that the person is losing the benefit of that money
2 over that period of time that it sits in that
3 account?

4 KATHRYN MADDOX: I can't speak for
5 everyone, but I think many times a deposit,
6 particularly when you're dealing with low-income
7 families, might be \$20 for the deposit. Now, would
8 you -- if you had, again, a hundred accounts and
9 you're figuring out interest on \$20 for a year's
10 interest then -- you know, think of the time that
11 that's taking.

12 I don't think that it usually matters. I
13 haven't had a single tenant to ever complain about
14 the deposit losing -- that low amount of deposit
15 losing interest. Never had a complaint. I don't
16 know if anyone else ever has or not.

17 MR. RODD: Thank you very much,
18 Mrs. Maddox.

19 KATHRYN MADDOX: Thank you.

20 MR. RODD: The next person we have
21 signed up is Zol -- I apologize -- Maggied?

22 ZOL MAGGIED: Maggied.

23 MR. RODD: Maggied?

24 ZOL MAGGIED: Yes, sir.

1 My name is Zol Maggied. I live in Charleston.
2 I'm a landlord. I'm the immediate past-president of
3 the West Virginia Landlords Association, the same
4 association that Katie Maddox is now president of.

5 Because of time interest and because quite a
6 few of our people have already spoken, I must say
7 that I would rather not comment on item for item but
8 maybe make a few general comments.

9 In the matter of deposits, deposits are
10 designed not to keep extra money from the tenant but
11 designed to encourage the tenant to take care of the
12 property, and also to give proper notice of leaving,
13 and to follow certain procedures in that regard.
14 I've found that by having a substantial deposit, it
15 makes a tremendous difference in the condition that
16 the apartment is left in and kept in.

17 And as far as the interest-bearing aspect of
18 it, I agree with Katie Maddox. The bookkeeping
19 would be tremendous, and it would be a tremendous
20 problem to do this.

21 Utility costs, a comment was made also by
22 another speaker. The utility cost probably should
23 be paid for by the tenant. In some of the older
24 buildings which provide very reasonable and good

1 housing, it's virtually impossible to do that, and
2 that's the reason that utilities are always paid for
3 by landlords.

4 The hue and cry in Charleston, as I understand
5 in most of the country, has been for years that
6 there's a necessity and a great desire by public
7 officials for reasonable housing at reasonable costs
8 for people who do not have high incomes, and that's
9 part of what we provide. And I think it's time that
10 the legislators and the lawmakers stop tilting the
11 laws towards the tenant. I think it's time that the
12 landlords' rights are protected, also. And if you
13 have any doubts as to this, talk to anybody about
14 procedures for evicting tenants who do not pay, talk
15 about procedures for evicting tenants who do not
16 obey the law, and then you will find that this thing
17 is way off-balance.

18 I apologize for not staying with your numbers
19 here, but I feel very strongly in this regard.

20 MR. RODD: That's perfectly all
21 right.

22 ZOL MAGGIED: And I think it's
23 something that should be considered by the
24 lawmakers, by the legislature, by all people

1 concerned.

2 And if -- you must remember this, too: That
3 when we are burdened with extra costs, there's only
4 one way we can survive, and that's to pass it on.
5 We're just like the clothing store whose suit cost
6 them a given number of dollars, and then it's raised
7 by the manufacturer 20 percent later. They pass it
8 on to the customer. And that's the only way the
9 landlord survives. And I hope you will keep this in
10 mind. Thank you.

11 MR. RODD: Thank you very much.

12 The next person signed is Roy Stricklen.

13 ROY STRICKLEN: Tom, my comments
14 will be made in writing.

15 MR. RODD: Thank you,
16 Mr. Stricklen.

17 For anybody who's just come in, at the
18 beginning of the hearing in response to an inquiry I
19 indicated that we would keep the record open for 24
20 hours, and I will say until the close of business
21 tomorrow at the Attorney General's office, either at
22 the main capitol or preferably at 812 Quarrier
23 Street, for written submissions.

24 The next person signed up is a Bryan Kett from

1 Ford Credit.

2 BRYAN KETT: Hello. I am Bryan
3 Kett. I am with Ford Credit, and I am here to
4 address the Series 24, "Legislative Rule Pertaining
5 To The Prevention Of Unfair Or Deceptive"
6 practice -- "Deceptive Acts" and "Practices In
7 Security Interests and Repossession Practices."

8 As the largest automotive finance company in
9 the world, with over 77 billion dollars in
10 receivables, Ford Motor Credit Company supports
11 efforts to promote fair and consistent treatment of
12 all customers.

13 To the extent the proposed rule promotes such
14 treatment, Ford Motor is supportive; however, we
15 must express our deep concern over and opposition to
16 provisions which would place unreasonable burdens
17 upon the automotive finance industry and ultimately
18 work against the best interest of the consumers of
19 West Virginia.

20 Although Ford Credit is -- let's see, although
21 it is Ford Credit's policy to accommodate our
22 customers to the greatest extent possible,
23 unfortunately repossessions do occur. Proposed
24 Rules 3.2.7 and 3.4.3 are opposed by Ford Credit for

1 the following reasons:

2 3.2.7 requires the creditor to possess
3 knowledge that is generally unavailable. The rule
4 provides that it shall be unfair and deceptive acts
5 or practice deliberately (sic) -- to deliberately
6 seize property from a location that causes undue
7 hardship to the consumer.

8 Most vehicle repossessions cause some degree of
9 hardship, but how will a creditor ever know whether
10 a recovery place and time will constitute an undue
11 hardship? Ford Credit would make subject to the
12 burden -- would be made subject to the burden of
13 countless claims and litigation, alleging that Ford
14 Credit knows or should have known that the
15 repossession would cause an undue hardship. We
16 believe this rule is tantamount to the repeal of the
17 statutory right to repossess collateral. The cost
18 of which would be borne to the West Virginia
19 consumers who pay is great.

20 Rule 3.4.3 places burdens on creditors which
21 will increase the cost of and decrease the
22 availability of credit in West Virginia. The rule
23 requires that a repossessed vehicle be sold at
24 retail or that the creditor -- or that the customer

1 be given credit for retail market value. This rule
2 appears to be based on two false premises. First,
3 creditors will always be able to collect
4 deficiencies from defaulted customers and, hence,
5 have no incentive to maximize the sale price of
6 repossessed vehicles. Second, a retail sale will
7 result in greater proceeds applies to the -- apply
8 to the account than a wholesale -- than a wholesale
9 sale.

10 Unfortunately, such premises are flawed for the
11 following reasons: One, the creditor must get the
12 highest sale price reasonably (sic) for repossessed
13 vehicles. The rule assumes the creditor can simply
14 force the defaulting customer into paying the
15 difference between the outstanding balance and the
16 proceeds of the sale. In fact, repossessions occur
17 precisely because the consumer is unwilling or
18 unable to pay.

19 The creditors must, therefore, assume the
20 additional amounts will not be collected and seek to
21 obtain the highest sales price reasonable to, to
22 minimize the potential losses. For example, Ford
23 Credit experiences an average deficiency of over 31
24 hundred dollars after the sale of a repossessed

1 vehicle. Less than one-third of this deficiency is
2 recovered from post-repossession collection
3 activities. Once again, it is critical that we
4 maximize the sale price of a repossessed vehicle to
5 reduce our bottom-line losses.

6 Number two, wholesale automotive auctions open
7 to dealers obtain the highest prices at the least
8 cost. The automotive auctions used by Ford Credit
9 in selling recovered vehicles are sophisticated,
10 state-of-the-art, multi-million-dollar facilities
11 complete with marketing departments, cleaning and
12 repair facilities. It is not uncommon to have over
13 1500 dealers in attending and participating at these
14 auctions. Every aspect of the process is designed
15 and monitored by vehicle remarketing specialists to
16 quickly and efficiently obtain the highest price for
17 those consumers' account.

18 Three, forcing creditors to open retail outlets
19 and/or give retail prices will increase the cost
20 and/or reduce the availability of credit to
21 consumers in West Virginia. Proposed Rule 3.4.3
22 would increase the cost associated with
23 repossessions to creditors such as Ford Credit. In
24 response, creditors, in order to maintain acceptable

1 profit margins, will either have to raise the cost
2 of credit to the customers or tighten credit
3 policies. Marginal and high-risk customers will be
4 rejected in an effort to reduce the number and cost
5 of repossessions.

6 Number four, the proposed rule is contrary to
7 current West Virginia law. The legislature has
8 established the standard for rules for repossessed
9 goods as commercially reasonable, West Virginia Code
10 46-9-504(3). The standard for this application to
11 wholesale automotive auctions has long been accepted
12 in jurisdictions throughout the country.

13 Five, the federal government has concluded that
14 the wholesale automotive auctions are advantageous
15 to consumers. As a part of the investigation of
16 creditor practices which led to the adoption of the
17 credit practices rules, the FTC considered requiring
18 repossessed vehicles to be disposed at retail. The
19 FTC's conclusions match what common sense would
20 dictate: After deducting the reasonable expenses of
21 the retail sale, the debtor's account would not be
22 credited the amount greater than the resulting (sic)
23 from the wholesale sale.

24 They further concluded that this provision

1 would impose costs and would raise the cost and
2 reduce the availability of credit in excess of
3 offsetting benefits. Its conclusion was based on
4 the examination of the incentive of creditors to
5 maximize the sale price and the fact that the
6 wholesale retail price difference is due primarily
7 to the cost of running retail outlets.

8 We view this rule as nothing more than an
9 attempt to increase the creditor cost on defaulting
10 accounts which will only hurt good-paying
11 customers. Thank you.

12 MR. RODD: Thank you very much,
13 Mr. Kett.

14 I had -- I apologize for conversing a little
15 bit while you were talking there, but I had seen
16 some of your comments in writing, as well as I was
17 pretty familiar with them. So, I figured -- and I
18 appreciate that.

19 BRYAN KETT: I have a copy, if you
20 would want one.

21 MR. RODD: Yes. If you, if you
22 have -- well, we received -- already received your
23 comments in writing.

24 MR. KETT: Okay.

1 MR. RODD: Just a second.

2 The next person signed up is Joe Doughton
3 from --

4 JOE DOUGHTON: (Interposing)
5 Mr. Kett has explained our position. Thank you.

6 MR. RODD: Thank you,
7 Mr. Doughton.

8 The next person signed up is Alonzo Johnson.

9 ALONZO JOHNSON: I am Alonzo
10 Johnson from Monongalia County. I have a small
11 mobile home park in that county. Several things
12 concern me in these regulations I'd like to talk to
13 you about, and I thank you for allowing me to do
14 this. --

15 When I started my park several years ago when I
16 was a much younger man, I would have probably lost
17 it if these rules had been in effect, because I was
18 able then to rent some of my lots to mobile home
19 salespeople, keeping them available for their sales,
20 which allowed me to make my payments much earlier
21 than I would have been able to otherwise.

22 Item No. 3.4 on Page 3 of the mobile home
23 regulations you have would exclude the possibility
24 of doing this. Item 3.5 seems a little unfair to

1 me, but I guess we are unfair in some things, that
2 you can't rent to the highest bidder for a lot that
3 excludes one person offering more for a lot than
4 someone else if there's only one lot available.

5 Item No. 4.2 requiring a one-year lease unless
6 the tenant requests in writing a shorter period of
7 time would exclude many of the practices I now use,
8 it appears to me.

9 One is you could not prorate the first month's
10 rent, because you'd have to have a year's lease, the
11 payments being monthly, covering this statement in
12 the rule.

13 MR. RODD: I'm sorry, I'm not
14 following you.

15 ALONZO JOHNSON: Okay. Item 4.2
16 says, one, that -- each rental agreement must be for
17 no less than one year. So, it's got to be a
18 one-year. So, it could be more than one year; it
19 could be one year and ten days or one year and 20
20 days, the first one; and one year after that. I
21 assume it says one-year lease and the payments be
22 monthly.

23 If it's a one-year lease and the payments being
24 monthly, then I would not be able to get my rents

1 all coming due the first of each month, which I do.
2 I prorate the second month of rental so all payments
3 will come due on the first of the month. This says
4 all payments would be monthly payments.

5 MR. RODD: So, it's not clear
6 that, that under the circumstances you're
7 describing, partial payments could be made?

8 ALONZO JOHNSON: It's says they do
9 not. It says montly, equal monthly installments,
10 all rent must be in equal monthly installments.

11 MR. RODD: I understand. There's
12 no exception for the circumstance where you prorate.

13 ALONZO JOHNSON: Prorate or where
14 I want my -- all leases to expire on June 30th, if I
15 would want that to happen; and I could see where
16 people, because of administrative costs, would want
17 them all to come due at a particular time.

18 MR. RODD: Okay. I understand
19 you. Thank you.

20 ALONZO JOHNSON: Okay. I'm sorry
21 I wasn't clear.

22 MR. RODD: No, no. Please
23 proceed.

24 ALONZO JOHNSON: Item 5.3.1,

1 although I don't now have nonmetered utilities, when
2 I started the park I did have nonmetered utilities;
3 and everyone paid the same amount of rent, and the
4 charge was included in the rent. I don't know
5 whether it was listed as separate or not. But this
6 tends to say that you have to charge everyone for
7 utilities according to how much they use. It
8 appears to me to say that.

9 Since you are not metering -- when you -- small
10 parks are not metered, you just pay your water. Get
11 one water meter, and everyone has paid for the water
12 in their rent. This would exclude that practice.
13 It appears to.

14 I have trouble reading these things sometimes.

15 Item 6.2 excludes rule changes during the terms
16 of the rental agreement. Item 6.2 with Item 9.1, I
17 read 9.1 to give a perpetual lease to anyone that
18 does not break a rule in the park, the mobile home
19 community, whatever we call it here. It appears to
20 include those forever. I'll get back to Item 9.1
21 again when I get over to that. If Item 9.1 was
22 changed, that would take care of my problems with
23 6.2.

24 And I would like to see Item 5, the one I just

1 talked about a moment ago, to allow monthly leases
2 instead of just annual leases, which I do now
3 monthly lease.

4 MR. RODD: That is at this time
5 your practice is to say that you can terminate a
6 lease anytime --

7 ALONZO JOHNSON: (Interposing)
8 Either party. Either party can terminate the lease
9 on a 30-day notice.

10 MR. RODD: Period.

11 ALONZO JOHNSON: Period.

12 MR. RODD: Anybody who rents from
13 you, that's what they --

14 ALONZO JOHNSON: (Interposing)
15 Sign, and that's what they renew.

16 MR. RODD: You don't offer them
17 any other option?

18 ALONZO JOHNSON: No.

19 MR. RODD: Okay.

20 ALONZO JOHNSON: And I've had no
21 problem with that in years.

22 Item 7.2 and 7.3, I think all of the items in 7
23 refer to the age of a factory-built home. You can
24 exclude solely or in part on the basis of.

1 I am sure many of my tenants would take me to
2 court when I terminate their lease and say it was in
3 part on the basis of, based on. If I would require
4 them to paint the home and they refused to paint the
5 home -- "Why does it need painted?"

6 "Because of its age, it needs paint."

7 So, anything dealing with the age of the home
8 you cannot use to exclude someone from the home --
9 from the park.

10 Item 7.8 appears to allow tenants to place a
11 mobile home "For Sale" sign anywhere in their lot.
12 Mobile homes have to be moved in and out, and I at
13 least allow to re- -- keep a right to move anything
14 so I can move a home in or out, because you have to
15 pass one -- or cross over one lot sometimes to get
16 into another one. But Item 7.8 says "or on the site
17 on which the mobile home is located." I'm sure
18 people will interpret that anywhere they want to put
19 one.

20 Item 9.1 really bothers me. "It shall be an
21 unfair and deceptive act or practice to refuse to
22 renew the tenancy of a resident of a mobile home
23 park, except upon the following grounds." (sic)
24 It lists three grounds. That's for renewing. So,

1 we're giving a one-year lease; we cannot terminate
2 the agreement at the end of that unless one of these
3 three things occur.

4 I recently just put in some extra spaces on
5 land that I, quote, held -- or felt was too valuable
6 for mobile homes, but I knew I could change it in
7 five years if I wanted to put something else of
8 higher value in on the land. The way I read 9.1, if
9 these people pay their rent, don't break any of the
10 terms of the rental agreement, material terms of the
11 rental agreement, they can stay there forever,
12 unless I change the whole community, change the use
13 of the whole community. I just can't change the use
14 of part of it.

15 Item 10.3, if I wanted to put in a pool, pave
16 roads, does Item 10.3 exclude me from having a
17 charge for doing that? It appears to to me.

18 Timing on these rules bother me. I just
19 recently had to pay an attorney over \$500 to get a
20 lease written that met the conditions, he said,
21 after talking with him, of the West Virginia new law
22 concerning mobile home parks. With this, I will
23 have to get a new lease and have everyone sign a new
24 lease. I wish the two had been done at the same

1 time, because this -- these regulations will require
2 me to have everyone sign a new lease and have a new
3 lease written.

4 I have two questions I'd like to know. When
5 will these rules be final, and when will they be
6 effective?

7 MR. RODD: The rules will not be
8 effective until and unless they are approved by the
9 legislature of the State of West Virginia.

10 ALONZO JOHNSON: So, the answer is
11 the next legislative session?

12 MR. RODD: I believe that's a
13 pretty safe answer.

14 ALONZO JOHNSON: Thank you.

15 MR. RODD: Thank you very much,
16 Mr. Johnson.

17 Tom Winner.

18 TOM WINNER: Counsel will give our
19 remarks.

20 MR. RODD: Okay.

21 DEBBIE SINK: Debbie Sink. I
22 signed in.

23 MR. RODD: You're the next person
24 that signed up.

1 DEBBIE SINK: Yes.

2 MR. RODD: Thank you.

3 DEBBIE SINK: My name is Debbie
4 Sink, and I'm here with Tom Winner on behalf of the
5 West Virginia Bankers Association which represents
6 the banks and their parent companies in the state of
7 West Virginia, and we would like to just give some
8 very general oral comments on Series 24, the
9 repossession regulations.

10 We've previously submitted fairly detailed
11 written comments, and I will not take the time to go
12 through each of those, but the concepts we would
13 like to relay this morning are -- relate to our
14 serious concern with that proposed series. We
15 believe that they would have, if promulgated, an
16 adverse impact on consumer credit or -- and/or the
17 cost of that credit, both availability and cost.
18 The reason we say that is that these proposed rules
19 will discourage banks from lending to a marginal
20 borrower or one where there may be the likelihood of
21 a need to repossess. The cost that the proposed
22 rules would impose upon repossessions, or the
23 limitations on repossessions, would lead to this
24 result.

1 The regulations also would tend to eliminate
2 flexibility and work-out room, if you will,
3 negotiation room, between a creditor and a borrower
4 because of some of the limitations imposed on
5 creditors within those rules.

6 Another serious concern we have is the several
7 provisions that are in direct conflict with the
8 Uniform Commercial Code, and we have enumerated
9 those and given references in our written comments.
10 The reason for concern there is multifold, but one
11 point I want to make that hasn't been made, I don't
12 believe, by the other commenters is that the Uniform
13 Commercial Code has extreme value because it is just
14 that: uniform. And it permits interstate commerce,
15 interstate transactions, because of its uniformity.

16 We are concerned that any attempt, attempt to
17 alter that could not only have an adverse effect
18 with respect to what's available to consumers within
19 the state but also from without the state, because
20 it will be more costly for those out of state who
21 would perhaps make credit offerings or offerings of
22 goods to consumers in West Virginia. It will be
23 more costly for them to do business in this state.

24 Also, there's some concern, I guess, about

1 enforceability, given that the proposed rule is a
2 rule as opposed to a statute, and there could be
3 litigation in an effort to establish which prevails
4 in the consumer context.

5 We also made the point in the written comments
6 and would like to reiterate here that portions of
7 the rule which are not in conflict with the UCC are,
8 we believe, duplicative; and we have the same
9 concern that was expressed at the outset this
10 morning about piling on when there is very adequate
11 coverage on some of the areas addressed in the
12 rules, both within the West Virginia Consumer Credit
13 Protection Act, other areas of West Virginia, and
14 federal law; and, again, we pointed out some
15 specifics in that regard in our written comments.

16 In short, the concern we have is very high with
17 these proposed rules, and details are set forth in
18 the written comment. And we thank you for this
19 opportunity and appreciate your consideration of our
20 comments.

21 MR. RODD: Okay. May I ask you
22 one -- it's simply a clarification of something you
23 said, and I understand that you may not be able to
24 respond to this, but you said something about

1 eliminating the work-out room.

2 DEBBIE SINK: Yes, sir. I could
3 give you one example just off the top of my head.
4 There's -- I believe in the proposed rule there's a
5 provision that a creditor shall not make a, quote,
6 "false threat," I believe is the language, to
7 repossess. If the creditor did that, that would be
8 an unfair or deceptive practice.

9 I think in the written comments we pointed out
10 that it would be impossible to know what was false.
11 I mean, perhaps it was a genuine indication that
12 repossession was imminent, but perhaps something
13 could be worked out. If the creditor did not follow
14 through, could it then be construed as a false
15 threat? That's one example that occurs to me.
16 That's a very, a very vague standard; and it might
17 require creditors to establish a policy that if they
18 ever mention the likelihood of repossession, they
19 must follow through or else they would in fact be
20 guilty of an unfair practice.

21 That's one example that occurs to me, but
22 that's the type of thing that I think could impede
23 flexibility or work-out opportunities.

24 Thank you very much.

1 MR. RODD: Okay, thank you.

2 The next person signed is Bonnie Harold.

3 Bonnie Harold.

4 The next person signed is S. D. McClure,

5 Charleston.

6 S. D. MCCLURE: Thank you. My

7 name is Steve McClure. I'm with Old Colony

8 Management Services. We manage over 450 rental

9 properties, that's residential and commercial. And

10 I'm very concerned about this whole proposition here

11 of Rule 26 -- or Series 26 that is totally one-sided

12 towards the, towards the tenant.

13 A couple of questions. I'm not going to go

14 into all of the details, but I would like to invite

15 the author of this to come to my office and spend a

16 day or two or three and see how we have to live

17 fighting this kind of stuff.

18 One question. It says -- on the -- I don't

19 know what this sheet is called. It's a rule

20 entitled: "Explanation of Overall Economic

21 Impact." It says here that it will promote private

22 adjudication of consumer issues, reducing the burden

23 on state regulations; and right in it it says the

24 only way you can evict anybody is to go to court.

1 It's kind of contradictory.

2 Anyway, to me it reads like a Japanese
3 instruction book before you translate into English.
4 I'd like to invite the author to come and spend a
5 day with me. Thank you.

6 MR. RODD: Thank you.

7 The next speaker is a J. D. Stricklen.

8 J. D. STRICKLEN: Thank you. My
9 name is J. D. Stricklen with Stricklen Properties.
10 Our offices are in South Charleston. We operate --
11 own and operate a few hundred units throughout the
12 Kanawha Valley.

13 And the comments I want to make today is, first
14 of all, the -- some of the things I'm in agreement
15 with. I can see where some of it is a little bit
16 one-sided, but I don't think anybody should have to
17 live in anything that's inhabitable or substandard.

18 To get specific with what my concerns are,
19 first of all -- of course, I'm speaking on the
20 tenant-landlord Series 26. The first item would be
21 3.5 where "Fail within a reasonable time after
22 receipt of notice from the tenant to make repairs"
23 when you've been notified that something is not fit
24 or habitable. The only concern I would have would

1 be that if in fact the problem was created by a
2 tenant, such as someone spoke to earlier where there
3 had been a domestic squabble and the door got busted
4 down or a thermostat got knocked off the wall. I
5 think there should be some special consideration to
6 tenant responsibility due to their negligence.

7 The next thing would be 3.8, which deals with
8 reimbursement for repairs within a reasonable time.
9 A little bit of gray area there. What is
10 reasonable? If on Sunday afternoon my air
11 conditioner goes off at my house, my wife thinks a
12 reasonable repair could mean within a half an hour,
13 which I don't personally think is reasonable.

14 You know, I try to -- when we deal with
15 tenants, we try to put the shoe on the other foot.
16 And, you know, if something happened to my house on
17 Sunday, I'm going to tend to wait until Monday to
18 fix it, and I think that's reasonable as opposed to
19 trying to track down a technician at double-time
20 pay. So, I think that could be a little gray, and
21 there could be some misinterpretation of what a
22 reasonable time would be, and I would hope that that
23 would be addressed.

24 Moving to Section 4 on "Notices and Demands," I

1 really don't have any problem with what you've
2 written other than I'd like for it to be bilateral.
3 I'd like for the tenants to be involved with that.
4 For instance, on 4.2, "Fail or refuse to accept" --
5 or backing up, it says "It shall be unfair and
6 deceptive act or practice for a landlord to,"
7 4.2, "Fail or refuse to accept any notice sent to
8 any address to which customarily sent."

9 To make a long story short, I don't have a
10 problem accepting notices; I just wish that the
11 tenants would accept Certified Mail. I'd like to
12 see that be a little bit more bilateral to make it
13 more fair.

14 Getting to the section that deals with the
15 interest-bearing deposits, security deposits would
16 be first mentioned in Section 5.2.3 and also in
17 Section 6.3. Well, what I want to point out to you
18 is that I was over at One Valley Bank earlier this
19 morning. I noticed that on a one-year C.D. the
20 interest rate is now 3.75. Let's call it 4 percent.

21 If you've got a \$200 security deposit on a
22 tenant, 4 percent, you're talking about \$8 a year.
23 In order to process that back to the tenant, our
24 cost made be \$20 to process \$8. So, what we do is,

1 like in any business, when you have an increase in
2 the cost of business, you generally pass it on to
3 the tenant. So, in order for the tenant to get the
4 benefit of an \$8 interest payment on their deposit,
5 they're probably going to have their rent increased
6 to reflect a \$20 increase in doing business.

7 I know it sort of seems like the money is just
8 sitting there, but that's, that's the things that
9 you've got to take into consideration, is what the
10 cost of doing some of these things would be.

11 Moving on down to the matter of security
12 deposits in 6.4 and 6.5 on the 20-day period, as
13 other landlords, I have a problem with the 20 days.
14 But there's an incentive for me as a businessman and
15 a landlord to even process security deposits much
16 more quickly than 20 days. We -- because of the
17 word mouth, you know, the way you conduct yourself
18 helps you in future business relationships and
19 referrals from past tenants.

20 However, the problem is, you know, we like to
21 refund deposits within two days of when the people
22 move out. Sometimes you can do that and sometimes
23 you can't. There are al- -- there can be
24 extenuating circumstances where it could take up to

1 60 days. The most, the most prevalent problem is,
2 is getting the final utilities paid. You know,
3 under the Public Service Commission regulations, the
4 property owner can be held responsible for the final
5 garbage bill or the final sewer bill; and you might
6 think that, "Well, that could be an 8 or \$20 item,
7 but by the time -- if that gets slipped past and
8 they actually put a lien on your property and you
9 get that put on your personal credit report, and
10 then it maybe will cost you as much as \$100 to get
11 that cleared up. So, it's important to always have
12 those cleared up when tenants leave, and sometimes
13 you just can't do that within 20 days.

14 What I tell people is when I get notice that
15 they're going to move, I say, "Please get me those
16 paid receipts." Sometimes they don't listen.
17 Sometimes they are moving out of state. When people
18 are moving, it's a busy time. It's very important
19 that we have enough time to get these utilities
20 accounts taken care of when people leave.

21 The Section 7 which deals with the termination
22 of leases, just generally -- someone made the
23 comment earlier that they thought that West Virginia
24 had a quick eviction process, which I disagree

1 with -- and I would, I would say that I think that
2 probably what's on the books now is fair; and I
3 think that anything that would be more stringent as
4 reflected in Section 7 would not be fair to the
5 landlords.

6 And the last item I'd like to make a comment on
7 would be Section 9.1 which has to do with entering
8 the tenant's unit. And really the only problem that
9 I have with that -- we don't make periodic
10 inspections or anything of that nature. We re- --
11 it's mostly through where you reserve a right to
12 enter at reasonable times for purposes of repairs or
13 showing the unit to prospective tenants. And at the
14 end of that it says that you can, you can enter if
15 it's authorized in writing; and if you stop it
16 there, I don't have any problem with it. But it
17 goes on to say that "other than in a form
18 provision," which is what a lease is. And I'd like
19 for that to be struck, from -- the end of Section
20 9.1, in order for us to be able to put that in the
21 lease as opposed to have to get an individual
22 authorization from every tenant.

23 I might also say that's all of my comments, and
24 I'm glad that the Attorney General has decided to

1 spend his valuable time here this morning. I'm
2 quite impressed that you stayed to hear our
3 comments. Thank you very much.

4 DARRELL MCGRAW: Thank you.

5 MR. RODD: Thanks very much.

6 The next person signed up is David Yoder.

7 DAVID YODER: Director Rodd, Judge
8 McGraw, thank you for taking the time to hear us
9 today.

10 I am David Yoder from Morgantown. My address
11 is 1225 Pineview Drive. I'm here representing the
12 Home Builders Association of West Virginia, and I'm
13 also president of the Apartment and Rental Housing
14 Association of West Virginia. I'm president of
15 Allegheny Development Corporation, which operates
16 and owns several hundred -- at least 300 units of
17 various types, whether they are residential housing,
18 single-family, two-family, four-family, and
19 multiple-housing structures, as well as commercial
20 units.

21 I'd like to state that I have been involved in
22 housing issues for about 30 years. I have worked
23 since that time with at least four university
24 administrations in Morgantown, with President

1 Harlow, President Budig, President Gee, and also
2 President Bucklew.

3 In all our endeavors, whether they are in the
4 corporate structure or with the associations in the
5 housing industry which I represent, we promote safe,
6 decent, and affordable housing. In fact, you might
7 recognize the fact that when we can provide good
8 housing, that means more jobs for our industry.

9 When we can eliminate housing that is not fit
10 and habitable, we, we find that that's good for the
11 housing construction. So, we support good housing.
12 We support fair and just dealings with our housing
13 consumers, as well.

14 And I could relate some horror stories. I will
15 have a prepared text for you, as well. I recall
16 that in times past we have gotten into situations
17 where we've had tenants that were a little less than
18 responsible in our corporate affairs, and we had
19 tenants' associations deal with us, and always in a
20 good relationship. We're very proud of our
21 reputation in Morgantown.

22 We have had one instance where a family had
23 rented a new duplex. They were the first tenants in
24 this duplex. It was a 3-bedroom unit, and they had

1 a family with several children, and they couldn't
2 pay their rent. So the, the tenants' association
3 intervened and said, "Well, would you let us hold a
4 check until the end of the tenancy, and then you'll
5 be sure to get your money? And after the tenancy,
6 then we will deliver to you the check, after we
7 inspect the apartment," because these tenants believe
8 that you may not be fair, you may not want to return
9 all of their security deposit. So, after we
10 inspected the unit," the association said, "we will
11 assure you payment."

12 That check was around \$2,000. And after they
13 vacated the apartment -- the unit in about one
14 year -- I think the tenancy was for one year -- we
15 inspected the unit and found that the little kid
16 cars and what have you had raced around the hallways
17 and virtually destroyed the decor of the unit.

18 So, that's why the cost of repairing the unit
19 was considerably more than the check that was to
20 come to us.

21 These tenants moved on to an out-of-state
22 location; and at the time when we cashed the check,
23 we found, after a couple of weeks, that payment had
24 been stopped.

1 So, how do we -- how do you propose that we go
2 about finding the tenants and recover our losses?
3 These are some of the, the experiences typical of
4 this one that we have had.

5 The issue of security deposits, in my view, is
6 not nearly as serious as it appears in the proposed
7 regulations. They are typically safe in the
8 landlord's hands, simply because to own property you
9 would have some financial assets; and there are
10 remedies, if the security deposit is not repaid when
11 appropriate, to recover any deposit of the security
12 deposit.

13 So, we -- we also had a situation which was
14 mentioned before where the utilities become an
15 issue. We find that security deposits are necessary
16 for many reasons, whether it's for repair of damages
17 potentially to an apartment or whether they are for
18 the security of utilities which may have been
19 transferred back into the landlord's name.

20 And where there's a public service district
21 involved, the Public Service Commission provides
22 that the District can attach the landlord's property
23 for not paying the utilities, even though it was a
24 tenant who had signed for the utility. I'm not sure

1 that that's always the case in a municipal utility,
2 but I know it's true in a public service district
3 which I chair.

4 The Board of Directors of the West Virginia
5 Home Builders Association met on July 23, 1994, and
6 unanimously adopted an action to present testimony
7 here today, and the Apartment and Rental Housing
8 Association has likewise acted on the day before to
9 authorize the providing of testimony here today.

10 The testimony which I have prepared that is
11 written is from the homeowners association, and I
12 signed it as Chairman of the Subcommittee on
13 Legislation.

14 We find that many of the provisions outlined --
15 and I have footnoted in the prepared remarks the,
16 the specific section to which we refer as we provide
17 these comments. I hope that you'll be just slightly
18 lenient, as you have been for the other speakers. I
19 am representing more than one entity, and I thank
20 you very much for your courtesy.

21 The association, as I've indicated, likes to
22 promulgate good relations with landlords and
23 tenants, and any way that can be accomplished we
24 would support. We find that the requirement under

1 Section 5.2.3 and 6.3 are, in the paying of interest
2 on security deposit, is probably more cost than the
3 value to the tenant. I think you had some figures
4 brought to your attention this morning regarding the
5 rate of interest. In fact, we find that many banks
6 will refuse to pay an interest on these small
7 accounts and, on the other hand, would likely charge
8 a fee for servicing such accounts.

9 And there's another problem where the Social
10 Security numbers are required, and you have multiple
11 tenants in one unit. The financial institutions
12 would likewise have a problem in how to segregate
13 out who is responsible for receiving the interest on
14 the money.

15 A "fit and habitable condition" has never been
16 defined by the legislature. In years past, in the
17 mid-'70s to the mid-'80s, the late Senator William
18 Moreland from Monongalia County frequently attempted
19 to amend the landlord-tenant legislation so
20 that "fit and habitable condition" could be
21 defined. There's always controversy on whether to
22 open the landlord-tenant legislation as it is now
23 provided.

24 Another section, 6.1, that I wish to refer to,

1 I have the following comments: The prohibition and
2 the regulations against collecting rent in advance
3 or any amounts in excess of one month as a security
4 deposit makes it very difficult to collect for a
5 12-month lease in college towns where the normal
6 school year is less than nine months. In fact, some
7 landlords provide for payment of the first month's
8 rent and a security deposit with the last month's
9 rent in installments to ensure that at least some
10 rent is collected for the period between May and
11 August.

12 In addition, some landlords provide for a
13 discount for the payment of a term, such as six
14 months or a year in advance. Our companies do
15 that. We give as much as a ten percent discount for
16 payment of the rent in advance. We're assured that
17 way that the rent will be there; and, as I've
18 indicated, we have not had any problem with this
19 with out tenants, because we're very proud of our
20 relations with our tenants for many years. In fact,
21 yesterday a past tenant of about 1965 called me and
22 wanted to see whether they couldn't stop by and say
23 hello, and they have stopped by on occasions in
24 years past. These are the types of things that make

1 business worthwhile, when you can refer back to
2 relationships that you have developed with those
3 with whom you deal.

4 As previously noted, the Association supports
5 fair dealings in all landlord-tenant contracts and
6 relationships. We support the refunding of security
7 deposits in all instances, except where legitimate
8 deductions are made for items of damage by a tenant
9 or failure to pay amounts due under the contract.

10 We do not believe that a time limit of 20 days
11 for the refund of a security deposit is always
12 reasonable. We are aware of many landlords whose
13 contracts, as I indicated, run on a calendar year or
14 a term peculiar to a specific location. Therefore,
15 when multiple tenancy is handled on a compressed
16 time frame, it is reasonable to assume that there
17 would be an undue burden on the staff of a company
18 or any landlord to compile the necessary data for
19 the return of the deposit in such a short period of
20 time.

21 We are aware that other states in some
22 instances have a time period of 30 days. I note
23 that others have indicated that that may not be
24 enough time on occasion. But any term less than 30

1 days, we believe, would be quite difficult for many
2 of the operators who do a good job and try to do a
3 proper accounting.

4 We have always urged our members to make an
5 effort to make such refunds on an expeditious and
6 timely manner. And we further believe that a
7 security deposit should rightfully be applied to
8 excessive cleaning required by a tenant whose living
9 habits have caused excessive wear and tear, but we
10 do not condone withholding a security deposit simply
11 to collect additional rent. We refer in that
12 instance to Section 6.4 and 6.5.

13 The next paragraph which I refer to applies
14 more to Section 3.7. We are strictly opposed to any
15 rule which would allowed tenants to perform work on
16 property of the landlord. The proposed rules would
17 allow a tenant to replace a tile roof. You know, if
18 a tile roof happens to have a leak, that's -- that
19 takes some skilled craftsman to replace it.

20 So, there are exceptions to anything that a
21 tenant might undertake on a landlord's property, and
22 we believe that any, any work that's refundable to a
23 tenant should certainly be by a contractor
24 acceptable to the property owner.

1 I have just about concluded, Mr. Director, and
2 I thank you for your consideration.

3 We also find that the Section 5.2.3 and Section
4 7.1 through 7.5 have some concerns to us. They
5 prohibit accelerations of rent payments in the event
6 of default or breach of a contract. Common business
7 practice would permit a bank to accelerate payment
8 on a note, but somehow acceleration of rent payments
9 is found by these proposed regulations to be
10 unacceptable. We also find that the section
11 relating to evictions and termination of tenancy is
12 generally restrictive.

13 West Virginia law provides for a process for
14 eviction for wrongful occupation. We believe this
15 section attempts to extend the time necessary for
16 obtaining possession even during unlawful
17 occupation. We believe this section further
18 requires a landlord to provide utilities during
19 unlawful occupation. We find this to be
20 unreasonable.

21 As to Section 7.5 and 8.2, we agree with the
22 provisions of the regulations which would prevent
23 denying a tenant the use of utilities during any
24 lawful occupation. We strenuously oppose the

1 requirement that all utilities shall be furnished
2 during unlawful occupation. We object to any
3 arrangement which would require a landlord to
4 provide utilities when funds are being withheld by
5 tenants in a breach of a contract.

6 It is quite conceivable that a group or an
7 association of tenants could join and decide "We're
8 all going to withhold rent for a month or two," and
9 there may be no alternative for the landlord but to
10 cut off the utilities, because he may not have the
11 funds whereby he could support the utilities during
12 such a time period.

13 And as to Section 9.1, we believe the
14 requirement of these twelve hours advance notice to
15 show premises to prospective tenants or purchasers
16 is unreasonable when both landlord and tenant have
17 agreed in writing otherwise. This would deny
18 prospective tenants who are in town for just one day
19 the opportunity to view a living unit where
20 arrangements were made -- were not made at least a
21 day ahead of time.

22 And, finally, these comments are provided in
23 the interest of promoting fair and reasonable
24 landlord and tenant relations and dealings. We

1 believe that the proposed rules and regulations are
2 silent concerning landlord rights or that they
3 attempt to remove legitimate rights which the
4 landlord may already have. It must be noted that
5 there are no unfair and deceptive acts cited which
6 can be attributed to the tenant.

7 An example of this inconsistency is the
8 provision that it is an unfair and deceptive act for
9 a landlord, quote, to fail or refuse to accept any
10 notice, end quote. But there is no provision which
11 finds a tenant in violation of the same act.

12 It is our opinion that the adoption of these
13 rules will discourage the development of affordable
14 rental housing in West Virginia. Accordingly, these
15 rules will not promulgate job growth nor
16 landlord-tenant relations as they are presently
17 proposed.

18 So, we urge you to do some rewriting, and we
19 stand ready and willing and anxious to participate
20 with you in a way to make these rules more
21 equitable. Thank you very much.

22 MR. RODD: Thank you very much,
23 Mr. Yoder.

24 The next person we have on the list is Brad

1 Sorrells.

2 BRAD SORRELLS: Thank you,
3 Mr. Rodd, Judge McGraw.

4 I'm here today on behalf of the Chrysler Credit
5 Corporation and Green Tree Financial Corporation.

6 Before I move to the rule that I'm primarily
7 concerned with, which is Series 24, Title 142, I
8 wonder if I could offer a suggestion that's occurred
9 to me as I've heared (sic) -- as I've heard
10 landlords talk about the problems with the security
11 deposits, in not being able to put them into a
12 separate account and that type of concern.

13 Lawyers for a long time had the same problem
14 with their trust accounts, and the State Bar came up
15 with the IOLTA system where the -- all the money
16 went into one, interest was drawn and taken off for
17 something of good use. It seems that would be an
18 appropriate use of what in individual cases would be
19 smaller amounts; but when amassed together across
20 the state, it would certainly be quite a sum.

21 Moving to Series 24, as an initial matter, both
22 Chrysler Credit and Green Tree believe that rules
23 pertaining to repossession are desirable. It's a
24 somewhat nebulous field, but guidance is desirable.

1 There are, however, a few provisions within the
2 proposed rules that cause concern, and I'll run
3 through them as quickly as I can. First, 2.2, the
4 definition of a "Consumer transaction," I would
5 maintain that that should be limited as it is by
6 West Virginia Code Section 46A-1-102, 12A-5, to
7 transactions that do not exceed \$25,000.

8 Second, 3.1.1, this has been commented on
9 previously regarding the actual intent to repossess.
10 I deal with a variety of certain secured creditors
11 in addition to Green Tree and Chrysler Credit. In
12 most of those instances I've been hired to take
13 possession, and in virtually all of those instances
14 they would rather work something out than take
15 possession. And that rule seems to say, "Go get
16 it. If you took the security interest, you have to
17 go get it."

18 Next would be 3.2.4, "false threats to
19 repossess." Again, I'm not -- I think that's
20 somewhat ambiguous. I'm not sure whether it's
21 threatening to repossess when you have no intent;
22 and that was already covered, so I think it must
23 mean something else. I assume that what is meant is
24 threatening repossession when the creditor really is

1 not a secured creditor and has no right to
2 repossess; and I would suggest that perhaps it would
3 be clearer if the provision read "threaten to
4 repossess property, including but not limited to
5 household goods when the creditor knows that it has
6 no recoverable claim of a right to do so."

7 Next, 3.2.5, it's somewhat ambiguous there in
8 the last two words, "of other deception." Certainly
9 it's improper to make false threats about the use of
10 law enforcement, but a lot of ambiguity as to other
11 deceptions.

12 On 3.2.6, the same concern as to otherwise
13 misrepresent the reposessor's identity, that that
14 could be construed in a lot of instances that when
15 you have a repossession agent going out to look for
16 a car, unless he clearly has it marked "Larry's
17 Repossession Service," he's misrepresented himself
18 as just being a standard citizen driving down the
19 street.

20 3.2.7 causes a great deal of concern, and I
21 think that it's an invitation for litigation to
22 ensue almost every time that there's a
23 repossession. It is so subjective that I don't
24 think any creditor can be charged with that

1 knowledge of when seizing property from a particular
2 location might cause undue hardship.

3 I have the feeling that the intent of this
4 provision is to stop malicious conduct on the part
5 of creditors; and perhaps there are some creditors
6 who would say, "Well, this guy defaulted. I'm
7 really going to stick it to him." And if that's the
8 intent, that's a good thing.

9 But I would propose that language such as the
10 following might serve that same purpose and not put
11 creditors at risk of an ambiguous section, and that
12 would be "Seize the property from a given location
13 when the creditor has actual knowledge that seizing
14 the property from that location will cause
15 objectively undue hardship to a consumer." I think
16 that takes care of the concerns.

17 I next would bring you to 3.2.9. That regards
18 repossession agents to carry a firearm. Now,
19 neither Green Tree nor Chrysler Credit have any
20 interest in hiring Wyatt Earp to go out and seize
21 their collateral, if they have to do that. On the
22 other hand, they don't have any control, their
23 actual control of whether or not the repossession
24 agent is going to carry a firearm. There are

1 already state laws that govern who can carry a
2 firearm, and when that person can carry it, and what
3 use that person can make of it while they have it.

4 Now, a creditor can have it in his
5 contract, "Agent shall not carry any firearm"; but
6 if the agent does, this provision would appear to
7 make the creditor strictly liable for that conduct.

8 DARRELL McGRAW: This is a problem
9 that appears to me. On the one hand -- and among my
10 life's experiences is some experience in the
11 practice of what some might say repossession. On
12 the other hand -- all right. And in that experience
13 I know of the stresses and strains that develop in
14 that enterprise. And the availability -- or the
15 availability of weapons in those circumstances is
16 always problematic.

17 Do you think it's unreasonable to propose that
18 repossessioners should not have -- should not be armed?

19 BRAD SORRELLS: Well, Judge, there
20 are a lot of situations in life which are highly
21 stressful. I think my concern as to this section
22 deals with creditors who by and large, and I would
23 suggest almost as a universal practice, do not go
24 out and have their employees do the actual

1 repossession. This is accomplished by repossession
2 agencies, people that are in that business.

3 DARRELL MCGRAW: Well, they're
4 contractors; are they not?

5 BRAD SORRELLS: Yes, they are.

6 DARRELL MCGRAW: Yes. And would
7 it not be possible for the contract to include a
8 provision in the repossession contract that the
9 repossessioners not be armed?

10 BRAD SORRELLS: It -- of course,
11 that would be possible; but unless someone from the
12 credit agency went out, it would be pretty hard to
13 enforce; and as I mentioned previously, I think that
14 section pretty much imposes strict liability on the
15 creditor.

16 But the thing I want to stress is there are
17 already laws in the state of West Virginia that deal
18 with this. If a creditor comes up and pulls up his
19 gun and says, "I want the Chevy," well, he's
20 brandishing, and that's a criminal offense. He's
21 not supposed to do that. And I think we're
22 already -- I mean, the use of a firearm really
23 doesn't have anything to do with repossession.

24 MR. RODD: Could I just ask you,

1 since you've raised this issue -- you are the first
2 person that's raised the issue on a public comment
3 side. I would just like to ask you, would you agree
4 that this is an area where a person is granted the
5 right under the law to in a self-help extra-judicial
6 fashion confiscate or take property from another
7 person's possession?

8 BRAD SORRELLS: Only if there's
9 not a breach of the peace in doing so.

10 MR. RODD: Right. But they are
11 given that right to do that, which is kind of an
12 exceptional situation. And it has -- it's very
13 fraught with the possibility of conflict.

14 BRAD SORRELLS: I won't belabor
15 this point.

16 MR. RODD: No. I understand.

17 BRAD SORRELLS: This is not a
18 provision that is particularly -- that Chrysler
19 Credit or Green Tree are particularly adamant
20 about. It sort of goes along the same concerns the
21 Attorney General was addressing this morning, as
22 regulations and rules being piled on when they may
23 not be needed.

24 MR. RODD: I understand your. I

1 appreciate your raising it and addressing it. I
2 think you have made legitimate points. Thank you.

3 BRAD SORRELLS: The final comment
4 on that is I'm not sure that that doesn't raise
5 constitutional questions, both state and federal.

6 3.2.11, I'm a little concerned over the
7 word, "premises." I'm not sure if that's intended
8 to mean residential property as a whole or the
9 dwelling place. If it -- if -- either way, of
10 course the creditor shouldn't itself or have an
11 agent barge into the customer's home to be
12 repossessing something. On the other hand, if we're
13 talking about going onto that customer's property,
14 this makes, as it's written, makes it illegal to
15 walk up and politely knock on the door and
16 say, "Excuse me. As you were notified, you are in
17 default on the vehicle in the driveway. I'm here to
18 to pick it up. It would be easier on everybody and
19 less expensive if you just gave me the keys."

20 I mean, this would seem to require a creditor
21 to wait until the vehicle is away from the home and
22 then seize it. But then the creditor has to concern
23 himself with the other provision I mentioned: Is
24 this going to cause undue hardship?

1 Most consumer goods most of the time are going
2 to be at the home; and that as long as there's no
3 breach of the peace and being on private property
4 after you have been asked to leave -- and we also
5 have a specific provision in here elsewhere that
6 says that trying to repossess when you have been
7 told no -- I mean, that's sufficient. I don't think
8 we need to restrict legitimate and polite entry on
9 the consumer's residence.

10 DARRELL MCGRAW: Well, what is --
11 I should know this. What is the process these days
12 for the repossession of property? What's the
13 process? And I'm not talking about business in a
14 lot of respects, the help -- the self-help
15 procedures. What is the process for repossessing of
16 property?

17 BRAD SORRELLS: If it's consumer
18 goods, of course first there has to be a notice of
19 right to cure default. The cure period has to
20 expire, and then the property can be seized whenever
21 or wherever it's found as long as there's no breach
22 of peace. If that is not possible --

23 DARRELL MCGRAW: (Interposing) All
24 right. At this point --

1 BRAD SORRELLS: (Continuing) --
2 then you need to move into the courts. You simply
3 file a standard civil action --

4 DARRELL MCGRAW: (Interposing)
5 When you say it can be -- when you say it can be
6 seized by an officer, by whom?

7 BRAD SORRELLS: By the creditor or
8 its agent. It's when you are still in the self-help
9 mode.

10 DARRELL MCGRAW: Why wouldn't it
11 be more desirable to have a process which requires
12 one to deliver up the property? After all, if you
13 think of the common law, the procedure of
14 (untelligible) probably would require the delivery
15 up of the property, would it not?

16 BRAD SORRELLS: Well --

17 DARRELL MCGRAW: Unless, of
18 course, it were (unintelligible) or something like
19 this, in which instance it would be the cause of
20 action called replevin, and all of those things have
21 to be merged of course into a cause of a civil
22 action, but -- I guess really my question goes to --
23 my question is a philosophical one that does not
24 necessarily relate to this process today, but rather

1 it goes to the issue of why don't we have a process
2 by which people who are in the possession of the
3 property of others in the instance of the failure of
4 finance agreements and so on and such as that, why
5 don't we have a process that requires the delivery
6 up to an officer of the court the property?

7 BRAD SORRELLS: Because it's too
8 expensive to go through a formal process every time
9 there's a breach of a contract which already
10 requires that person to surrender the collateral.

11 My next point with regard to entering on the
12 residential premises is that would require in the
13 case of all repossessions that process be issued,
14 that a civil action be filed, that a summons and
15 complaint be served, that a judgment be entered,
16 that the creditor then get a writ of possession,
17 that that be served by the sheriff.

18 And all of those things are very expensive.
19 You've got \$70 to file the action; \$20 to file the
20 summons and complaint; you've got costs to go back
21 and -- attorney time and time of the individual to
22 go and get the actual judgment; another \$20 for
23 service of the writ. All of those costs are charged
24 to the losing party. So, every time that an

1 absolutely meritorious claim -- which wouldn't have
2 been objected to by the consumer in the first place
3 if the creditor simply came up and said, "I'm here
4 to get the keys."

5 And he'd say, "Yeah. I knew you were coming."

6 Adding on a lot of money and a lot of time for
7 no benefit. And that's not to mention the fact that
8 you're taking up court time and the time of officers
9 going out and delivering writs and summonses when
10 nobody wants them.

11 I mean, the sheriffs of the various counties of
12 West Virginia have much better things to do than
13 deliver papers that nobody wants, nobody needs, that
14 cost a lot of money. And certainly there are many
15 instances where the only way to get possession of
16 the property is through an actual civil action.
17 Even in those cases, once the summons and complaint
18 is delivered, the majority of them are worked out,
19 never go to the actual possession.

20 Moving to provision 3.3.2, "Include a provision
21 waiving the consumer's right to personal property
22 taken with a repossessed vehicle," now neither
23 Chrysler Credit nor Green Tree -- and I would
24 suggest no responsible creditor would say that a

1 consumer just doesn't have a right to their goods in
2 the car, mobile home, or whatever. But I would
3 suggest to you that that needs to be somewhat
4 limited to a reasonable period.

5 As written, it would prohibit language in
6 contracts saying, "You will be provided with a list
7 of any goods that were in the vehicle; they will be
8 held for you for a period of 'X' days."

9 You know, there's a lot of things that are left
10 in cars or left in mobile homes. It's just
11 abandoned property. Yet, as written, this would
12 turn the creditors into involuntary bailees, and
13 they would be charged with keeping that stuff
14 forever. You couldn't -- so, there needs to be a
15 reasonable time limit on that.

16 Moving to 3.4.2, "Sell collateral at private
17 sale to a secured party or to a party affiliated
18 with the secured party," now I think it's quite -- I
19 have a very serious problem with that. That's in
20 direct opposition to the specific provisions of the
21 UCC and 46-9-504-3, which specifically provides a
22 secured party may buy at public sale.

23 MR. RODD: I'm sorry, I thought it
24 said "private sale" in the regulation.

1 BRAD SORRELLS: Yes. It said --
2 MR. RODD: (Interposing) That you
3 read.

4 BRAD SORRELLS: Okay. Well, I
5 didn't read enough of the UCC.

6 MR. RODD: I'm just trying to
7 follow you. I thought that you meant --

8 BRAD SORRELLS: (Interposing)
9 You're, you're right. 3.4.2 is a private sale.
10 46-9-504-3, "Secured party may buy at public sale
11 and, if the collateral was of a type customarily
12 sold in a recognized market or is in a type that you
13 can subject to widely-distributed price quotations,
14 the secured party may buy at a private sale." And
15 both of my clients would be involved with collateral
16 of exactly that nature. Both of them are published
17 NADA Guides as to the retail -- or the value of used
18 mobile homes and value of used cars, which is what
19 you have to own to be able to repossess.

20 I believe that the harm -- I think what's
21 trying to be stopped here is the idea that secured
22 parties can abide -- it's going to be a sham
23 transaction, low dollars, high deficiency. That's
24 already covered. The UCC requires that the entire

1 disposition, including the method, the manner, time,
2 place, and terms, must be commercially reasonable.

3 Now, especially in light of things like mobile
4 homes and cars, which are subject to huge books that
5 are published monthly as to what they're worth, sham
6 transactions can be covered by the UCC, and this is
7 not needed.

8 3.4.3, "private sale only to wholesale bidders
9 without deducting the retail market value," that --
10 the retail market value provision just doesn't
11 work. It's going to end up costing consumers more.
12 When you get right down to it, it's just not fair;
13 and if you work out the numbers, it doesn't make any
14 sense. Anytime something is sold on the retail, a
15 significant chunk of that price is profit for the
16 seller for the work that goes into selling a
17 product. But that's not what's going on here. But
18 I don't want to speak much on that. I would refer
19 instead to the Federal Trade Commission's comments
20 when they considered a similar provision and
21 rejected it.

22 There's a number of very good policy reasons
23 why it's bad, and I'm going to be making a couple of
24 slight changes to my written comments and submitting

1 them this afternoon, and that is attached as an
2 exhibit.

3 3.4.5, "sell collateral at an ostensible public
4 sale which charges fee or deposit for admission,"
5 not all auto auctions do, but some do charge a fee.
6 It's a minor fee. It's something that they use to
7 offset the cost. But we would submit the same thing
8 perhaps in some mobile home auctions, although
9 generally those aren't sold at a public auction.

10 That doesn't serve any real useful purpose. I
11 think that perhaps what's trying to be accomplished
12 here is someplace where, quote, it's a public sale
13 but you've got to pay big money to get in, so nobody
14 can really get in, so there are no buyers. And
15 that's just not a harm that's going on out there.
16 If you have done any work around these auto
17 auctions, they are big things, they are in
18 competition with each other, and the fees that
19 dealers pay are relatively low. And, you know,
20 dealers travel at great distance to go down to these
21 sales which are well-published and advertised, and
22 that they aren't going down there just to look.
23 They are going down to buy. So, it's not a question
24 of "if" but how much they are going to buy.

1 3.4.6, it's sort of the same problem. That's
2 saying you can't sell it if the seller waives
3 warranties. Well, when you are selling a piece of
4 repossessed collateral, whether it's a mobile home
5 or a car, you don't know where it's been, you don't
6 know how it's been taken care of. And you are by
7 and large selling it to a dealer, and the dealer
8 doesn't really need that warranty. Now, he may be
9 required by state law when he later sells it to a
10 consumer to warrant that good; but if the seller at
11 an auction has to warrant this vehicle, there's
12 going to be a charge for that. And the charge is
13 not for anything of value in the collateral as it
14 was repossessed from the defaulting consumer. That
15 charge is for the service that this dealer is
16 being -- or the seller is being required to offer by
17 this rule. It doesn't protect consumers.

18 I'm almost done here.

19 3.4.10 regarding seek -- it says you can't seek
20 attorney fees not authorized by law. I think that's
21 ambiguous. I'm not sure if it means you can't seek
22 attorney's fees unless they are affirmatively
23 authorized by law or you can't seek attorney's fees
24 that are prohibited by law. And just one way or the

1 other it ought to be made clear.

2 Finally, 3.4.11 regarding "retain property in
3 strict foreclosure without crediting the buyer's
4 obligation with the retail market value and turning
5 over any surplus to the consumer," in the first
6 place this seems to be in violation of 46-9-505-2
7 which doesn't call that process strict foreclōsure,
8 but I think it's the same thing; and it allows
9 strict foreclosure so long as you give the consumer
10 notice of it and he doesn't object within 30 days.

11 You -- but the bottom line is a repossessed
12 piece of collateral is not worth to the creditor
13 what the retail value is. It's worth to him what
14 the wholesale value is. And there are going to be a
15 lot of instances where the creditor says, "You know,
16 it's not worth selling it and seeking a deficiency.
17 We'll just keep it." But with this section, if they
18 are required to give the retail market value, all of
19 a sudden they are going to go, "No, we have to sell
20 it," and then go after that deficiency when the case
21 could have been closed and everybody was done. But
22 as it ends up, the consumer ends up with a
23 deficiency lawsuit against him and/or bad credit
24 entry with "X" number of dollars owed to Creditor Z.

1 Again, I thank you, and I know I have sort of
2 picked apart various sections in there, and it truly
3 is my intent that that be helpful, and I hope it
4 won't be taken as criticism. I know -- I think it's
5 quite obvious looking that a great deal of work has
6 gone into this process, and I understand that these
7 repossession rules are only a part of the consumer
8 credit protection process going on.

9 DARRELL MCGRAW: I take your
10 comments in the spirit of constructive
11 contribution. Thank you. And we appreciate what
12 you have said, and we are particularly sensitive to
13 the area that you discussed.

14 BRAD SORRELLS: Thank you, Judge.

15 DARRELL MCGRAW: Thank you.

16 MR. RODD: Thank you.

17 The next person signed up is Norman Googel.

18 NORMAN GOOGEL: My name is Norman
19 Googel, and I'm here on behalf of a woman named
20 Helen Ann Wooten. Ms. Wooten is a loving, fun
21 person who is also a renter, and this year she
22 formed an organization called the Renters
23 Association and Protective Services, and this is an
24 organization which is strictly volunteer and

1 hopefully will provide some meaningful advocacy to
2 people that rent so that they understand what few
3 legal rights they do have and to enable them to
4 enforce their rights.

5 At this point the organization operates out of
6 a Helen's suitcase -- or I should say her briefcase.
7 I really would have preferred Helen to be here,
8 because she can comment much better than me and much
9 more eloquently than me on Series 26, which is what
10 I will address.

11 On the same note, I have to say that I wasn't
12 aware that this public hearing was coming at the end
13 of the written comment period, that I was hoping
14 that Helen could still present some written
15 comments, but I know it wouldn't be possible for her
16 to do it by the close of business tomorrow.

17 So, I would ask if the law permits it, if you
18 could extend the period for written comments perhaps
19 till maybe the close of business on Monday.

20 MR. RODD: I don't think I can.

21 NORMAN GOOGEL: Okay. In any
22 event, I do want to -- my comments are going to be
23 very general. I want to offer my, my support for
24 all of the legislative rules. I'm only going to

1 comment, however, on Series 26. I do want to say
2 that I, I support these rules in principle. I don't
3 see anything in here which is burdensome or that I
4 think would be unreasonable.

5 I do want to say, as the Attorney General's
6 staff is aware, there are very few statutes that
7 give tenants very many rights, and I think -- but
8 the few rights that tenants do have are very
9 important, but sadly enough they don't get enforced.

10 We have one statute that requires landlords to
11 provide rental housing in a fit condition when
12 tenants first move in and to maintain it
13 throughout. It's a very important right. There's
14 no way really to enforce it other than a lawsuit,
15 and then there's another statute that says a
16 landlord has to give a one -- one rental period of
17 notice in advance before evicting them. But that
18 doesn't even apply when a tenant doesn't pay the
19 rent.

20 And then you have a summary eviction statute
21 which not only is fair to the landlords, but this
22 statute in my experience representing tenants in 14
23 years is absolutely brutal. It calls for a -- it
24 doesn't require landlords to provide any type of

1 written notice of events before filing the eviction
2 suit, and often they don't. When the suit is filed,
3 the trial on the eviction case is five to ten days
4 later. Often the tenants are served with the notice
5 of trial a couple days in advance. And if they
6 don't know their rights and they go straight to the
7 trial and are evicted, as they almost always are, it
8 doesn't even do them any good to appeal, because
9 there's no possession pending appeal.

10 So, to whatever extent -- as far as the
11 landlords today who have commented on the eviction
12 procedure who would want to say to you that, that it
13 favors tenants, that's simply not true. And in West
14 Virginia we have an eviction procedure which in my
15 opinion doesn't even meet minimum standards of due
16 process.

17 So, I -- while tenants do have very few rights
18 by statute, there are some legal rights that they
19 have from other sources. And contrary to popular --
20 or contrary to popular belief, even renters have the
21 right to not be trespassed upon, they have the right
22 to be free from invasion of property, and many other
23 rights.

24 And what I think these rules do and the reason

1 why I think they're helpful is they, they help to
2 make meaningful those few rights that tenants
3 actually already have. These rules do not create
4 any rights for tenants that don't already exist; but
5 by saying that some of these things that landlords
6 commonly do are unfair and deceptive acts and
7 practices, now tenants have a meaningful way to
8 enforce these rights which they already have, and I
9 just don't see how anybody can disagree with that.

10 And I haven't really heard any of the landlords
11 today say that they should be required to maintain
12 property in a fit condition or that they shouldn't
13 be required to return damage deposits when it's
14 justified. And all these rules seem to do is
15 enforce the right.

16 DARRELL McGRAW: But the problem
17 is, is that we live in a society of laws, and within
18 those laws we have provided for contracting, which
19 is the heart of our economic system, that is in
20 terms of the relationship between whomever in an
21 economic engagement -- in any economic activity, and
22 then we have provisions for the enforcement of those
23 contracts.

24 NORMAN GOOGEL: That's right, and

1 I do think that no one can say that the tenants and
2 the landlords start out on any type of even
3 footing. I mean, the tenant is at a tremendous
4 disadvantage from this entire relationship. And
5 even with this summary eviction procedure, which I,
6 which I would say is unfair even if it's followed
7 properly by the landlord, the reality is most
8 landlords try to avoid it, and they use ever
9 unlawful means possible to try to evict tenants
10 without going through the statutes, just -- such as
11 cutting off utilities, locking them out.

12 In one recent case a tenant who lived in an
13 upstairs apartment, the landlord removed the stairs
14 so he couldn't get up to his apartment to get in or
15 to get his stuff. And that's not an extreme
16 example. That's typical. Landlords are only
17 limited by their imagination as to the ways to get
18 around the laws.

19 And then I don't even want to begin to tell you
20 about all of the tenants who have lived in rental
21 properties and improved these places and make them
22 better by making repairs, and of course they can't
23 get compensated for it.

24 So, I, I think all these rules do is help to

1 enforce already existing rights. There's no tilt
2 here in favor of the tenants. I think -- it's just
3 not correct to say that rules which now make it
4 possible to enforce already existing rights
5 constitute a tilt toward the landlord and away from
6 the tenant -- or rather in favor of the tenant (sic).

7 And as far as the security deposits go, that
8 seems to be a favorite issue of the landlord. What
9 I have found in my practice representing tenants,
10 good tenants, bad tenants, it doesn't matter how
11 well you take care of the place, it's almost
12 universal, that you will not get your damage deposit
13 returned. And a lot of tenants, it's just not worth
14 it to them to have to file suits to get the damage
15 deposits back.

16 So, I think that the rule proposed on damage
17 deposits is very reasonable. It's a good start.
18 It's a lot less than many other states have. I
19 just, I just don't buy the arguments about all of
20 this burdensome bookkeeping by putting a couple of
21 hundred dollars into an account somewhere so that
22 the money is set aside and will be there at the
23 end. I just -- I think it's a very reasonable
24 requirement and a good starting place.

1 So, I would offer my support for these rules
2 and commend the Attorney General in general for
3 proposing these legislative rules on unfair or
4 deceptive acts and practices.

5 DARRELL McGRAW: Thank you very
6 much.

7 MR. RODD: Thank you, Mr. Googel.

8 Andrew Maier has informed me that there is an
9 individual, a Mr. Anderson, who would like to jump
10 ahead of the pack because he's got some
11 responsibilities, and that's perfectly okay.

12 Mr. Anderson.

13 Which Anderson are we going to hear from?

14 E. C. ANDERSON: I'm "Bud"
15 Anderson; and this is Neal, the more vocal part of
16 my family.

17 I am both a property owner, a landlord, and a
18 property manager.

19 DARRELL McGRAW: It's really
20 interesting to see who Neal is kin to.

21 E. C. ANDERSON: Well, from the
22 cheeks up, he's definitely mine; and from there
23 below, I believe he's my wife's, but --

24 I would like to say that I apologize for

1 bringing him and being disruptive, and I apologize
2 to anybody with a tight time schedule. I don't have
3 a lot of points to cover that have not already been
4 stated, and I don't want to be redundant. I did
5 miss the first part, so forgive me if I restate
6 something other landlords might have said.

7 The basic premise on the landlord-tenant
8 relationship as we see it is that there are
9 different options for people to have a place to
10 live. They can have an extended family. Other
11 countries do not find it strange to have many
12 generations under one roof.

13 We recently enabled some Chinese immigrants
14 here to be able to get mattresses put on their
15 floor. We told them that they had too many people
16 to rent from us, because we were following basic
17 rules. They wanted to have boys and girls in the
18 same room, and they wanted to have 17 people living
19 in a 2-bedroom home. We were unable to follow
20 current regulations and rent to them, but we did go
21 out of our way to assist them in finding clothing,
22 bedding, and other places for them to live.

23 I'd also like to say that, speaking for myself,
24 my parents, and a few associates of Anderson

1 Properties, that we do a lot of things to help
2 tenants out. And to the person that spoke just
3 before me, I would love to have a chance to share
4 actual experiences that came from tenants that
5 burdened us as property owners and landlords.

6 I think that if you look purely to the rights
7 of tenants -- and I know that this varies from
8 landlord to landlord -- but I'm here to say that as
9 a responsible landlord, as a compassionate human
10 being, I feel not only downtrodden by the system but
11 absolutely taken advantage of, humiliated,
12 undermined, and back-stabbed by the way the system
13 supports the consumer aspects without being able to
14 have the tenants held accountable to the landlords.

15 In a contractual relationship -- as I
16 understood it in college there were five basic
17 tenets. You had to have -- the points of the
18 contract would include a legal contract, an offer,
19 and acceptance, a timeliness, and also
20 compensation.

21 You do not rent somebody else's property from
22 them without compensating them for it. You do not
23 tear up somebody else's property without expecting
24 to have to pay for that.

1 Yes, when I rent property, it will be in good
2 shape. There's a lady been trying to move into the
3 unit that I have in Cross Lanes for the last two
4 weeks, and I won't let her move in because I know
5 that I have a leak in the wall -- it's a simple
6 matter -- and it also does not have all of the
7 burners on the stove working, and the dishwasher
8 does not work.

9 To me, that's a luxury apartment that I am
10 refusing to rent because I want everything to be
11 right when the lady moves in. She is begging me.
12 She is trying to make me feel like I am withholding
13 a place for her to live. She is living with her
14 parents right now. It's just a choice that she has
15 made, that she does not want to be responsible, be
16 cooperative, and share space with her parents and
17 her family; that she is now trying to hurry us up to
18 get these things fixed. And when parts are not
19 available, it is impossible to have something fixed
20 within a day or two.

21 There were a few specific points that I want to
22 mention that we have done both as members of the
23 Kanawha Valley Landlords Association that a few of
24 us got together and founded a while back, also other

1 members of the West Virginia Landlords Association
2 that I'm a member of, have gone as far as trying to
3 help people out to find them other places to live,
4 to work through the FMHA office -- that's the
5 Farmers Home Administration office ---so that they
6 could find literally better housing than I'm able to
7 rent them at the subsidization of government monies
8 for a rent that is actually 150, sometimes \$125 a
9 month. They're getting a bigger house, a yard. And
10 I'm able to do that kind of thing because I enjoy
11 helping people, and I am a compassionate person.

12 We also work with Mountaineer Habitat For
13 Humanity. And as a member of a number of civic
14 clubs that I belong to, we also help the homeless
15 shelters, both the emergency men's shelter, the
16 Sojourners, and the Samaritan Inn. We cook at the
17 Samaritan Inn at least once a month, provide a lot
18 of help there.

19 I'm not saying people need to live in homeless
20 shelters if they can't afford to have a place to
21 live, but where in American society has it ever been
22 said that you get something without paying for it?
23 It is no different to move into my place, tear it
24 up, and not pay for it, and move -- or to move into

1 it, and occupy its accommodations and not pay for it
2 and move, there's absolutely no difference in that
3 and walking into Kmart and shoplifting at will, or
4 going into Kroger's and eating off the stand and
5 ruining it for everyone else and then walking away
6 and expecting not to pay for it. Thieves are
7 thieves.

8 And the biggest thing that I stress to my
9 tenants is that we want to work with them, but that
10 necessitates a two-way communications.

11 I have asked, "If you cannot pay the rent, you
12 must at least contact us." And I will tell you
13 inevitably it is the people who move out and owe two
14 or three months' rent, tear the doors off the
15 hinges, scratch and tear up walls, loosen the tiles,
16 and knock over the handrail when they are moving
17 their U-Haul truck in, those are the type of people
18 that do not notify us when they're unable to pay the
19 rent. They think the best way to treat us is to
20 ignore us.

21 I vehemently oppose people that have such poor
22 communication skills that they do not avail
23 themselves of opportunities where I might assist
24 them through the Department of Human Services, FEMA,

1 local community groups that will help to subsidize,
2 such as Heart And Hand.

3 Tenant obligations are to pay and also let us
4 know when they are ending their occupancy. I have a
5 unit sitting right now where the mother moved off to
6 Maryland. She left an 18-year-old boy and a
7 16-year-old daughter; and I have no control over
8 that unit.

9 The boy broke into the unit next-door, thieved,
10 stole over \$900 worth of property, and it is still
11 in the hands of the court right now. That unit is
12 totally in limbo. We have sent mailings to both the
13 mother that signed on the lease and the 18-year-old
14 boy that signed on the lease. We have no idea what
15 to do with their property. It's costing me \$290 a
16 month plus utilities. I have absolutely no idea
17 when the end of their occupancy will occur.

18 And if you're not going to expect fair-paying
19 tenants to bear the burden for our overhead and
20 costs -- because we like to help people, but we are
21 not in the human services business, we are not in
22 the charity business. We are in the business of
23 trying to get a fair return on our investment
24 dollar. And believe me, any store uptown does not

1 operate on the profit margin that I subject myself
2 to. And nobody would put up with the kind of bad
3 communications our tenants share with us.

4 And just -- if I may, to, to state a couple
5 things, Paul Harvey is one of my favorite people.
6 I'll end with him but not before trying to make a
7 point.

8 In political science, if you read a lot of
9 Plato, you know that Plato wrote The Republic. He
10 had a lot of good ideas. When he wrote the law, it
11 was his idea to try to adjudicate common sense. It
12 was his idea to try to legislate fair practices.
13 And it was as big a flop as it might be to try to
14 overlegislate things that could best be handled if
15 the tenants were required to reciprocate, to
16 communicate, and to be fair to us. We would be much
17 more in a frame of mind to cooperate with them and
18 be more lenient.

19 My experience is if you do not share with the
20 landlords the ability to collect (sic) more than a
21 flat one-month security deposit, then we will be
22 forever at a disadvantage. If a landlord only owns
23 property in a bad part of town and you expect one
24 month's security deposit when it's well-known that

1 the guy is moving in, and he gives you one month,
2 that's all you see for three or four months -- they
3 know the tricks, they go to the magistrate court,
4 they postpone it, they're still living there. They
5 get a -- they fight the eviction that I give them.
6 That's another 30 days. There are up to 70 to 90
7 days it will take to get rid of an absolute crook.

8 If the system is cleaned up so that people can
9 be accountable for the merchandise, and that is the
10 property that they are occupying from me, I would be
11 very happy to deal with them.

12 Insurance companies are given the ability to
13 set their rates and fees based upon their specific
14 experiences; and I would say to you that one month
15 might be fine in a place where people are paying
16 good rent, the place is in a nice part of town. One
17 month might be just wonderful. But when you are
18 dealing with the lower-income properties, you are
19 dealing with a lot more headaches; and the only way
20 to protect the landlord and protect the other
21 tenants would be to have some flexibility in the
22 amount of security deposits.

23 They have choices. They can live at home; they
24 can share a dwelling; they can get a roommate; they

1 can go through Mountaineer Habitat; they can go
2 through FMHA (sic); they can deal with people that
3 are willing to help them, but they cannot move in
4 and take advantage of the landlords or the landlords
5 will just simply move their investment dollars
6 elsewhere, and there will be no option left to
7 government but to provide more expensive and more
8 socioeconomically-deprived projects and housing
9 units that compound the problem by concentrating
10 crime and that kind of status.

11 And as I said, I'd like to end with Paul
12 Harvey, and a famous quote that he always uses
13 is: "Self-government without self-discipline will
14 not work." And I don't want to be like Plato and
15 overlegislate, but I do not see anything spoken to
16 in this that would, quote, assist the responsible
17 businesses, because we consider ourselves a very
18 responsible and humanitarian type business -- but I
19 see on your Appendix B, No. 4B, it says "Will
20 promote consumer confidence and assist responsible
21 businesses." I see nothing in this legislation that
22 would assist me as a responsible business person if
23 you do not give some flexibility and to hold people
24 accountable and make sure that they are accountable

1 to their own leases that they sign, that they
2 communicate with us, and that they actually display
3 self-discipline so that they might have
4 self-government and a lot less legislation. Thank
5 you.

6 DARRELL MCGRAW: Thank you.

7 MR. RODD: Thank you,
8 Mr. Anderson.

9 The next person signed up, returning to our
10 original schedule, is Leff Moore.

11 LEFF MOORE: Judge, Director Rodd,
12 thank you for the opportunity to speak today. I'll
13 try to be brief.

14 I'd like to have the opportunity to address
15 both Series 23 and Series 24 rules; and then at the
16 conclusion of my remarks I'd like to sort of give an
17 overview, if I could, as to how the organization
18 that I represent, which is the West Virginia
19 Manufactured Housing Association, generally views
20 this rule-making exercise generally and the good
21 work of the Attorney General's office, Consumer
22 Protection Division in particular.

23 In relation to Series 23, some of the
24 information that we would like for the Attorney

1 General's office to consider is the problem of the
2 drafting of the rule itself. From a technical
3 standpoint, it appears that the rule drafter
4 recognized that there is a new statute, 1993
5 statute, Chapter 37, Article 15, wherein the
6 legislature clearly indicates that its purpose --
7 that it is trying to determine the differences
8 between various types of factory-built homes, and it
9 gives on ---in its legislative purpose and
10 applicability section under 37-15-1, it clearly
11 states the reason for these definitions.

12 We accept those definitions in drafting the
13 rule in part, but we abandon them in part; and we
14 are unclear as to why the drafter of the regulations
15 accepted some of those legislative statutes and
16 abandoned others.

17 We find that that process was carried
18 throughout the drafting of the rules, and there's an
19 inconsistency in definitions and terms. And as
20 such, we find that, notwithstanding other parts of
21 the rule and its intent, we find it to be virtually
22 unadministerable and subject to a lot of litigation
23 just on the definition section, because it is in so
24 much conflict with numerous state statutes, but

1 particularly 37-15.

2 MR. RODD: Excuse me. I'm having
3 a little trouble hearing, Mr. Anderson.

4 E. C. ANDERSON: We're leaving
5 right now.

6 MR. RODD: Okay.

7 I'm sorry.

8 LEFF MOORE: In addition, we would
9 point out specifically that 2.5 in Series 23 defines
10 a, quote, "mobile home park"; and the rules
11 themselves are entitled "Practices in Mobile Home
12 Parks."

13 While the statute clearly at 32-15-2(c)
14 defines "factory-built home rental community"
15 clearly in the statute, we're unclear as to why we
16 are using slang language in the rule and in some
17 type of cases we adopt those definitions. I -- we
18 feel that the definition section is extremely
19 important. The title of the rule is extremely
20 important as it relates to other state codes, and
21 for consistency.

22 That ambiguity be clear -- is also clear in
23 2.1 and 2 wherein mobile homes and mobile homes
24 rather than factory-built homes are generally

1 addressed. And when you compare those definitions
2 and apply the legal definition to the, to the
3 proposed rule, it would indicate that we have a
4 problem there.

5 We're, we're confused and perplexed about why
6 we even included 142-23-3, the "Tie-in Sales;
7 Separate or Discrimination (sic) Charges." I heard
8 speakers earlier today complain that they felt that
9 that was unfair; that people should be able to use
10 their property in whatever way they felt
11 appropriate. However, we recognize as an industry
12 that the, that the antitrust provisions of West
13 Virginia and federal law clearly prohibit tie-in
14 sales.

15 The reason we raise the question is the
16 Attorney General's office's Antitrust Division has
17 brought in the past several successful, I might add,
18 actions against rental community owners who engaged
19 in tie-in -- in tie-in sales and engaged in
20 antitrust activity, and there were several consent
21 decrees that were signed by those -- by our industry
22 firms.

23 And so, we're unsure as to why we're even
24 including that language in the rule. We think the

1 energy might be better expended actually enforcing
2 the law that is already there, because we do have ---
3 we clearly do have laws that protect people from
4 tie-in sales and separate and discriminatory charges
5 based on previous actions of the Attorney General's
6 division.

7 In the term, the "Rental Agreement
8 Requirements," we find that, that a, that again the
9 rule appears to be redundant in view of the statute
10 of 37-15-1. Those statutory requirements were
11 there. The only thing that this rule appears to do
12 is allow the Attorney General's division to bring a
13 civil suit on behalf of an aggrieved party who finds
14 that the, the regulated entity under thirty- --
15 under Chapter 37, Article 15 fails to perform. And
16 from that standpoint we find no -- nothing wrong
17 with that as long as the language in that rental
18 agreement requirement section is compatible with our
19 existing statute.

20 Where we feel that the rule is defective is it
21 fails to take into account and fails to acknowledge
22 a whole body of law that's designed to protect the
23 consumer that's not even, not even addressed here.

24 The West Virginia Fair Housing Act, which is

1 the companion statute to the United States Fair
2 Housing Act, it's a body of law that is, is readily
3 available to the consumers of all kinds of rental
4 property nationally, and particularly in West
5 Virginia; and that statute is very clear; and rental
6 agreements and what shall be contained in them and
7 what cannot be contained in them as well as all
8 kinds of rental practices are very much a part of
9 the existing body of law.

10 It's obvious to us in our industry that there
11 is a general ignorance on the part of not only the
12 landlords but also the tenants in this state about
13 that body of law; and as a result, a lot of
14 violations of that law occur; and even the court
15 system, particularly at the magistrate level, is
16 unaware of that body of law and issues rulings
17 without referring to that law or to the -- and thus
18 depriving the consumer, those that the law was
19 designed to protect, with -- from the benefits of
20 the law.

21 We find that to be consistent throughout a lot
22 of the activities of government generally is that
23 those people charged with enforcing the law in many
24 cases are not well-versed in the letter and the

1 provisions of the law, so the result there being
2 that we try to pass another new law so that it's
3 within our comfort zone rather than to enforce the
4 laws that we already have on the books.

5 I would point out that, that in the
6 manufactured housing regulations generally -- I'll
7 submit more detailed comments about the particular
8 technical sections that we feel are defective,
9 and -- but many of that (sic) has to do with the
10 overall approach to terminology.

11 An old lobbyist at the legislature many years
12 ago told me that -- he said, "Just let me write the
13 definitions, and you can write all the rest of the
14 bill." And in writing the definitions in this
15 proposed rule, I think we've created a situation
16 where we're going to have a lot of conflict in its
17 effective administration between contract law,
18 contract terminology, and the existing state law.

19 In addition, I'd like to just briefly talk
20 about rule Series 24 regarding repossessions. I'm
21 not going to repeat a lot of the information that
22 the Attorney General's office has received this
23 morning, but there are certain sections that are
24 particularly troublesome to the manufactured housing

1 industry because of the uniqueness of the product.

2 For instance, it would be a deceptive act or
3 trade practice to enter a consumer's residential
4 premise to seize property. We understand the
5 concept there, and we understand what we are trying
6 to achieve, but remember that we were actually
7 repossessing his residential property from his
8 residential property. His real estate very well may
9 be his residential property; and we may be also
10 entering into his factory-built manufactured home
11 which is held as personal property, that's secured
12 as personal property, to remove it from his
13 residential property.

14 So, just the -- that -- we think that's a
15 fixable thing, but we think that it could be the
16 source of a lot of litigation by those people who
17 feel -- felt aggrieved by trespass or "entering
18 into" or wherever.

19 There is also -- there's some time limitations
20 on the sale of distressed merchandise or on
21 repossessions that we find to be owners,
22 particularly in view of the trade practices within
23 the industry.

24 If we were forced to meet the time frames that

1 were outlined in the, in the rule, what would happen
2 is that many consumers would be subjected to greater
3 deficiency balances than are necessary. There are
4 many times when it's to the advantage of both the
5 consumer and the holder of the security to defer a
6 sale for a seasonal period of time in order to
7 capture the best dollars for the season. In
8 addition, because of the transportation difficulties
9 of adverse and inclement weathers and mud and those
10 kinds of things, many times collateral has to sit in
11 place for some time in order for it to be physically
12 moved, and it is not as simple as repossessing an
13 automobile and towing it to another location,
14 because of the complexity there.

15 We would urge that -- and we will address those
16 in more detail in our written comments, but we would
17 urge that the Attorney General's office revisit
18 those rules with those kind of comments in mind with
19 the idea of trying to refine the language somewhat
20 to consider that there is a lot of unique situations
21 that could very well prove troublesome under the
22 draft language.

23 Finally, I would like to, if I could, just
24 briefly address our history of consumerism within

1 our industry generally and how it has related to the
2 Consumer Protection Division most particularly.

3 In 1975 when the act passed, went into effect,
4 we recognized that the holder in due course doctrine
5 was eliminated in West Virginia, and a lot of the,
6 the, a lot of the requirements of the business
7 community were changed by the nature of that
8 statute. And we also recognize that, unlike some of
9 the previous speakers, that business people are held
10 under -- to a higher standard in the marketplace
11 than consumers are. And we recognize that there
12 is -- they should be held to a higher standard, and
13 we subscribe to that. And it's a right and a
14 privilege under licenses and other laws that
15 business people serve the public, and it is a
16 privilege to do that, and we understand that
17 consumers' rights and businesses' rights are not
18 necessarily to be held even in all cases before the
19 law.

20 But we, we also recognize that business has a
21 responsibility to its consumers; and as such, we
22 formed what we call our Consumer Service Bureau
23 through the West Virginia Manufactured Housing
24 Association. And what we did is we worked very

1 closely with the Attorney General's Consumer
2 Protection Division, and so the Consumer Protection
3 Division actually would review consumer complaints
4 emanating from our industry. They would then review
5 the complaints to see if a statute was violated,
6 particularly Chapter 46A; and if no violation on the
7 surface was deemed and they couldn't mediate the
8 complaint, they would refer it to our Consumer
9 Protection Division for industry mediation and
10 assistance.

11 What we learned over -- and that system worked
12 for -- very well. What we learned over the years,
13 that most of the complaints coming before the
14 Attorney General's Consumer Protection Division were
15 not violations of 46A, but they were contractual
16 disputes, or warranty disputes, or violations of the
17 Magnus-Moss (phonetic) Warranty Act, or violations
18 of Chapter 29 -- or Chapter 21-9 or Chapter 21-11 of
19 the Code of West Virginia in regards to manufactured
20 housing, or violations of the fair housing law, or
21 many other violations of existing statutes.

22 We, we have stacks and stacks of files in our
23 offices of complaints that -- where the complainant
24 had first filed a complaint with the Attorney

1 General's Consumer Protection Division, and the
2 Attorney General's Consumer Protection Division made
3 a good-faith attempt to mediate. In addition, they
4 also made a review and determined that there was not
5 a violation or not an apparent violation of Chapter
6 46A.

7 We then got the complaint. Upon investigating
8 those complaints, in many cases we found numerous
9 protracted, over and over, lots of code sections
10 that were violated. There were -- there -- we --
11 the Attorney General's case workers did not
12 understand that they were looking at a violation of
13 numerous laws. But they applied their law, 46A, to
14 that particular complaint but did not look at other
15 Code sections that are in existence that protect
16 that consumer.

17 We have a defect in our system. And I'm not
18 sure I know how to fix that defect; but when a
19 consumer comes to the Attorney General's office,
20 they assume that, that, that they're going to get
21 legal advice on how to proceed with their consumer
22 complaint.

23 In many cases what they get is a review of the
24 consumer complaint, a good faith attempt at

1 mediation, but they are left unawares of many of the
2 laws that exist in the Code of West Virginia and the
3 United States Code that protect them. And so, what
4 we -- I think what happens is is that that leaves
5 the consumer unserved to a degree, although it's not --
6 a willingness on the part of the Attorney General's
7 office to do that. I understand their restraint --
8 constraints by staff and budget and their
9 legislative mandate under Chapter 46A.

10 But at the same time many, many landlord-tenant
11 relationships, many magistrate situations, many
12 violations of other licensing laws or regulatory
13 laws that are designed to protect consumers are
14 never passed on to those consumers by the Attorney
15 General's consumer complaint division, simply
16 because the case worker does not have the
17 comprehensive knowledge of all of those various
18 consumer protection laws that exist, including fair
19 housing and licensing laws and regulatory laws and
20 other rules and regulations that exist, including
21 sanitary, health laws, trespass laws, and those
22 other things.

23 So, in reviewing that consumer complaint, a
24 knowledgeable consumer advocate, like APPALRED and

1 others, use a whole body of law to assist the
2 consumer and not just Chapter 46A. I believe that
3 what we are doing is we are trying to expand our
4 realm of influence under Chapter 46A so we can act
5 as a government agency on behalf of more aggrieved
6 people.

7 But now, even that, it requires a civil action
8 and a protracted process under West Virginia law
9 under these sections for any meaningful work to
10 happen on behalf of the consumers.

11 I would submit, gentlemen, that we would be
12 better served to find ways to inform the public,
13 assist the public in accessing that body of
14 knowledge about the laws that already exist that
15 protect them. I find that many of our business
16 people are not -- are -- in many cases are violating
17 the laws themselves simply because they don't know
18 they exist.

19 So, we have a real educational problem on
20 behalf of the public, on behalf of the business
21 community, and I would submit on behalf of the
22 Attorney General's Consumer Protection Division case
23 workers who in many cases are unawares of the
24 various laws that they overlook in assisting

1 consumers.

2 I'm, I'm sort of like the guy alongside the
3 road who can point out how the car broke down, but
4 I'm not sure that I have a solution on how to fix
5 it. But I believe that if we recognize that this
6 body of law exists, that -- I'm sure that as these
7 rules make their way through the legislative
8 process, there will be advocates from all corners
9 pointing out how there are existing statutes that
10 cover many of the things that are covered in these
11 rules and why -- and how we have as a society
12 collectively failed to inform our consumers about
13 these particular laws that there are there to
14 benefit them. If we can address that issue at the
15 same time we're working on these rules, I think the
16 public would be well served. Thank you.

17 DARRELL MCGRAW: Mr. Moore, I want
18 to say something before you quit. I want to say
19 that, of course, wisdom, you know, the concept of
20 wisdom, is most often recognized because the
21 purveyor of the wisdom is cultivating the prejudice
22 of the one who is listening attentively to what he
23 has to say, all right?

24 And so, I want to thank you for what I perceive

1 to be in your latter remarks this morning a very
2 wise commentary with respect to how government
3 operates generally. And inasmuch as we are able to
4 apply your observations to the improvement of our
5 little corner of the government, I want to, I want
6 to, to perhaps apply your wisdom to our
7 circumstances with a view to improving our services
8 to the general community that we serve, consumers
9 particularly and vendors also.

10 And so, so, so, I want to thank you
11 particularly for your, your remarks this morning and
12 imparting your wisdom to us on these issues that you
13 have addressed.

14 LEFF MOORE: Thank you very much.

15 MR. RODD: Thank you, Mr. Moore.

16 I'm going to take about a two-minute break to
17 consult about the process here, and then we'll
18 resume the hearing; but literally that will be just
19 a couple of minutes.

20 (Short recess.)

21 MR. RODD: Our court reporter has
22 kindly acknowledged that he is able to continue, so
23 in about two minutes we'll resume with the next
24 speaker; and I mean that precisely, that being, in

1 the order that I have it here, Lester Caudill.

2 I'm going to -- during this two-minute period
3 of time, I'm going to also give you the names of the
4 remaining people whose names I have here: David
5 McMahon, Nelson Robinson, Susan Sobkovich, and then
6 previously I had called the name of Bonnie Harold,
7 and I was told that the name of Terry Snyder should
8 be deleted, and also a Neal Walters.

9 Are any of those people around?

10 Okay, we'll begin in just, as I say, about a
11 minute with Mr. Lester Caudill. Thank you.

12 Thereupon, at 12:17 p.m. a recess was had until
13 12:19 p.m., at which time the following proceedings
14 were had, all parties being present as heretofore
15 noted:

16 MR. RODD: We're ready to resume,
17 and the next person listed is Lester Caudill.

18 Thanks for your patience, Mr. Caudill.

19 LESTER CAUDILL: Well, I'm
20 actually here and going to speak on behalf of myself
21 and Terry Snyder representing the role of United
22 National Bank. And, of course, we're members of the
23 West Virginia Bankers Association. We're here
24 basically just to support Tom Winner's letter that

1 he's already submitted and addressed to you-all.

2 I did want to make some simple comments that we
3 support the Consumer Protection Agency, the issues
4 that they have to address. In general, on Series 24
5 as Tom Winner has already pointed out. I don't want
6 to be redundant, but the issues that he -- that Tom
7 has addressed, that the Series 24 is prevented in
8 certain areas, and perhaps not necessary in certain
9 areas; and then as other people have also pointed
10 out, other creditors, that some of the language as
11 written that the issues are too vague and in certain
12 circumstances too restrictive.

13 And that's basically all we have. I think
14 there were some questions asked about some general
15 repossession procedures earlier, and I was going to
16 encourage anyone from the Consumer Protection Agency
17 or the Attorney General's office simply to call.
18 I'm sure the other banks will -- certainly mine
19 will -- we would be happy to discuss and, as I
20 indicated, as to our procedures and any
21 recommendations or any conflicts or issues that
22 we -- we all need -- you know, we need the agency
23 as, you know, not only as an agency to keep us in
24 line, but as individuals I'm sure we all have got

1 friends and relatives that we need protected, and we
2 respect and appreciate the efforts of the agency and
3 the Attorney General's office. Thank you.

4 MR. RODD: Thank you,
5 Mr. Caudill.

6 The next speaker listed is David McMahon.

7 DAVID McMAHON: I had some
8 thank-you's for the General. I'll save those until
9 later.

10 I have some general remarks and some specific
11 remarks. Do you have any particular idea whether it
12 would be better to wait for the General to hear the
13 specifics in general or shall I just -- or does it
14 make a difference?

15 MR. RODD: Well, give us your --
16 start with your specifics, I would say.

17 DAVID McMAHON: Okay.

18 There have been several comments by creditors
19 and other businesses about the difficulty of using
20 the word, "reasonable." The benefit of using the
21 word, "reasonable," is it means flexibility. We
22 cannot under these rules predict all future market
23 conditions, all future needs, all current
24 circumstances and damages. I think that if we --

1 the, the complaint about overregulation --
2 unfortunately we complain about reasonableness. If
3 you become too specific, then it will be
4 overregulated and inflexible.

5 Reasonableness leaves it in the hands of
6 industry to decide and businesses to decide. They
7 who know, as Mr. Moore went on, better than the
8 consumers how things work, what the standard should
9 be. They in the first instance are the ones who
10 know what it is.

11 With regard to the subject of landlord-tenant
12 and deposit accounts bearing interest at some
13 possible time frame, there is -- if you are the
14 fiduciary for the account and if it is to your
15 benefit for the money to stay in the account, and if
16 you get paid the interest, then that is possibly a
17 conflict because of your fiduciary's interest.
18 That's why lawyers are not allowed to receive
19 interest on their trust accounts. However, it's
20 unclear that because it applies to the lawyer's
21 fiduciary, that it would apply here.

22 But I support the suggestion by the man from
23 Robinson & McElwee, that we do for deposit accounts
24 what was done for interest on lawyers' trust

1 accounts. Have them put the money in a, in a, in an
2 interest-bearing account. The interest will first
3 go to the expenses of the account. And because it
4 is so difficult to account for each tenant's
5 interest if there is more than one tenant's money in
6 the account, have that money go to a fund that would
7 provide housing for homeless people.

8 With regard to the comment in the -- in a
9 landlord-tenant on the fact that the rules require
10 the deposit be returned, if possible, to have been
11 done within 20 days, I think that's extraordinarily
12 reasonable. I would think 14 days would be my first
13 choice. That's two weeks for the landlord to walk
14 in the place, look around, get a reasonable estimate
15 of what's it's going to take, get someone in there
16 to do an estimate of repairs, and walk out.

17 60 days is just not workable for your typical
18 tenant. People have a hard enough time getting
19 together a deposit to rent one apartment. If they
20 then need to move from one apartment to another,
21 where do they get the money for the second deposit
22 if they've got to wait 60 days for the deposit from
23 the first unit to become free? It's just not a
24 feasible thing for the tenant to be able to do, to

1 wait 60 days to get a deposit back. It should be --
2 I say 14 sounds reasonable to me. Anything beyond
3 30 is just -- it just deprives tenants of the
4 ability to rent their next rental unit.

5 With regard to the complaint about there having
6 to be a roof -- an estimated repair of \$50, one
7 gentleman suggested \$200, I would suggest that if
8 you are on a minimum wage, working 30 hours a week,
9 which lots of folks are, trying to raise a family,
10 your monthly income is going to be about 550 bucks.
11 If you have got a surprise auto repair for 200 bucks
12 on a car that might not be worth more than 3 or
13 \$400, that's a significant fact. I think the \$50
14 amount is very reasonable on that account.

15 I have written down -- I think it was on
16 deposits. To get to the lady who said she required
17 a \$20 deposit, I have never in my 20 years of Legal
18 Aid history heard of a deposit that low. There
19 are -- I'm not sure that I've ever heard of one
20 under a hundred dollars either. It's kind of a
21 practice in the industry to have one month's rent,
22 which is, which is not unreasonable, which is what,
23 what is allowed by the rule, and I think it's
24 unreasonable to -- just by the comments

1 of Mr. Anderson.

2 With regard to the comments of Ford Motor
3 Credit company and with respect to Chrysler Credit
4 company, they talked about the place that they have
5 found where they can get the highest dollar when
6 they resell a repossessed vehicle is a wholesale,
7 that is dealers-only auction and not the public.
8 And they say that they've tried all of these
9 different things, and that's what they found works.
10 They say they've tried an independent lot to sell
11 repossessed goods; they say they have tried to
12 advertise in the paper; they have tried -- they have
13 tried public sales on the courthouse steps; they
14 have tried the dealers-only auction.

15 The problem with the dealers-only auction is it
16 assures that never ever will they get an amount for
17 the repossessed goods above wholesale, because
18 consumers are not allowed into those auctions. So,
19 it guarantees that they will, that they will not get
20 more than wholesale. If the car was worth more than
21 wholesale, the dealers are friendly, that he'd bid
22 on some other car at its wholesale value, and then
23 you could mark it up to retail. So, it's inherently
24 unfair.

1 They say it's the one they have tried that is
2 the best, but they haven't really tried them all.
3 The best one is to put it back on their dealer's
4 used-car lot. But they don't do that, and the
5 reason is because the dealers make a higher profit,
6 a higher net profit when they sell their own
7 inventory, used inventory -- even as used inventory,
8 they make a higher net profit on that than reselling
9 the repossessed car. But they don't wish to compete
10 with themselves in the way that they really would
11 get a true fair market value.

12 Of course, you go to a used car lot. If -- you
13 can call the previous owner.

14 You can call the previous owner of a
15 repossessed car. There's no reason why not. But
16 they don't use that kind of practice as they would
17 if their own used car lot sold a car, because they
18 don't want to compete with themselves. So,
19 references to the -- the retail value of the books
20 is the most accurate one.

21 Another comment I want to make generally is
22 that several of the commentators said that any
23 little additional expense that these rules may cause
24 are automatically passed on to the consumer. I'm

1 confused. I thought these gentlemen were all
2 private enterprise people who live in a marketing
3 fund where price is determined by supply and demand
4 in addition to cost. And it depends on the
5 flexibility and demand for the product whether in
6 fact the industry will absorb from its profits some
7 of the other expenses. It's simply not an accurate
8 statment that all costs would be passed on to the
9 consumer.

10 There were also several comments that said that
11 what the, what the Attorney General has proposed
12 goes beyond the Uniform Commercial Code. Well,
13 that's really not the question. If -- everything,
14 almost everything in Article 46A -- Chapter 46A goes
15 beyond what's in the Uniform Commercial Code. - -
16 Chapter 46A provides additional consumer
17 protections. Included in that is the unfair and
18 deceptive practices law which can offer protections
19 to consumers. It goes beyond the Uniform Commercial
20 Code, Holder v. Course deemed as an example. So,
21 that it's not inappropriate for the Attorney General
22 to do this. The difficulty would be assuring that
23 there is particular statutory authority for what you
24 are doing when you go beyond the Uniform Commercial

1 Code.

2 MR. RODD: Do you want to explain
3 what you mean by the example of the Holder v. Course
4 as going beyond the UCC?

5 DAVID McMAHON: The Uniform
6 Commercial Code -- I don't know the exact
7 provisions -- devised the -- let me think for a
8 second.

9 It says there -- I think "privy" would be
10 appropriate -- privy between the buyer -- where he
11 brings a warranty claim and the assignee of the
12 negotiable paper -- therefore, the old -- for
13 example, the old roofing scams where someone would
14 go to an old person's house, convince them they
15 needed a new roof, go up and paint the roof black,
16 charge them for a new roof, sell the paper to a bank
17 or a collection agency which would then collect the
18 cost of the new roof.

19 Under the Holder v. Course that stood up in
20 UCC, the seller would have to pay the bank. It --
21 could only go against the guys that painted his roof
22 black to get his money back. Of course, they guy
23 that painted the roof black is in Ohio. However,
24 46-2-101, 102, and 103 abolishes Holder v. Course.

1 It's -- it goes beyond the Uniform Commercial Code,
2 perhaps not exactly conflicting with it.

3 The cutoff in landlord and tenant cases, the
4 cutoff of utilities, the gentleman made an excellent
5 remark. He said that when the tenant is lawfully,
6 lawfully in the premises, the landlord should not be
7 able to turn off his utilities. When the tenant is
8 unlawfully on the premises, then everyone should;
9 and I agree with him. The question is who decides
10 unlawfully? And I believe if you listen to his
11 remarks, he was saying once the guy has stopped
12 paying rent before any court has declared his
13 tenancy to be unlawful, that's when he ought to be
14 able to cut off the utilities.

15 The problem with that is, is that despite the
16 apparent reputability of the people who testified
17 here, there are lots of disreputable landlords. I
18 find it frankly incredible that the fellow
19 representing the Morgantown landlords association
20 comes down, and anybody that's gone to school in
21 Morgantown or had children gone to school in
22 Morgantown knows that landlords take tremendous
23 advantages of suits in those situations. I think
24 there are other people who are not at a good

1 bargaining position, either economically or
2 otherwise, to, to get back deposits and to otherwise
3 protect themselves from unscrupulous practices of
4 landlords.

5 I'd also like to correct the gentleman from
6 Robinson & McElwee when he talked about the fact
7 that the secured party came by at a private sale
8 when there are recognized markets for -- that state
9 the price of goods.

10 The case law in that situation talks about
11 things like wheat futures, especially the commercial
12 practice thing of grain futures, security markets,
13 you know, when stocks are put up as security. And
14 unfortunately a -- the -- its values would -- NADA
15 blue books. Those are not considered to be
16 recognized markets.

17 MR. RODD: I believe there is case
18 law to that effect.

19 MR. McMAHON: Yes.

20 They talked to us somewhat about not needing
21 more guidance on commercially-reasonable sales.
22 Currently the concept of commercially-reasonable
23 sales is too flexible. I have an article that's
24 about to be published in the Financial Quarterly

1 which I will submit tomorrow that's pertinent
2 testimony that states nine reasons why it's not true
3 that the secured party has a financial interest in
4 getting the most out of the resale of secured
5 goods. In fact, what they are most interested in is
6 their own deeds and their own overall financial
7 interest.

8 Why should you step on your feet and not work a
9 little harder to get a little extra value for these
10 goods you repossessed when you can send that same
11 guy out to a sales promotion that will bring lots
12 and lots of business to your, into your company?

13 So, there are in fact huge difficulties with
14 commercially-reasonable sales currently in the
15 Uniform Commercial Code which makes the Attorney
16 General's attempts to limit and clarify an excellent
17 idea. An example: There is a West Virginia case
18 that says that a car was advertised for sale in the
19 legal ads in a local paper as part of the notice to
20 the public that the goods were for sale so the
21 public could bid on it. And the West Virginia
22 Supreme Court, surprisingly but consistent with
23 other courts, remanded that to the circuit court to
24 find out if that was a commercially-reasonable way

1 to advertise a car for sale.

2 Well, I think anybody in this room -- there's
3 not many of us left -- knows that if you ever
4 shopped to buy a used car, you start in the want ads
5 or you start in the Ad Bulletin or you start in the
6 car advertisements. Whoever goes to the legal aid
7 section to buy a car? And yet our West Virginia
8 Supreme Court has said that that may in fact be a
9 commercially-reasonable way to sell a car, and that
10 makes no sense.

11 Part of the NADA book valuation as in strict
12 foreclosure, the real fraud that takes there is
13 strict foreclosure, that is where I go to the
14 consumer -- I go to the -- the secured party goes to
15 the debtor and says, "I'll tell you, I'm not going
16 to go to this commercially-reasonable sale, so let
17 me keep the goods, and you don't owe me anything."

18 The current law: that can only be done for
19 full satisfaction. That is, I can only keep the
20 goods that way from a commercially-reasonable sale
21 if I grant full value. Oh, I have to tell you that
22 the national conference of (unintelligible) uniform
23 state laws has taken a change in that to be purchase
24 satisfaction. But that -- what that -- it's only

1 supposed to apply if the secured party doesn't keep
2 the goods for their own use. And we all know that
3 people who finance used cars or repossess new cars
4 which are then used cars never keep it for their own
5 use. So, the use of strict foreclosure at all is
6 probably inappropriate.

7 Mr. Moore, from the manufactured housing
8 association, made some excellent points, some of --
9 some I agree with. I am not sure either that the
10 60-day requirement for sale will in the end work to
11 the consumer's benefits, because particularly in the
12 area of mobile homes I think you do better selling
13 them in the summer than February, and it's better to
14 wait and get a better price. On the other hand,
15 there are times when -- with cars, you know, it
16 doesn't make such a difference; that people do keep
17 cars until they deteriorate in value, and they don't
18 make enough effort. Perhaps a reasonableness time
19 frame should be put in there which gives the burden
20 on the industry to figure out what it is if they
21 know this.

22 With regard to his statement that there are
23 perhaps other areas of West Virginia law that cover
24 some of the areas that we have covered, and a number

1 of people said that, that it is true that there are
2 other areas of law that cover some of the ones we
3 covered, but the particular benefit of making it an
4 unlawful practice under the West Virginia Consumer
5 Credit and Protection Act is that it will give the
6 consumer a remedy for things like your -- the
7 credit -- UCC -- FTC Credit Practices Act that West
8 Virginia incorporated... There currently is no
9 private remedy for the Attorney General to do that
10 and enforce that. Only the FTC can enforce its.
11 And I don't know about antitrust. And so this would
12 give the consumer a remedy to enforce, which would
13 be very beneficial.

14 Let's go back to the general remarks. Of
15 course, we thank the Attorney General for doing
16 this. These rules and regs, they have law. These
17 are -- they also are an enormous undertaking, and I
18 admire the work of Mr. Rodd and his people under him
19 trying to do this. Because it is such an enormous
20 task, of course there will be, there will be things
21 that cannot be thought about by all of the heads
22 sitting around the first time. So, these comments
23 are important, and I thank the Attorney General and
24 his staff for allowing me to comment and exceeding

1 my five minutes.

2 There are certain areas that are very
3 important, landlord-tenant being one. We see
4 repeated problems with landlords entering tenants'
5 places as if they were the landlord's residence
6 instead of the tenants' residence. That's an
7 important factor.

8 It is also important to recognize that
9 landlord-tenants transactions now are essentially
10 consumer transactions, and the law originally arose
11 out of the law of England dealing with lords and
12 peasants. And so this kind of update is needed.
13 All of the provisions that you are inquiring in
14 other states -- and there are still lots of
15 landlord-tenant transactions going on in there.

16 It's particularly important to segregate that
17 deposit account. A lot of the problems we have are
18 the, are the tenant -- the landlords who are not
19 particularly doing well who mix -- commingle their
20 deposits, their deposit funds with their, with their
21 general cash flow. When cash flow is down, we
22 find -- when their cash flow is down, particularly
23 are the deposits, and that's why it's particularly
24 important to segregate those accounts.

1 Within repossession -- again, I'm talking about
2 commercially-reasonable sale -- the sale at a public
3 auction is the worst abuse of used cars that I see,
4 and then it's resold later. I have a particular
5 case that I am now working on where the bank sold
6 the car to itself at a public auction for \$200; my
7 clients and everybody -- the car went there for \$800.
8 Well, even the value -- it will only earn credit
9 against the resale for \$200. And in fact when the
10 car was repossessed, they told her that the car was
11 going to be sold to that dealer. So, it was all a
12 setup.

13 I've already mentioned that the credit practice
14 rule is not enforceable unless you pass these rules.

15 I'd also like to particularly thank you for
16 your proprietary schools. Since the legislature in
17 the last session eviscerated the statutory
18 protections for students going into proprietary
19 schools, such as Northeastern Business College, they
20 closed down Century College, they closed down the --
21 I think it was great that the Attorney General used
22 his statutory authority to do this.

23 My closing remark is that whenever you do
24 legislation, the rules -- the important thing: You

1 never want to hurt the good guys, but it's important
2 to get the bad guys. The difficulty is how do you
3 regulate the bad guys in a way that hurts the good
4 guys the least? But the polar star -- we must
5 always keep the light lit -- is that we do have bad
6 guys out there operating. The good guys should not
7 have to compete with them. We need to be sure to
8 get the bad guys while treating the good guys as
9 gently as we can, and still not forget that the
10 ultimate goal is to regulate those bad ones in our
11 business community and protect our interests.

12 And I will also submit a mark-up, if you would,
13 of the rules and regs and some small things that I
14 have found as I have read through them.

15 MR. RODD: Thank you very much.

16 As I look around the room, I see that there is
17 nobody here, all who has not spoken, so I will
18 spread my thanks upon the record to all of those
19 people who have spoken and to our court reporter for
20 bearing with us during this long morning.

21 And with that I'll declare the public hearing
22 closed; but I'll state for the record that we will
23 receive comments at the Attorney General's Consumer
24 Protection Division, 812 Quarrier Street, Sixth

1 Floor floor, until 5:00 o'clock the close of
2 business tomorrow.

3 Any comments, questions?

4 Thank you. This hearing is concluded.

5 AND at 1:42 p.m. these were all the proceedings
6 had and reported upon this matter.

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1 STATE OF WEST VIRGINIA
2 COUNTY OF KANAWHA, To-wit:

3

4 I, Dwayne Price, a notary public within and for
5 the county and state aforesaid, duly commissioned
6 and qualified, do hereby certify that the foregoing
7 public hearing was duly taken by me and before me at
8 the time and place specified in the caption hereof.

9 I do further certify that the said hearing was
10 reported by me in stenotype notes, that the same
11 were accurately written out in full and reduced to
12 typewriting, and that said transcript is a true
13 record of the proceedings.

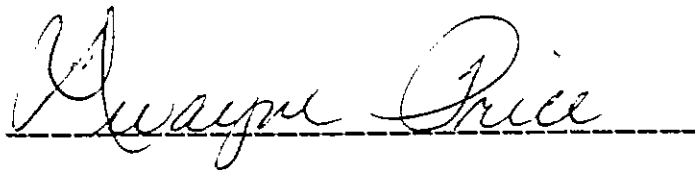
14 I do further certify that I am neither attorney
15 or counsel for, not related to or employed by, any
16 of the parties to this action, and further that I am
17 not a relative or employee of any attorney or
18 counsel employed by the parties hereto or
19 financially interested in this action.

20 My commission expires December 13, 1998.

21 Given under my hand this 13th day of August,
22 1994.

23

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**LIST OF PERSONS WHO ATTENDED PUBLIC HEARING
ON PROPOSED LEGISLATIVE RULES TITLE 142 SERIES 23-30**

- | | |
|-------------------------|-------------------------|
| 1. Richard Gallagher | 16. Joe Doughton |
| 2. Bill Minsker | 17. Alonzo Johnson |
| 3. Jack Albert | 18. Tom Winner |
| 4. Bill Gossett | 19. Debbie Sink |
| 5. James Rice | 20. Bonnie Harold |
| 6. Alvin McCorkle | 21. S. D. McClure |
| 7. A.D. McCorkle, IV | 22. J. D. Stricklen |
| 8. Pat Hose | 23. David Yoder |
| 9. Melody Douglas | 24. Brad Sorrells |
| 10. Gary C. Porter, Jr. | 25. Norman Geogel |
| 11. Neal Walters | 26. Leff Moore |
| 12. Zol Maggied | 27. Lester Claudill |
| 13. Kathryn Maddox | 28. David McMahon |
| 14. Roy Stricklen | 29. Nelson Robinson |
| 15. Bryan Kett | 30. E.C. "Bud" Anderson |

ROBINSON & MCELWEE

Thomas W. Rodd, Esquire

August 11, 1994

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necessitated by the regulation. This provision is also inconsistent with the spirit and letter of West Virginia Code, 46A-6-101.

6.17 - 6.19 These provisions should be eliminated in their entirety because they are vague and confusing, and not consistent with the spirit and letter of West Virginia Code, 46A-6-101.

6.20 This provision should be amended to eliminate the words "clearly" and "conspicuously" as this language is vague and subject to varying interpretations, which would breed litigation.

SERIES 24 - SECURITY INTEREST AND REPOSSESSION PRACTICES**3.2 Repossession**

Various subsections of §3.2 either restate or contradict existing law and, for that reason, are confusing and inconsistent with the spirit and letter of West Virginia Code, 46A-6-101. Further, §3.2.7 contains language (undue hardship) which is vague and subject to various interpretations. This language would unquestionably breed substantial litigation and render the repossession rights of a creditor meaningless and merely an invitation to litigation. Further, §3.2.9 involves issues which are constitutional in nature and, accordingly, this provision should be eliminated.

3.4 Sales

The various provisions contained in subsections set forth from §§3.4.1 to 3.4.12 are inconsistent with existing law and violate the spirit and letter of West Virginia Code, 46A-6-101.

SERIES 25 - ADVERTISING AND SALES

Numerous provisions set forth in Series 25 are vague and subjective and would result in varying interpretations of the meaning of the language. This would result in litigation and increased costs to both dealerships and consumers. This language also violates the spirit and letter of West Virginia Code, 46A-6-101. Various sections and subsections of Series 25 which contain language of this sort include, but are not limited to, the following: 2.1, 2.2, 2.5, 2.6, 2.7, 2.9.1, 2.9.2, 3.1, 3.2, 3.3, 3.3.3, 3.4.2, 3.4.3, 3.4.4, 4.1, 4.5, 4.8, 5.3, 6.1, 6.1.2, 6.1.4, 6.1.5, 7.1.1, 7.1.2, 7.1.6, 7.3, 9.3.2, 10.1, 10.1.1, 10.1.3, 10.1.5,

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Thomas W. Rodd, Esquire

August 11, 1994

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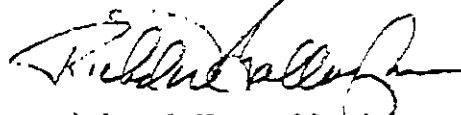
10.3, 10.4 (and all subsections), 12.2, 12.2.1, 14.1, 16.1, 16.2.1, 16.2.2, 17.1, 17.1.1 and 17.1.2.

SERIES 30 - DOOR-TO-DOOR SALES

West Virginia Code, 46A-6-101 provides that the purpose of Article 6 is to compliment the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices. This provision also states that in construing Article 6, the Court should be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. Further, West Virginia Code, 46A-6-103 provides that all rules and regulations 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 currently drafted, Series 30 does not provide an exemption to the sellers of automobiles from the provisions of the cooling off period for door-to-door sales. The Federal Trade Commission previously created an exemption in this regard to sellers of automobiles. Please see the attached letter of February 1, 1989 and addendum attached hereto as "Exhibit A" which reflects the acknowledgement of the Office of the Attorney General that this FTC exemption is applicable. Accordingly, the language in Series 30 should be amended to the extent necessary to ensure that the FTC exemption discussed herein is given full force and effect in these proposed regulations.

If you have any questions regarding any aspect of these comments, please contact me.

Very truly yours,



Richard W. Gallagher

RWG:djm

Enclosures

**ISSUES WITH RESPECT TO TITLE 142 SERIES 25
LEGISLATIVE RULE PERTAINING TO THE
PREVENTION OF UNFAIR OR DECEPTIVE ACTS OR PRACTICES
IN ADVERTISING AND SALES**

A clarification that the scope of this regulation is intended to regulate only advertising and sales practices would be helpful. For example, it should be clear that the word "advertisement" does not include an actual contract, such as a credit contract.

A question arises with respect to § 140-25-6, which imposes certain obligations or restrictions upon a seller purporting to sell on "easy credit" terms; sub-section 6.1.6 indicates that the instrument must be labeled a "Consumer Note." The reason for this requirement is unclear.

With respect to §§ 142-25-10 through 16 regarding certain material disclosures, these provisions should not apply to bank products as these products and disclosures relating to pricing of these products is extensively regulated on the credit side by the Federal Truth in Lending Act and on the deposit side by the Federal Truth in Savings Act. The regulation targets sales and advertising of goods and services related to goods (warranty, maintenance contracts and the like). Perhaps a section could be added to clarify that it does not apply to credit products.

West Virginia Bankers Association, Inc.

Suite 1212 • Commerce Square • Charleston, WV 25301-1780 • (304) 343-8838

Thomas A. Winner
President and CEO

August 9, 1994

Tom Rodd, Director
Consumer Protection Division
Office of the Attorney General
812 Quarrier Street
Charleston, WV 25301

Re: Proposed Rule, Title 142, Series 25,
Pertaining to the Prevention of
Unfair or Deceptive Acts or
Practices in Advertising and Sales

Dear Director Rodd:

The West Virginia Bankers Association represents commercial banks and their parent companies within this State. In connection with that role, the West Virginia Bankers Association monitors the legislative rule making process in order to ascertain matters of issue to its constituents.

The Association has one conceptual comment it would like to make with respect to proposed Series 25. It appears that the focus of this Rule, as well as the statutory provisions which are the source of this proposed Rule, is to regulate advertising practices. For that reason, we suggest that the Rule should be clear, perhaps in Section 2.2 under the definition of "Advertisement," that it does not apply to actual contract documents, whether they be credit contracts or other types of contracts. These instruments are regulated by other provisions of West Virginia and federal law. With respect to credit contracts, some of the provisions of the proposed

West Virginia Bankers Association, Inc.

Tom Rodd, Director
August 9, 1994
Page 2

advertising rule would conflict with, by way of example, the Federal Truth and Lending Act, if this Rule is construed to apply to the actual contracts.

We make this comment because we are aware that in the past, the Attorney General's Consumer Protection Division has taken the position that certain contractual language constitutes "advertising" for purposes of Section 46A-6-102. Again, we do not believe this is consistent with the focus of the statute or the regulation and it creates conflicts and confusion with respect to law applicable to the contractual documents.

Again, thank you for your consideration of this comment. If you have any questions about this information, please do not hesitate to contact me.

Very truly yours,



Thomas A. Winner
President

TAW/bal
267025

For Comment see Interimctions

**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**

§ 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. *for poor product want*

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

"Bait advertising" is the advertisement of goods followed by after which the merchant steers consumers responding to the advertisement to other goods by disparaging the advertised goods or otherwise discovering their purchase.

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 an advertisement is a bona fide offer are:~~ *including, without limitation:*

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 recision 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.

how do you know a "subterfuge"?

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 clearly 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.

CONS105

SUMMARY OF WRITTEN COMMENTS TO
PROPOSED LEGISLATIVE RULE TITLE 142 SERIES 25
PERTAINING TO THE PREVENTION OF UNFAIR AND DECEPTIVE ACTS OR PRACTICES
IN ADVERTISING AND SALES

Two commenters stated that the rule should be clear that the definition of "Advertisement" does not apply to actual contract documents. Commenter stated that this would be consistent with the focus of the regulation and would not would not create conflicts and confusion with respect to the law applicable to the contractual documents.

2.4 One commenter suggested changing this definition to "the advertisement of goods after which the merchant steers consumers responding to the advertisement of other goods by disparaging the advertised goods or otherwise discouraging their purchase."

3.3 One commenter suggested eliminating the section beginning with "a part of a bait scheme...." and adding "including without limitation."

6.1.6 One commenter objected to Section 6.1.6 on the ground that it is unclear why an instrument must be labeled a "a consumer note."

10 - 16 One commenter objected to Sections 10-16 on the ground that these provisions should not apply to bank products as these products, and disclosures relating to their pricing is covered by the Federal Truth-in-Lending Act. The commenter suggested that a section should be added to clarify that it does not apply to credit products.

One commenter objected generally to the following sections as containing subjective interpretations, resulting in litigation: 2.1, 2.2, 2.5, 2.6, 2.7, 2.9.1, 2.9.2, 3.1 - 3.3, 3.3.3, 3.4.2-3.4.4, 4.1, 4.5, 4.8, 5.3, 6.1, 6.1.2, 6.1.4, 6.1.5, 7.1.1, 7.1.2, 7.1.6, 7.3, 9.3.2, 10.1, 10.1.1, 10.1.3, 10.1.5, 10.3, 10.4, 12.2, 12.2.1, 14.1, 16.1, 16.2.1, 16.2.2, 17.1, 17.1.1, 17.12.

RESPONSE TO PUBLIC COMMENTS

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

The Consumer Protection Division of the Office of West Virginia Attorney General has received written and oral comments on the above-styled proposed legislative rule.

The Consumer Protection Division has read and discussed every comment submitted. In many instances, the Division has modified the proposed rule in response to public comments. In others, the Division has concluded that the proposed rule is both necessary to adequately protect consumers and is authorized by pertinent provisions of the West Virginia Code.

The Division has concluded that all proposed Advertising and Sales Rules will be submitted to the legislature as proposed, except for the following rule:

Rule 2.5: This rule will be changed to improve the definition of bait advertising.

This change is largely in response to changes requested by the regulated community. Minor typographical and grammatical errors may also be corrected.

The Attorney General wishes to thank the members of the public who took the time to study the proposed rule and comment on it.

These responses may not cover every change or respond to every comment. The reasons for most substantive changes are self-explanatory in the language changed or readily understood when read with the relevant oral and written comments on the rule. There are also typographical, grammatical and stylistic changes.



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

(304) 558-2021
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August 15, 1994

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

Dear Mr. Hechler:

Please accept this letter as my authorization for the filing of the enclosed proposed legislative rules with the Secretary of State's Office and the Legislative Rule Making Review Committee. A public hearing was held on these rules on August 10, 1994. Written comments were also received.

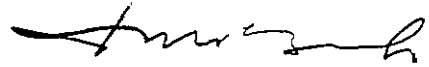
The enclosed proposed legislative rules to which my authorization extends are:

- (a) Legislative Rule Pertaining to the Prevention of Unfair or Deceptive Acts or Practices in Mobile Home Parks;
- (b) Legislative Rule Pertaining to the Prevention of Unfair or Deceptive Acts or Practices in Advertising and Sales;
- (c) Legislative Rule Pertaining to the Prevention of Unfair or Deceptive Acts or Practices in Landlord Transactions;
- (d) Legislative Rule Pertaining to the Prevention of Unfair or Deceptive Act or Practices in Motor Vehicle Repairs;
- (e) Legislative Rule Pertaining to the Prevention of Unfair or Deceptive Act or Practices in Motor Vehicle Sales;
- (f) Legislative Rule Pertaining to the Prevention of Unfair or Deceptive Act or Practices in Proprietary Institution;
- (g) Legislative Rule Pertaining to the Prevention of Unfair or Deceptive Act or Practices in Door-to-Door Sales.

Ken Hechler, Secretary of State
August 15, 1994
Page 2

Thank you for your cooperation.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Darrell V. McGraw, Jr.", with a stylized, cursive script.

Darrell V. McGraw, Jr.

DVM/mgc
Enclosures