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# WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 1998



# ENROLLED

**Com. Sub. for  
House Bill No. 4267**

(By Delegates Amores, Coleman, Pino, Kominar,  
Staton, Smith and L. White)



Passed March 14, 1998

In Effect Ninety Days from Passage



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**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR

**H. B. 4267**

(BY DELEGATES AMORES, COLEMAN, PINO, KOMINAR,  
STATON, SMIRL AND L. WHITE)

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[Passed March 14, 1998; in effect ninety days from passage.]

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AN ACT to amend and reenact sections one hundred four, four hundred sixteen and four hundred seventeen, article three, chapter forty-six of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections two hundred seven and two hundred eight, article four of said chapter; to amend chapter forty-six-a of said code by adding thereto a new article, designated article six-e; and to amend and reenact section five, article four, chapter sixty-one of said code, all relating to the regulation of telemarketing activities generally; defining the term "demand draft"; making transfer warranties applicable to demand drafts transferred by a person for consideration; making presentment warranties applicable to demand drafts; making transfer warranties applicable to demand drafts transferred by a customer or collecting bank; making presentment warranties applicable to demand drafts presented to the drawee for payment; defining certain terms related to the regulation of telemarketing; exempting certain persons and entities from telemarketing registration; requiring the registration of telemarketers; requiring surety

bond upon application for registration; levying of civil administrative penalty for failing to register or meet security requirement; requiring a telemarketer to keep records related to telemarketing activities; mandating disclosures which a telemarketer must make when communicating with a consumer; requiring a minimum policy on accepting returns or canceling services; describing unfair or deceptive acts or practices; establishing causes of action for unfair or deceptive acts or practices; creating the felony offense of operating a criminal recovery service and establishing the penalty therefor; describing abusive acts or practices; providing for civil remedies; providing that remedies are not exclusive; providing for service of process on certain nonresidents; and making the creation of a fraudulent demand draft a felony forgery offense subject to criminal penalties.

*Be it enacted by the Legislature of West Virginia:*

That sections one hundred four, four hundred sixteen and four hundred seventeen, article three, chapter forty-six of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that sections two hundred seven and two hundred eight, article four of said chapter be amended and reenacted; that chapter forty-six-a of said code be amended by adding thereto a new article, designated article six-e; and that section five, article four, chapter sixty-one of said code be amended and reenacted, all to read as follows:

## **CHAPTER 46. UNIFORM COMMERCIAL CODE.**

### **ARTICLE 3. NEGOTIABLE INSTRUMENTS.**

#### **§46-3-104. Negotiable instrument.**

1       (a) Except as provided in subsections (c) and (d),  
2 “negotiable instrument” means an unconditional promise  
3 or order to pay a fixed amount of money, with or without  
4 interest or other charges described in the promise or order,  
5 if it:

6       (1) Is payable to bearer or to order at the time it is  
7 issued or first comes into possession of a holder;

8       (2) Is payable on demand or at a definite time; and

9 (3) Does not state any other undertaking or instruction  
10 by the person promising or ordering payment to do any  
11 act in addition to the payment of money, but the promise  
12 or order may contain (i) an undertaking or power to give,  
13 maintain or protect collateral to secure payment, (ii) an  
14 authorization or power to the holder to confess judgment  
15 or realize on or dispose of collateral or (iii) a waiver of the  
16 benefit of any law intended for the advantage or  
17 protection of an obligor.

18 (b) "Instrument" means a negotiable instrument.

19 (c) An order that meets all of the requirements of  
20 subsection (a), except paragraph (1), and otherwise falls  
21 within the definition of "check" in subsection (f) is a  
22 negotiable instrument and a check.

23 (d) A promise or order other than a check is not an  
24 instrument if, at the time it is issued or first comes into  
25 possession of a holder, it contains a conspicuous statement,  
26 however expressed, to the effect that the promise or order  
27 is not negotiable or is not an instrument governed by this  
28 article.

29 (e) An instrument is a "note" if it is a promise and is  
30 a "draft" if it is an order. If an instrument falls within the  
31 definition of both "note" and "draft," a person entitled  
32 to enforce the instrument may treat it as either.

33 (f) "Check" means (i) a draft, other than a  
34 documentary draft, payable on demand and drawn on a  
35 bank or (ii) a cashier's check or teller's check. An  
36 instrument may be a check even though it is described on  
37 its face by another term, such as "money order."

38 (g) "Cashier's check" means a draft with respect to  
39 which the drawer and drawee are the same bank or  
40 branches of the same bank.

41 (h) "Teller's check" means a draft drawn by a bank  
42 (i) on another bank or (ii) payable at or through a bank.

43 (i) "Traveler's check" means an instrument that (i) is  
44 payable on demand, (ii) is drawn on or payable at or  
45 through a bank, (iii) is designated by the term "traveler's

46 check” or by a substantially similar term and (iv) requires,  
47 as a condition to payment, a countersignature by a person  
48 whose specimen signature appears on the instrument.

49 (j) “Certificate of deposit” means an instrument  
50 containing an acknowledgment by a bank that a sum of  
51 money has been received by the bank and a promise by  
52 the bank to repay the sum of money. A certificate of  
53 deposit is a note of the bank.

54 (k) “Demand draft” means a writing that is not  
55 signed by a customer, as defined in subdivision five,  
56 subsection (a), section one hundred four, article four of  
57 this chapter, and that is created by a third party under the  
58 purported authority of the customer for the purpose of  
59 charging the customer's account with a bank. A demand  
60 draft does not include a check drawn by a fiduciary, as  
61 defined in section three hundred seven of this article. A  
62 demand draft may contain any or all of the following:

63 (1) The customer's printed or typewritten name or  
64 account number;

65 (2) A notation that the customer authorized the draft;  
66 and

67 (3) The statement “No signature required,”  
68 “Authorization on file,” “Signature on file,” or words to  
69 that effect.

**§46-3-416. Transfer warranties.**

1 (a) A person who transfers an instrument for  
2 consideration warrants to the transferee and, if the transfer  
3 is by indorsement, to any subsequent transferee that:

4 (1) The warrantor is a person entitled to enforce the  
5 instrument;

6 (2) All signatures on the instrument are authentic and  
7 authorized;

8 (3) The instrument has not been altered;

9 (4) The instrument is not subject to a defense or claim  
10 in recoupment of any party which can be asserted against  
11 the warrantor;

12 (5) The warrantor has no knowledge of any  
13 insolvency proceeding commenced with respect to the  
14 maker or acceptor or, in the case of an unaccepted draft,  
15 the drawer; and

16 (6) If the instrument is a demand draft, the creation of  
17 the instrument according to the terms on its face was  
18 authorized by the person identified as drawer.

19 (b) A person to whom the warranties under subsection  
20 (a) are made and who took the instrument in good faith  
21 may recover from the warrantor as damages for breach of  
22 warranty an amount equal to the loss suffered as a result  
23 of the breach, but not more than the amount of the  
24 instrument plus expenses and loss of interest incurred as a  
25 result of the breach.

26 (c) The warranties stated in subsection (a) cannot be  
27 disclaimed with respect to checks. Unless notice of a  
28 claim for breach of warranty is given to the warrantor  
29 within thirty days after the claimant has reason to know of  
30 the breach and the identity of the warrantor, the liability of  
31 the warrantor under subsection (b) is discharged to the  
32 extent of any loss caused by the delay in giving notice of  
33 the claim.

34 (d) A cause of action for breach of warranty under  
35 this section accrues when the claimant has reason to know  
36 of the breach.

37 (e) If the warranty under subdivision six, subsection  
38 (a) is not given by a transferor under applicable conflict  
39 of law rules, the warranty is not given to that transferor  
40 when that transferor is a transferee.

**§46-3-417. Presentment warranties.**

1 (a) If an unaccepted draft is presented to the drawee  
2 for payment of acceptance and the drawee pays or accepts  
3 the draft, (i) the person obtaining payment or acceptance,  
4 at the time of presentment and (ii) a previous transferor of

5 the draft, at the time of transfer, warrant to the drawee  
6 making payment or accepting the draft in good faith that:

7 (1) The warrantor is, or was, at the time the warrantor  
8 transferred the draft, a person entitled to enforce the draft  
9 or authorized to obtain payment or acceptance of the draft  
10 on behalf of a person entitled to enforce the draft;

11 (2) The draft has not been altered;

12 (3) The warrantor has no knowledge that the signature  
13 of the drawer of the draft is unauthorized; and

14 (4) If the instrument is a demand draft, the creation of  
15 the draft according to the terms on its face was authorized  
16 by the person identified as drawer.

17 (b) A drawee making payment may recover from any  
18 warrantor damages for breach of warranty equal to the  
19 amount paid by the drawee less the amount the drawee  
20 received or is entitled to receive from the drawer because  
21 of the payment. In addition, the drawee is entitled to  
22 compensation for expenses and loss of interest resulting  
23 from the breach. The right of the drawee to recover  
24 damages under this subsection is not affected by any  
25 failure of the drawee to exercise ordinary care in making  
26 payment. If the drawee accepts the draft, breach of  
27 warranty is a defense to the obligation of the acceptor. If  
28 the acceptor makes payment with respect to the draft, the  
29 acceptor is entitled to recover from any warrantor for  
30 breach of warranty the amounts stated in this subsection.

31 (c) If a drawee asserts a claim for breach of warranty  
32 under subsection (a) based on an unauthorized  
33 indorsement of the draft or an alteration of the draft, the  
34 warrantor may defend by proving that the indorsement is  
35 effective under section 3-404 or 3-405 or the drawer is  
36 precluded under section 3-406 or 4-406 from asserting  
37 against the drawee the unauthorized indorsement or  
38 alteration.

39 (d) If (i) a dishonored draft is presented for payment  
40 to the drawer or an indorser or (ii) any other instrument is  
41 presented for payment to a party obliged to pay the

42 instrument and (iii) payment is received, the following  
43 rules apply:

44 (1) The person obtaining payment and prior  
45 transferor of the instrument warrant to the person making  
46 payment in good faith that the warrantor is, or was, at the  
47 time the warrantor transferred the instrument, a person  
48 entitled to enforce the instrument or authorized to obtain  
49 payment on behalf of a person entitled to enforce the  
50 instrument.

51 (2) The person making payment may recover from  
52 any warrantor for breach of warranty an amount equal to  
53 the amount paid plus expenses and loss of interest  
54 resulting from the breach.

55 (3) The warranties stated in subsections (a) and (d)  
56 cannot be disclaimed with respect to checks. Unless notice  
57 of a claim for breach of warranty is given to the warrantor  
58 within thirty days after the claimant has reason to know of  
59 the breach and the identity of the warrantor, the liability of  
60 the warrantor under subsection (b) or (d) is discharged to  
61 the extent of any loss caused by the delay in giving notice  
62 of the claim.

63 (e) A cause of action for breach of warranty under this  
64 section accrues when the claimant has reason to know of  
65 the breach.

66 (f) If the warranty under subdivision four, subsection  
67 (a) is not given by a transferor under applicable conflict  
68 of law rules, the warranty is not given to that transferor  
69 when that transferor is a transferee.

#### **ARTICLE 4. BANK DEPOSITS AND COLLECTIONS.**

##### **§46-4-207. Transfer warranties.**

1 (a) A customer or collecting bank that transfers an  
2 item and receives a settlement or other consideration  
3 warrants to the transferee and to any subsequent collecting  
4 bank that:

5 (1) The warrantor is a person entitled to enforce the  
6 item;



7 (2) All signatures on the item are authentic and  
8 authorized;

9 (3) The item has not been altered;

10 (4) The item is not subject to a defense or claim in  
11 recoupment (section 3-305(a)) of any party that can be  
12 asserted against the warrantor;

13 (5) The warrantor has no knowledge of any  
14 insolvency proceeding commenced with respect to the  
15 maker or acceptor or, in the case of an unaccepted draft,  
16 the drawer; and

17 (6) If the item is a demand draft, the creation of the  
18 item according to the terms on its face was authorized by  
19 the person identified as drawer.

20 (b) If an item is dishonored, a customer or collecting  
21 bank transferring the item and receiving settlement or  
22 other consideration is obliged to pay the amount due on  
23 the item (i) according to the terms of the item at the time it  
24 was transferred or (ii) if the transfer was of an incomplete  
25 item, according to its terms when completed as stated in  
26 sections 3-115 and 3-407. The obligation of a transferor  
27 is owed to the transferee and to any subsequent collecting  
28 bank that takes the item in good faith. A transferor cannot  
29 disclaim its obligation under this subsection by an  
30 indorsement stating that it is made "without recourse" or  
31 otherwise disclaiming liability.

32 (c) A person to whom the warranties under subsection  
33 (a) are made and who took the item in good faith may  
34 recover from the warrantor as damages for breach of  
35 warranty an amount equal to the loss suffered as a result  
36 of the breach, but not more than the amount of the item  
37 plus expenses and loss of interest incurred as a result of  
38 the breach.

39 (d) The warranties stated in subsection (a) cannot be  
40 disclaimed with respect to checks. Unless notice of a claim  
41 for breach of warranty is given to the warrantor within  
42 thirty days after the claimant has reason to know of the  
43 breach and the identity of the warrantor, the warrantor is

44 discharged to the extent of any loss caused by the delay in  
45 giving notice of the claim.

46 (e ) A cause of action for breach of warranty under  
47 this section accrues when the claimant has reason to know  
48 of the breach.

49 (f) If the warranty under subdivision six, subsection  
50 (a) is not given by a transferor or collecting bank under  
51 applicable conflict of law rules, the warranty is not given  
52 to that transferor when that transferor is a transferee or to  
53 any prior collecting bank of that transferee.

**§46-4-208. Presentment warranties.**

1 (a) If an unaccepted draft is presented to the drawee  
2 for payment or acceptance and the drawee pays or accepts  
3 the draft, (i) the person obtaining payment or acceptance,  
4 at the time of presentment and (ii) a previous transferor of  
5 the draft, at the time of transfer, warrant to the drawee that  
6 pays or accepts the draft in good faith that:

7 (1) The warrantor is, or was, at the time the warrantor  
8 transferred the draft, a person entitled to enforce the draft  
9 or authorized to obtain payment or acceptance of the draft  
10 on behalf of a person entitled to endorse the draft;

11 (2) The draft has not been altered;

12 (3) The warrantor has no knowledge that the signature  
13 of the purported drawer of the draft is unauthorized; and

14 (4) If the instrument is a demand draft, the creation of  
15 the draft according to the terms on its face was authorized  
16 by the person identified as drawer.

17 (b) A drawee making payment may recover from a  
18 warrantor damages for breach of warranty equal to the  
19 amount paid by the drawee less the amount the drawee  
20 received or is entitled to receive from the drawer because  
21 of the payment. In addition, the drawee is entitled to  
22 compensation for expenses and loss of interest resulting  
23 from the breach. The right of the drawee to recover  
24 damages under this subsection is not affected by any  
25 failure of the drawee to exercise ordinary care in making  
26 payment. If the drawee accepts the draft, (i) breach of

27 warranty is a defense to the obligation of the acceptor and  
28 (ii) if the acceptor makes payment with respect to the  
29 draft, the acceptor is entitled to recover from a warrantor  
30 for breach of warranty the amounts stated in this  
31 subsection.

32 (c) If a drawee asserts a claim for breach of warranty  
33 under subsection (a) based on an unauthorized  
34 indorsement of the draft or an alteration of the draft, the  
35 warrantor may defend by proving that the indorsement is  
36 effective under section 3-404 or 3-405 or the drawer is  
37 precluded under section 3-406 or 4-406 from asserting  
38 against the drawee the unauthorized indorsement or  
39 alteration.

40 (d) If, (i) a dishonored draft is presented for payment  
41 to the drawer or an indorser or (ii) any other item is  
42 presented for payment to a party obliged to pay the item,  
43 and the item is paid, the person obtaining payment and a  
44 prior transferor of the item warrant to the person making  
45 payment in good faith that the warrantor is, or was, at the  
46 time the warrantor transferred the item, a person entitled to  
47 enforce the item or authorized to obtain payment on  
48 behalf of a person entitled to enforce the item. The  
49 person making payment may recover from any warrantor  
50 for breach of warranty an amount equal to the amount  
51 paid plus expenses and loss of interest resulting from the  
52 breach.

53 (e) The warranties stated in subsections (a) and (d)  
54 cannot be disclaimed with respect to checks. Unless notice  
55 of a claim for breach of warranty is given to the warrantor  
56 within thirty days after the claimant has reason to know of  
57 the breach and the identity of the warrantor, the warrantor  
58 is discharged to the extent of any loss caused by the delay  
59 in giving notice of the claim.

60 (f) A cause of action for breach of warranty under this  
61 section accrues when the claimant has reason to know of  
62 the breach.

63 (g) If the warranty under subdivision four, subsection  
64 (a) is not given by a transferor under applicable conflict

65 of law rules, the warranty is not given to that transferor  
66 when that transferor is a transferee.

**CHAPTER 46A. WEST VIRGINIA CONSUMER CREDIT  
AND PROTECTION ACT.**

**ARTICLE 6E. TELEMARKETING.**

**PART I. DEFINITIONS.**

**§46A-6E-101. Applicability of definitions.**

1 For the purposes of this article, the words or terms  
2 defined in this part have the meanings ascribed to them.  
3 These definitions are applicable unless a different  
4 meaning clearly appears from the context.

**§46A-6E-102. Chance promotion.**

1 "Chance promotion" means any plan in which  
2 premiums are distributed by random or chance selection.

**§46A-6E-103. Consumer; purchaser.**

1 "Consumer" or "purchaser" means a person who is  
2 solicited to become or does become obligated to pay for  
3 consumer goods or services offered by a telemarketer  
4 through telemarketing.

**§46A-6E-104. Consumer goods or services.**

1 "Consumer goods or services" means:

2 (1) Any property or services offered or sold to a  
3 natural person primarily for personal, family, household  
4 or agricultural purposes;

5 (2) Any property or service offered or sold for the  
6 purpose of providing a profit or investment opportunity;  
7 or

8 (3) Any property intended to be attached to or  
9 installed in any real property, without regard to whether it  
10 is so attached or installed, as well as timeshare estates and  
11 licenses, resort and campground memberships, and any  
12 services related to such property.

**§46A-6E-105. Division.**

1 "Division" means the consumer protection division  
2 of the office of the attorney general.

**§46A-6E-106. Individual.**

1 "Individual" means a single human being and does  
2 not mean a firm, association of individuals, corporation,  
3 partnership, joint venture, sole proprietorship, or any other  
4 entity.

**§46A-6E-107. Investment opportunity.**

1 "Investment opportunity" means anything tangible  
2 or intangible, that is offered for sale, sold or traded based,  
3 wholly or in part, on representations, either express or  
4 implied, about past, present or future income, profit or  
5 appreciation.

**§46A-6E-108. Material aspect or element.**

1 "Material aspect or element" means any factor likely  
2 to affect a person's choice of, or conduct regarding, goods  
3 or services and includes currency values and comparative  
4 expressions of value including, but not limited to,  
5 percentages or multiples.

**§46A-6E-109. Person.**

1 "Person" includes any individual, group of  
2 individuals, firm, association, corporation, partnership,  
3 joint venture, sole proprietorship, or any other business  
4 entity.

**§46A-6E-110. Prize, gift or award.**

1 "Prize, gift or award" means anything offered or  
2 given, or purportedly offered or given, to a consumer as  
3 part of a prize promotion.

**§46A-6E-111. Prize promotion.**

1 "Prize promotion" means:  
2 (1) A sweepstakes or other game of chance; or  
3 (2) An oral or written express or implied  
4 representation that a person has won, has been selected to  
5 receive, or may be eligible to receive a prize, gift or award.

**§46A-6E-112. Telemarketing solicitation.**

1 (a) "Telemarketing solicitation" means and includes  
2 any communication between a telemarketer and a  
3 prospective purchaser for the purpose of selling or  
4 attempting to sell the purchaser any consumer goods or  
5 services, if it is intended by the telemarketer that an  
6 agreement to purchase the consumer goods or services will  
7 be made after any of the following events occur:

8 (1) The telemarketer makes an unsolicited telephone  
9 call to a consumer, attempting to sell consumer goods or  
10 services to the consumer, when the consumer has not  
11 previously expressed an interest to the telemarketer in  
12 purchasing, investing in, or obtaining information  
13 regarding, the consumer goods or services offered by the  
14 telemarketer; or

15 (2) The telemarketer communicates with a consumer  
16 by any means and invites or directs the consumer to  
17 respond by any means to the telemarketer's  
18 communications, and the telemarketer intends to enter into  
19 an agreement with the consumer for the purchase of  
20 consumer goods or services at some time during the  
21 course of one or more subsequent telephone  
22 communications with the consumer.

23 (b) For purposes of this article, "communication"  
24 means a written or oral notification or advertisement  
25 transmitted from a telemarketer to a consumer by any  
26 means.

**§46A-6E-113. Telemarketer.**

1 (a) "Telemarketer" means any person who initiates or  
2 receives telephone calls to or from a consumer in this state  
3 for the purpose of making a telemarketing solicitation as  
4 defined in section one hundred thirteen of this article.

5 (b) A telemarketer may initiate or receive a  
6 communication that constitutes a telemarketing solicitation  
7 on his own behalf, through a salesperson, or through an  
8 automated dialing machine.

9 (c) A telemarketer does not include any of the persons  
10 or entities exempted pursuant to Part II of this article.

11 (d) A telemarketer does not include a salesperson as  
12 defined in section one hundred fourteen of this article.

13 (e) A telemarketer includes, but is not limited to,  
14 owners, operators, officers, directors, partners, or other  
15 individuals engaged in the management activities of a  
16 business entity that is subject to licensing and registration  
17 pursuant to this article.

**§46A-6E-114. Telemarketer in good standing.**

1 "Telemarketer in good standing" means a  
2 telemarketer who, during the previous two years has  
3 continually been engaged in the business of telemarketing  
4 and who has not been convicted, or pled guilty or nolo  
5 contendere to racketeering, embezzlement, fraudulent  
6 conversion, misappropriation of property or any violations  
7 of state or federal securities laws, a theft offense, or any  
8 consumer protection law or telemarketing law.

PART II. EXEMPT PERSONS OR ENTITIES.

**§46A-6E-201. Inapplicability of registration and bonding provisions of this article to charitable organizations.**

1 A charitable organization that is exempt from filing an  
2 annual registration statement with the secretary of state  
3 under the provisions of section six, article nineteen,  
4 chapter twenty-nine of this code is exempt from the  
5 registration and bonding provisions of this article when  
6 making a telemarketing solicitation.

**§46A-6E-202. Inapplicability of article to licensed securities, commodities, or investment broker, dealer, or investment adviser.**

1 The provisions of this article do not apply to any  
2 licensed securities, commodities, or investment broker,  
3 dealer, or investment adviser, when soliciting within the  
4 scope of his license. As used in this section, "licensed  
5 securities, commodities, or investment broker, dealer, or  
6 investment adviser" means a person who is licensed or

7 registered as such by the securities and exchange  
8 commission, by the national association of securities  
9 dealers or some other self-regulatory organization as  
10 defined by the Securities Exchange Act of 1934 (15  
11 U.S.C. § 781), or by an official or agency of this state or  
12 of any state of the United States.

**§46A-6E-203. Inapplicability of article to licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser.**

1 The provisions of this article do not apply to any  
2 licensed associated person of a securities, commodities, or  
3 investment broker, dealer, or investment adviser, when  
4 soliciting within the scope of his license. As used in this  
5 section, “licensed associated person of a securities,  
6 commodities, or investment broker, dealer, or investment  
7 adviser” means any associated person registered or  
8 licensed by the National Association of Securities Dealers  
9 or other self-regulatory organization as defined by the  
10 Securities Exchange Act of 1934 (15 U.S.C. §781) or by  
11 an official or agency of this state or of any state of the  
12 United States.

**§46A-6E-204. Inapplicability of article to person who does not make the major sales presentation.**

1 The provisions of this article do not apply to a person  
2 who does not make the major sales presentation during the  
3 telephone solicitation and who does not intend to, and  
4 does not actually, complete or obtain provisional  
5 acceptance of a sale during the telephone solicitation, but  
6 who makes the major sales presentation and completes the  
7 sale at a later face-to-face meeting between the seller and  
8 the prospective consumer in accordance with the home  
9 solicitation provisions in this chapter and as a home  
10 solicitation sale as defined by section one hundred two,  
11 article one of this chapter. However, if a seller, in violation  
12 of subdivision (4) subsection (a) section five hundred one  
13 of this article, causes an individual to go to the prospective  
14 consumer for the primary purpose of collecting payment  
15 or delivering any item purchased, this exemption does not  
16 apply.



**§46A-6E-205. Inapplicability of article to person who solicits sales by catalog.**

1 The provisions of this article do not apply to a person  
2 who solicits sales by periodically publishing and  
3 delivering a catalog of a seller's merchandise to  
4 prospective purchasers, if the catalog:

5 (1) Contains a written description or illustration of  
6 each item offered for sale;

7 (2) Includes the business address or home address of  
8 the seller;

9 (3) Includes at least twenty pages of written material  
10 and illustrations and is distributed in more than one state;  
11 and

12 (4) Has an annual circulation, by mailing, of not less  
13 than one hundred fifty thousand catalogs.

**§46A-6E-206. Inapplicability of article to business-to-business sale.**

1 The provisions of this article do not apply to a  
2 business-to-business sale.

**§46A-6E-207. Inapplicability of article to person who solicits contracts for the maintenance or repair of goods.**

1 The provisions of this article do not apply to a person  
2 who solicits contracts for the maintenance or repair of  
3 goods previously purchased from the person making the  
4 solicitation or on whose behalf the solicitation is made.

**§46A-6E-208. Inapplicability of article to person soliciting a transaction regulated by the Commodity Futures Trading Commission.**

1 The provisions of this article do not apply to a person  
2 soliciting a transaction regulated by the federal  
3 commodity futures trading commission if the person is  
4 registered or temporarily licensed for this activity with the  
5 commodity futures trading commission under the  
6 Commodity Exchange Act (7 U.S.C. §1 *et seq.*) and the

7 registration or license has not expired or been suspended  
8 or revoked.

**§46A-6E-209. Inapplicability of article to supervised financial organization.**

1 The provisions of this article do not apply to any  
2 supervised financial organization or an affiliate or  
3 subsidiary thereof or regulated consumer lender subject to  
4 regulation by the commissioner of banking or a federal  
5 agency charged with regulating such supervised financial  
6 organizations or regulated consumer lenders when acting  
7 within the scope of the supervised or regulated activity.  
8 As used in this section, the terms “supervised financial  
9 organization” and “regulated consumer lender” shall  
10 have the same meanings as ascribed to them in section one  
11 hundred two, article one of this chapter.

**§46A-6E-210. Inapplicability of article to licensed insurance broker, agent, customer representative, or solicitor.**

1 The provisions of this article do not apply to any  
2 licensed insurance broker, agent, customer representative,  
3 or solicitor when soliciting within the scope of his or her  
4 license. As used in this section, “licensed insurance  
5 broker, agent, customer representative, or solicitor” means  
6 any insurance broker, agent, customer representative, or  
7 solicitor licensed by an official or agency of this state  
8 pursuant to subsection (a), section one, article twelve,  
9 chapter thirty-three of this code, or of any state of the  
10 United States.

**§46A-6E-211. Inapplicability of article to person soliciting the sale of services provided by a cable television system.**

1 The provisions of this article do not apply to a person  
2 soliciting the sale of services provided by a cable television  
3 system operating under authority of a franchise or permit,  
4 or to a person soliciting the sale of subscriber television  
5 services or advertising.

**§46A-6E-212. Inapplicability of article to certain telephone and communications companies.**

1 The provisions of this article do not apply to any of  
2 the following entities to the extent that its acts or practices  
3 are subject to the jurisdiction or regulation of the West  
4 Virginia public service commission or the federal  
5 communications commission:

6 (1) A telephone company, or any affiliate or agent of  
7 a telephone company; or

8 (2) Any provider of commercial mobile service, as  
9 defined by the communications act of 1934, as amended  
10 by the telecommunications act of 1966 (47 U.S.C. §151,  
11 et seq.).

**§46A-6E-213. Inapplicability of article to persons maintaining continuing business locations for sales of consumer goods or services.**

1 The provisions of this article do not apply to a person  
2 who offers to sell consumer goods or services through  
3 telemarketing activities if the person maintains a  
4 permanent business location under the same exact name as  
5 that used in connection with the telemarketing sales, and  
6 both of the following activities occur on a continuing  
7 basis:

8 (1) The identical consumer goods or services offered  
9 for sale by the person through telemarketing activities are  
10 offered for sale at the person's business location; and

11 (2) More than fifty percent of all of the consumer  
12 goods or services offered for sale by the person are  
13 provided to consumers at the person's business location  
14 rather than through telemarketing sales.

**§46A-6E-214. Inapplicability of article to issuer of certain securities.**

1 The provisions of this article do not apply to an issuer  
2 or a subsidiary of an issuer that has a class of securities  
3 which is subject to §12 of the Securities Exchange Act of  
4 1934 (15 U.S.C. § 781) and which is either registered or  
5 exempt from registration under paragraphs (A), (B), (C),  
6 (E), (F), (G), or (H) of subsection (g)(2) of that section.

**§46A-6E-215. Inapplicability of article to book, video, record, or multimedia club.**

1 The provisions of this article do not apply to a book,  
2 video, record, or multimedia club or contractual plan or  
3 arrangement:

4 (1) Under which the seller provides the consumer with  
5 a form which the consumer may use to instruct the seller  
6 not to ship the offered merchandise;

7 (2) That is regulated by the Federal trade commission  
8 trade regulation concerning use of negative option plans  
9 by sellers in commerce; or

10 (3) That provides for the sale of books, records,  
11 videos, multimedia products or other goods that are not  
12 covered under subdivisions (1) or (2) of this section,  
13 including continuity plans, subscription arrangements,  
14 standing order arrangements, single sales of items offered  
15 for sale one time, supplements, and series arrangements  
16 under which the seller periodically ships merchandise to a  
17 consumer who has consented in advance to receive such  
18 merchandise on a periodic basis.

**§46A-6E-216. Inapplicability of article to registered developer or a real estate salesperson or broker.**

1 The provisions of this article do not apply to a person  
2 who is licensed as a real estate broker, associate broker, or  
3 real estate salesperson, in accordance with the provisions  
4 of article twelve, chapter forty-seven of this code, when  
5 such person is acting within the scope of their license.

**§46A-6E-217. Inapplicability of article to person soliciting the sale of electric or natural gas energy or related goods or services.**

1 The provisions of this article do not apply to a person  
2 soliciting on behalf of an entity that sells electric or  
3 natural gas energy, or an affiliate of such an entity, if the  
4 solicitation is for the sale of electric or natural gas energy  
5 or related goods and services, and the transaction is  
6 governed and regulated by the public service commission  
7 or the federal energy regulatory commission.

**§46A-6E-218. Inapplicability of article to person soliciting the sale of a magazine or newspaper.**

1 The provisions of this article do not apply to a person  
2 primarily soliciting the sale of a single magazine  
3 subscription or subscription to a newspaper of general  
4 circulation or the sale of advertisements therein.

**§46A-6E-219. Inapplicability of article to certain telemarketers based on continuous sales and gross sales for exempt persons.**

1 The provisions of this article do not apply to any  
2 telemarketer, in good standing, who has been providing  
3 telemarketing sales services continuously for at least two  
4 years under the same name and ownership and which  
5 derives fifty percent of its gross telemarketing sales  
6 revenues from contracts with persons exempted from this  
7 part: *Provided*, That telemarketers under this exemption  
8 must register, without bond, with the secretary of tax and  
9 revenue to establish eligibility for this exemption.

**§46A-6E-220. Inapplicability of article to the annual sale of less than one hundred dollars for food stuffs and edibles.**

1 The provisions of this article do not apply to a person  
2 soliciting the sale of food stuffs and edibles, except  
3 vitamins, if the solicitations neither intends to result in, or  
4 actually results in a sale or sales which costs the consumer  
5 in excess of one hundred dollars annually to a single  
6 address: *Provided*, That such sales are not solicited by  
7 professional telemarketers.

PART III. REGISTRATION, SECURITY AND RECORD KEEPING.

**§46A-6E-301. Registration of telemarketers.**

1 (a) No person shall act as a telemarketer without first  
2 having registered with the secretary of the department of  
3 tax and revenue.

4 (b) The initial application for registration shall be  
5 made at least sixty days prior to offering consumer goods  
6 or services, or offering for sale consumer goods or  
7 services through any medium, and an application for

8 renewal shall be made on an annual basis thereafter. The  
9 department of tax and revenue shall charge reasonable  
10 application and renewal fees for administration of the  
11 registration requirements pursuant to this article. The  
12 application and renewal fees shall be established through  
13 the promulgation of a legislative rule pursuant to chapter  
14 twenty-nine-a of this code. The fees so collected shall be  
15 deposited into the state treasury to the credit of the special  
16 revenue fund known as the "telemarketer registration  
17 fund" pursuant to section three hundred four of this  
18 article.

19 (c) The application for a certificate of registration or  
20 renewal shall include, but not be limited to, the following  
21 information:

22 (1) The true name, mailing address, telephone number  
23 and physical address of the telemarketer, including each  
24 name under which the telemarketer intends to engage in  
25 telemarketing;

26 (2) Each occupation or business that the  
27 telemarketer's principal owner has engaged in for two  
28 years immediately preceding the date of the application,

29 (3) Whether any principal or manager has been  
30 convicted, or pled guilty to, or is being prosecuted by  
31 indictment for, racketeering, any violations of state or  
32 federal securities laws, a theft offense, or any consumer  
33 protection law or telemarketing law;

34 (4) Whether there has been entered against any  
35 principal or manager an injunction, temporary restraining  
36 order or a final judgment in any civil or administrative  
37 action, involving fraud, theft, racketeering, embezzlement,  
38 fraudulent conversion, misappropriation of property, or  
39 any consumer protection law or telemarketing law,  
40 including any pending litigation against the applicant;

41 (5) Whether the telemarketer, at any time during the  
42 previous seven years, has filed for bankruptcy, been  
43 adjudged bankrupt or been reorganized because of  
44 insolvency;

45 (6) The true name, current home address, date of birth,  
46 social security number and all other names of the  
47 following:

48 (A) Each person participating in or responsible for the  
49 management of the seller's business;

50 (B) Each person, office manager, or supervisor  
51 principally responsible for the management of the seller's  
52 business.

53 (7) The name, address and account number of every  
54 institution where banking or any other monetary  
55 transactions are done by the seller.

**§46A-6E-302. Security requirement.**

1 (a) An application for registration or renewal shall be  
2 accompanied by a continuing surety bond executed by a  
3 corporation that is licensed to transact the business of  
4 fidelity and surety insurance in the state of West Virginia.  
5 The bond must be approved by the department of tax and  
6 revenue before a certificate of registration is issued in  
7 accordance with the provisions of section three hundred  
8 one of this article. A separate bond in the amount of one  
9 hundred thousand dollars may be filed for each  
10 telemarketing location, including each principal office and  
11 each branch office thereof, or a single bond in the amount  
12 of five hundred thousand dollars may be filed for all  
13 locations of the telemarketer.

14 (b) The bond shall provide that the telemarketer will  
15 pay all damages to the State or a private person resulting  
16 from any unlawful act or action by the telemarketer or its  
17 agent in connection with the conduct of telemarketing  
18 activities.

19 (c) The registration of any telemarketer shall be void  
20 upon termination of the bond of the surety company, or  
21 loss of the bond, unless, prior to such termination, a new  
22 bond has been filed with the department of tax and  
23 revenue. The surety, for any cause, may cancel the bond  
24 upon giving a sixty day written notice by certified mail to  
25 the telemarketer and to the department of tax and revenue.  
26 Unless the bond is replaced by that of another surety

27 before the expiration of the sixty day notice of  
28 cancellation, the registration of the telemarketer shall be  
29 treated as lapsed.

30 (d) The surety bond shall remain in effect for three  
31 years from the period the telemarketing business ceases to  
32 operate in this state.

33 (e) Any business required under this article to file a  
34 bond with a registration application, may file, in lieu  
35 thereof, an irrevocable letter of credit, with annual  
36 renewals, a certificate of deposit, cash or Government  
37 bond in the same amount as would be required for the  
38 bond. The department of tax and revenue shall deposit  
39 any such funds in an interest bearing account. The  
40 department of tax and revenue shall hold such letter of  
41 credit, cash, certificate of deposit or government bond for  
42 three years from the period the telemarketing business  
43 ceases to operate or registration lapses, in order to pay  
44 claims made against the telemarketing business during its  
45 period of operation. At the end of the three year term all  
46 interest accrued, not required for payment of claims, shall  
47 be remitted to the telemarketer.

48 (f) The registration of the telemarketing business will  
49 be treated as lapsed if at any time, the amount of the letter  
50 of credit, bond, cash, certificate of deposit or government  
51 bond falls below the amount required by this section.

52 (g) Should the license of any surety company to  
53 transact business in this state be terminated, all bonds  
54 given pursuant to this article upon which such company is  
55 surety shall thereupon be suspended, and the department  
56 of tax and revenue shall immediately notify each affected  
57 licensee of such suspension and require that a new bond  
58 be filed. This notice shall be sent by registered or  
59 certified mail, return receipt requested, and shall be  
60 addressed to the telemarketer at his or its principal place  
61 of business as shown by the department of tax and  
62 revenue records. The failure of any telemarketer to file a  
63 bond with new or additional surety within thirty days after  
64 being advised in writing by the department of tax and  
65 revenue of the necessity to do so shall be cause for the



66 department of tax and revenue to revoke the  
67 telemarketer's registration.

68 (h) An action may be brought in any court of  
69 competent jurisdiction upon the bond by any person to  
70 whom the licensee fails to account and pay as set forth in  
71 such bond. The aggregate liability of the surety company  
72 to all persons injured by a telemarketer's violations may  
73 not exceed the amount of the bond.

**§46A-6E-303. Failure to register or meet security requirement; remedies.**

1 (a) Any person is subject to a civil administrative  
2 penalty, to be levied by the department of tax and revenue,  
3 of not more than five thousand dollars if the person:

4 (1) Acts as a telemarketer without first registering  
5 pursuant to section three hundred one of this article;

6 (2) Acts as a telemarketer without first meeting the  
7 security requirements set forth in section three hundred  
8 two of this article;

9 (3) Acts as a telemarketer after failing to maintain a  
10 certificate of registration accompanied by a surety bond as  
11 required by sections three hundred one and three hundred  
12 two of this article;

13 (4) Includes any material information on a registration  
14 application that is false or misleading; or

15 (5) Misrepresents that a telemarketer is registered.

16 In assessing a civil administrative penalty, department  
17 of tax and revenue shall take into account the seriousness  
18 of the violation, any good faith efforts to comply with  
19 applicable requirements, any benefit obtained by the act  
20 or omission, and any other appropriate factors as the  
21 department of tax and revenue may establish by rules  
22 proposed for promulgation by the legislature in  
23 accordance with the provisions of article three, chapter  
24 twenty-nine-a of this code.

25 (b) No assessment shall be levied pursuant to  
26 subsection (a) of this section until after the alleged violator

27 has been notified by certified mail or personal service.  
28 The notice shall include:

29 (1) A reference to this section, sections three hundred  
30 one and three hundred two of this article, and any  
31 legislative rule that was allegedly violated;

32 (2) A concise statement of the facts alleged to  
33 constitute the violation;

34 (3) A statement of the amount of the administrative  
35 penalty to be imposed; and

36 (4) A statement of the alleged violator's right to an  
37 informal hearing.

38 (c) The alleged violator has twenty calendar days from  
39 receipt of the notice within which to deliver to the  
40 department of tax and revenue a written request for a  
41 hearing. If no hearing is requested, the notice becomes a  
42 final order after the expiration of the twenty-day period.  
43 If a hearing is requested, the department of tax and  
44 revenue shall inform the alleged violator of the time and  
45 place of the hearing. The department of tax and revenue  
46 may appoint a hearing examiner to conduct the hearing  
47 and then make a written recommendation to the  
48 department of tax and revenue concerning the assessment  
49 of a civil administrative penalty. Within thirty days  
50 following the hearing, the department of tax and revenue  
51 shall issue and furnish to the alleged violator a written  
52 decision which explains the rationale for any assessment of  
53 a administrative penalty. The authority to levy an  
54 administrative penalty is in addition to all other  
55 enforcement provisions of this article and the payment of  
56 any assessment does not affect the availability of any other  
57 enforcement provision in connection with the violation for  
58 which the assessment is levied. No assessment levied  
59 pursuant to this section becomes due and payable until the  
60 procedures for review of such assessment as set out in this  
61 subsection have been completed.

62 (d) The department of tax and revenue may seek an  
63 injunction, or may institute a civil action against any  
64 person allegedly in violation of the provisions of this

65 section, sections three hundred one and three hundred two  
66 of this article. An application for injunctive relief or civil  
67 action under this section may be filed and relief granted  
68 notwithstanding the fact that all administrative remedies  
69 provided for in this article have not been exhausted or  
70 invoked against the person or persons against whom such  
71 relief is sought. Upon request of the department of tax  
72 and revenue, the division or the prosecuting attorney of  
73 the county in which the violation occurs shall assist the  
74 department of tax and revenue in any civil action under  
75 this section.

76 (e) Independently of the department of tax and  
77 revenue, with respect to any action brought by the division  
78 or a private citizen regarding unfair or deceptive acts or  
79 practices, or abusive acts or practices under the provisions  
80 of this article or under other applicable consumer  
81 protection laws set forth in this code, the division or a  
82 private citizen may also apply to the court for appropriate  
83 relief under this section against a person violating the  
84 provisions of sections three hundred one and three  
85 hundred two of this article, pending final determination of  
86 the proceedings.

87 (f) Any funds recovered and all registration fees, as  
88 provided for in this article, shall be paid into the state  
89 treasury to the credit of a special revenue fund to be  
90 known as the "telemarketer registration fund" which is  
91 hereby created. The moneys so credited to the fund shall  
92 be used solely for the purposes of administering and  
93 enforcing the registration and security requirements of  
94 this article.

**§46A-6E-304. Record keeping requirements.**

1 (a) A telemarketer shall keep for a period of four  
2 years from the date the record is produced the following  
3 records related to its telemarketing activities:

4 (1) One of each advertisement, brochure and other  
5 promotional materials;

6 (2) The name and last known address of each prize  
7 recipient and the prize awarded for prizes that are

8 represented, directly or by implication, to have a value of  
9 twenty-five dollars or more;

10 (3) The name and last known address of each  
11 customer, the goods or services purchased, the date such  
12 goods or services were shipped or provided, and the  
13 amount paid by the customer for the goods or services;

14 (4) The name, last known home address and telephone  
15 number, and the job title for all current and former  
16 employees directly involved in telephone sales;

17 (5) All verifiable authorizations required to be  
18 provided or received under this article; and

19 (6) A copy of all scripts, outlines or presentation  
20 material the seller will require the telemarketer to use when  
21 soliciting, as well as all sales information to be provided by  
22 the seller to a purchaser in connection with any  
23 solicitation.

24 (b) A seller or telemarketer may keep the records  
25 required by subsection (a) of this section in any form, and  
26 in any manner, format, or place as they keep such records  
27 in the ordinary course of business. Failure to keep all  
28 records required by subsection (a) of this section shall be  
29 a violation of this article.

30 (c) The telemarketer is responsible for complying with  
31 the above provisions.

32 (d) In the event of any dissolution or termination of  
33 the seller's or telemarketer's business, the principal of that  
34 telemarketer shall maintain all records as required under  
35 this section. In the event of any sale, assignment or other  
36 change in ownership of the seller's business, the successor  
37 shall maintain all records required under this section.

38 (e) (1) The division may require a telemarketer to file  
39 true copies of all scripts, outlines and promotional material  
40 and any modifications thereto with the division of  
41 consumer protection for a time period to be determined  
42 by the division. Such filing may be required upon an  
43 investigation and finding by the division that:

44 (A) A telemarketer is using scripts, outlines or  
45 presentation material that contain material  
46 misrepresentations or that fail to state material facts; or

47 (B) A telemarketer is deviating from scripts, outlines  
48 or presentation material so as to make material  
49 misrepresentations or to fail to state material facts.

50 (2) The attorney general shall comply with the  
51 requirements of article five, chapter twenty-nine-a of this  
52 code for hearings requested pursuant to part III.

PART IV. DISCLOSURES AND CONTRACT REQUIREMENTS.

**§46A-6E-401. Mandatory disclosures.**

1 (a) A telemarketer shall promptly disclose, in a clear  
2 and conspicuous manner, the following material  
3 information when making a telemarketing communication  
4 with a consumer:

5 (1) The true identity of the telemarketer;

6 (2) That the purpose of the call is to sell consumer  
7 goods or services; and

8 (3) The nature of the goods or services offered for  
9 sale.

10 (b) Before a consumer pays for the goods or services  
11 offered for sale, the telemarketer shall disclose, in a clear  
12 and conspicuous manner, the following material  
13 information:

14 (1) The total costs to purchase, receive or use the  
15 consumer goods or services that are the subject of the  
16 telemarketing communication;

17 (2) The quantity of the consumer goods or services  
18 that are the subject of the telemarketing solicitation;

19 (3) All material restrictions, limitations or conditions  
20 to purchase, receive, or use the consumer goods or services  
21 that are the subject of the telemarketing solicitation;

22 (4) All material aspects of the performance, quality,  
23 efficacy, nature or basic characteristics of the consumer

24 goods or services that are the subject of the telemarketing  
25 solicitation;

26 (5) All material aspects of the nature or terms of the  
27 telemarketer's refund, cancellation, exchange or  
28 repurchase policies;

29 (6) All material aspects of a prize promotion, disclosed  
30 prior to requesting the consumer to enter into a sale or  
31 lease, including, but not limited to, the following:

32 (A) A description of the prizes, gifts or awards offered  
33 or to be given to consumers participating in the prize  
34 promotion;

35 (B) A statement of the true retail value of each prize,  
36 gift or award offered or to be given to participating  
37 consumers;

38 (C) A clear identification of the person or entity on  
39 whose behalf the contest or promotion is conducted;

40 (D) A description of all material conditions which a  
41 participant must satisfy;

42 (E) A clear and unequivocal statement that the  
43 consumer is not required to make any purchase, lease or  
44 rental of consumer goods or services in order to qualify  
45 for any prize, gift or award or to otherwise participate in  
46 the prize promotion;

47 (F) A clear and unequivocal statement that the  
48 consumer is not required to pay any handling or shipping  
49 costs or to make any other payment of any kind in order  
50 to win or receive a prize, gift or award or to otherwise  
51 participate in the prize promotion;

52 (G) The actual numbers of the prizes, gifts or awards  
53 to be awarded;

54 (H) The odds of receiving a prize, gift or award; and

55 (I) A clear explanation of the no-purchase/no-  
56 payment method of participating in the prize promotion,  
57 with instructions on how to participate.

58 (7) All material aspects of any investment opportunity  
59 being offered, including, but not limited to, a description  
60 of the following factors:

61 (A) Risk;

62 (B) Liquidity;

63 (C) Earnings potential;

64 (D) Profitability;

65 (E) Benefits; and

66 (F) If applicable, the value, price and location of any  
67 real or personal property that the consumer will acquire  
68 by investing.

**§46A-6E-402. Accepting returns or canceling services.**

1 (a) Every telemarketer shall, at a minimum, have the  
2 following policy:

3 (1) Accepting returns or canceling services for a  
4 period of not less than seven days after the date of  
5 delivery to the consumer and providing a cash refund for  
6 a cash purchase or issuing a credit for a credit purchase,  
7 which credit is applied to the account to which the  
8 purchase was debited in connection with the return of its  
9 unused and undamaged merchandise or canceled services.  
10 For purposes of this subsection, it will be presumed that  
11 goods were received seven days after they were mailed  
12 unless it can be clearly demonstrated that the goods were  
13 not received or received at a later date;

14 (2) Disclosing the telemarketer's return and refund  
15 policy to the buyer, orally by telephone or in writing with  
16 advertising, promotional material, or with delivery of the  
17 products or service; and

18 (3) Restoring such payment or issuing such credit, as  
19 required under subdivision (1) of this section, within thirty  
20 days after the date on which the telemarketer receives  
21 returned merchandise or notice of cancellation of services.  
22 A seller who discloses, in writing, that a sale is made or  
23 provided "satisfaction guaranteed," with "free

24 inspection,” “no risk guarantee,” or similar words or  
25 phrases, shall be deemed to meet the requirements of the  
26 review and return for refund policy set forth in this  
27 subparagraph.

28 (b) Failure to comply with the provisions of this  
29 section is unfair or deceptive act or practice.

PART V. UNFAIR OR DECEPTIVE ACTS OR PRACTICES; PENALTIES.

**§46A-6E-501. Unfair or deceptive acts or practices.**

1 (a) It is an unfair or deceptive act or practice and a  
2 violation of this article for any seller or telemarketer to  
3 engage in the following conduct:

4 (1) To advertise or represent that registration as a  
5 telemarketer equals an endorsement or approval by the  
6 state or any governmental agency of the state;

7 (2) To request or receive payment of any fee or  
8 consideration for goods or services represented to remove  
9 derogatory information from, or improve, a person's credit  
10 history, credit record, or credit rating until:

11 (A) The time frame in which the telemarketer has  
12 represented all of the goods or services will be provided to  
13 that person has expired; and

14 (B) The telemarketer has provided the person with  
15 documentation in the form of a consumer report from a  
16 consumer reporting agency demonstrating that the  
17 promised results have been achieved, such report having  
18 been issued more than six months after the results were  
19 achieved;

20 (3) To obtain or submit for payment a check, draft, or  
21 other form of negotiable paper drawn on a person's  
22 checking, savings, share, or similar account, without that  
23 person's express verifiable authorization. Such  
24 authorization shall be deemed verifiable if any of the  
25 following means are employed:

26 (A) Express written authorization by the customer,  
27 which may include the customer's signature on the  
28 negotiable instrument; or



29 (B) Express oral authorization which is tape recorded  
30 and made available upon request to the customer's bank  
31 and which evidences clearly both the customer's  
32 authorization of payment for the goods and services that  
33 are the subject of the sales offer and the customer's receipt  
34 of all of the following information:

35 (i) The date of the draft(s);

36 (ii) The amount of the draft(s);

37 (iii) The payor's name;

38 (iv) The number of draft payments (if more than one);

39 (v) A telephone number for customer inquiry that is  
40 answered during normal business hours; and

41 (vi) The date of the customer's oral authorization.

42 (C) Written confirmation of the transaction, sent to the  
43 customer prior to submission for payment of the  
44 customer's check, draft, or other form of negotiable paper,  
45 that includes:

46 (i) All of the information contained in  
47 subparagraphs(i) through (vi), paragraph (B), subdivision  
48 (3) of this subsection; and

49 (ii) The procedures by which the customer can obtain  
50 a refund from the telemarketer in the event the  
51 confirmation is inaccurate.

52 (4) To procure the services of any professional  
53 delivery, courier or other pick-up service to obtain  
54 immediate receipt and possession of a consumer's  
55 payment unless:

56 (A) Such service is requested by the consumer;

57 (B) The consumer is informed that he or she can  
58 inspect the goods or services prior to payment and may  
59 refuse to accept the goods or services; and

60 (C) The consumer is actually afforded an opportunity  
61 to inspect the goods or services prior to payment.

62 (5) To engage in any other unfair or deceptive  
63 conduct which will create a likelihood of confusion or  
64 misunderstanding to any reasonable consumer.

65 (6) To misrepresent the requirements of this section.

66 (7) To provide substantial assistance or support to any  
67 telemarketer when that person knows or consciously  
68 avoids knowing that the telemarketer is engaged in any act  
69 or practice that violates this section.

70 (8) To engage in any "unfair methods of competition  
71 and unfair or deceptive acts or practices" as specified in  
72 subsection (f), section one hundred two, article six of this  
73 chapter and made unlawful by the provisions of section  
74 one hundred four, article six of this chapter.

**§46A-6E-502. Causes of action arising out of unfair or  
deceptive acts or practices; limitation of  
actions.**

1 (1) If a telemarketer violates the provisions of section  
2 five hundred one of this article, the consumer has a cause  
3 of action to recover actual damages and, in addition, a  
4 right to recover from the violator a penalty in an amount,  
5 to be determined by the court, of not less than one  
6 hundred dollars nor more than three thousand dollars. No  
7 action brought pursuant to the provisions of this  
8 subsection may be brought more than two years after the  
9 date upon which the violation occurred or the due date of  
10 the last scheduled payment of the agreement, whichever is  
11 later.

12 (2) If a telemarketer violates the provisions of section  
13 five hundred one of this article, any sale or lease of  
14 consumer goods or services is void and the consumer is  
15 not obligated to pay either the principal or any finance  
16 charge. If the consumer has paid any part of the principal  
17 or of the finance charge, he or she has a right to recover  
18 the payment from the violator or from any assignee of the  
19 violator's rights who undertakes direct collection of  
20 payments or enforcement of rights arising from the debt.

21 (3) A consumer is not obligated to pay a charge in  
22 excess of that allowed by the sales agreement, and if the

23 consumer has paid an excess charge, he or she has a right  
24 to a refund. A refund may be made by reducing the  
25 consumer's obligation by the amount of the excess charge.  
26 If the consumer has paid an amount in excess of the  
27 lawful obligation under the agreement, the consumer may  
28 recover in an action the excess amount from the person  
29 who made the excess charge or from an assignee of that  
30 person's rights who undertakes direct collection of  
31 payments from or enforcement of rights against the  
32 consumer arising from the debt.

33 (4) If a telemarketer has contracted for or received a  
34 charge in excess of that allowed by the sales agreement,  
35 the consumer may, in addition to recovering such excess  
36 charge, also recover from the telemarketer or the person  
37 liable in an action a penalty in an amount determined by  
38 the court not less than one hundred dollars nor more than  
39 three thousand dollars. No action brought pursuant to the  
40 provisions of this subsection may be brought more than  
41 two years after the date upon which the violation occurred  
42 or the due date of the last scheduled payment of the  
43 agreement, whichever is later.

44 (5) A telemarketer has no liability for a penalty under  
45 subsection (1) or subsection (4) of this section if, within  
46 fifteen days after discovering an error, and prior to the  
47 institution of an action under this section or the receipt of  
48 written notice of the error, the telemarketer notifies the  
49 consumer of the error and corrects the error.

50 (6) If the telemarketer establishes by a preponderance  
51 of evidence that a violation is unintentional or the result of  
52 a bona fide error of fact notwithstanding the maintenance  
53 of procedures reasonably adapted to avoid any such  
54 violation or error, no liability is imposed under  
55 subsections (1), (2) and (4) of this section, and the validity  
56 of the transaction is not affected.

**§46A-6E-503. Operating a criminal recovery service;  
penalties.**

1 (a) A person is guilty of operating a criminal recovery  
2 service when the person:

3 (1) Makes a representation that he will recover all or  
4 any portion of the consideration that a consumer has paid  
5 to a telemarketer in response to a telemarketing  
6 solicitation;

7 (2) Does not intend to make such recovery or has no  
8 reasonable expectation to anticipate that recovery will be  
9 made; and,

10 (3) Receives any remuneration from the consumer  
11 before a recovery of consideration is made.

12 (b) Any person who violates the provisions of this  
13 section is guilty of a felony, and, upon conviction thereof,  
14 shall be imprisoned in a state correctional center not less  
15 than one year nor more than ten years, or fined not more  
16 than five thousand dollars and confined in a state  
17 correctional center not less than one year nor more than  
18 ten years.

PART VI. ABUSIVE ACTS OR PRACTICES; PENALTIES.

**§46A-6E-601. Abusive acts or practices.**

1 (a) It is an abusive telemarketing act or practice and a  
2 violation of this act for any telemarketer to engage in the  
3 following conduct:

4 (1) Threaten, intimidate or use profane or obscene  
5 language;

6 (2) Engage any person repeatedly or continuously  
7 with behavior a reasonable person would deem to be  
8 annoying, abusive or harassing;

9 (3) Initiate an outbound telephone call to a person  
10 when that person previously has stated that he or she does  
11 not wish to receive an outbound telephone call made by or  
12 on behalf of the telemarketer whose goods or services are  
13 being offered.

14 (4) Engage in telemarketing to a person's residence at  
15 any time other than between eight a.m. and nine p.m.  
16 local time, Monday through Sunday, at the called person's  
17 location, or

18 (5) Engage in any other conduct which would be  
19 considered abusive to any reasonable consumer.

20 (b) A telemarketer will not be liable for violating  
21 subdivision three, subsection (a), of this section if:

22 (1) It has established and implemented written  
23 procedures to avoid outbound telephone calls to persons  
24 who have previously stated that they do not wish to receive  
25 such calls;

26 (2) It has trained its personnel in the procedures  
27 established pursuant to subdivision one of this subsection;

28 (3) The telemarketer has maintained and recorded lists  
29 of persons who have previously stated that they do not  
30 wish to receive such calls; and

31 (4) Any subsequent call is the result of error.

#### PART VII. REMEDIES.

#### **§46A-6E-701. Civil remedies.**

1 (a) If a telemarketer violates the provisions of section  
2 six hundred one of this article, the consumer has a cause  
3 of action to recover actual damages and, in addition, a  
4 right to recover from the violator a penalty in an amount,  
5 to be determined by the court, of not less than one  
6 hundred dollars nor more than three thousand dollars. No  
7 action brought pursuant to the provisions of this  
8 subsection may be brought more than two years after the  
9 date upon which the violation occurred or the due date of  
10 the last scheduled payment of the agreement, whichever is  
11 later.

12 (b) If a telemarketer violates the provisions of section  
13 six hundred one of this article, any sale or lease of  
14 consumer goods or services is void and the consumer is  
15 not obligated to pay either the principal or any finance  
16 charge. If the consumer has paid any part of the principal  
17 or of the finance charge, he or she has a right to recover  
18 the payment from the violator or from any assignee of the  
19 violator's rights who undertakes direct collection of  
20 payments or enforcement of rights arising from the debt.

21 (c) Any consumer that suffers harm as a result of any  
22 abusive act or practice shall receive injunctive or  
23 declaratory relief.

24 (d) The state, on behalf of its residents who have  
25 suffered a loss or harm as a result of a violation of this  
26 article, may seek injunctive or declaratory relief, actual  
27 damages, consumer restitution, civil penalties, forfeiture of  
28 bond, attachment of property, costs, attorneys fees and any  
29 other remedies available to the division under the  
30 provisions of this chapter or otherwise provided by law.

31 (e) In any action brought under this article where  
32 damages are awarded to a consumer, the court may adjust  
33 the damages to account for inflation from the first day of  
34 July, one thousand nine hundred ninety-eight, to the time  
35 of the award of damages, in an amount determined by the  
36 application of data from the consumer price index.  
37 Consumer price index means the last consumer price  
38 index for all consumers published by the United States  
39 department of labor.

**§46A-6E-702. Remedies not exclusive.**

1 Nothing contained in this article shall be construed to  
2 adversely alter or affect a right or benefit accruing to a  
3 consumer or the state in accordance with other provisions  
4 of this chapter, or to limit any civil or criminal remedy  
5 otherwise provided for by law. In the case of provisions  
6 contained in this article that exempt a person from the  
7 requirements of this article or that otherwise limit the  
8 applicability of this article to a person, those provisions are  
9 exclusive to this article and shall not be construed to  
10 otherwise exempt a person or to limit the applicability of  
11 any other provisions of this code.

**§46A-6E-703. Service of process on certain nonresidents.**

1 Any nonresident person, except a nonresident  
2 corporation authorized to do business in this state  
3 pursuant to the provisions of chapter thirty-one of this  
4 code, who directs telemarketing solicitations to persons  
5 residing in this state, shall be conclusively presumed to  
6 have appointed the department of tax and revenue as his

7 attorney-in-fact with authority to accept service of notice  
8 and process in any action or proceeding brought against  
9 him arising out of such consumer credit sale, consumer  
10 lease or consumer loan. A person shall be considered a  
11 nonresident hereunder if he is a nonresident at the time  
12 such service of notice and process is sought. No act of  
13 such person appointing the department of tax and revenue  
14 shall be necessary. Immediately after being served with or  
15 accepting any such process or notice, of which process or  
16 notice two copies for each defendant shall be furnished  
17 the department of tax and revenue with the original notice  
18 or process, together with the fee required by section two,  
19 article one, chapter fifty-nine of this code, the department  
20 of tax and revenue shall file in his office a copy of such  
21 process or notice, with a note thereon endorsed of the time  
22 of service or acceptance, as the case may be, and transmit  
23 one copy of such process or notice by registered or  
24 certified mail, return receipt requested, to such person at  
25 his address, which address shall be stated in such process  
26 or notice: *Provided*, That such return receipt shall be  
27 signed by such person or an agent or employee of such  
28 person if a corporation, or the registered or certified mail  
29 so sent by said department of tax and revenue is refused  
30 by the addressee and the registered or certified mail is  
31 returned to said department of tax and revenue, or to his  
32 office, showing thereon the stamp of the U.S. postal  
33 service that delivery thereof has been refused, and such  
34 return receipt or registered or certified mail is appended to  
35 the original process or notice and filed therewith in the  
36 clerk's office of the court from which such process or  
37 notice was issued. But no process or notice shall be served  
38 on the department of tax and revenue or accepted fewer  
39 than ten days before the return date thereof. The court  
40 may order such continuances as may be reasonable to  
41 afford each defendant opportunity to defend the action or  
42 proceeding.

43 The provisions for service of process or notice herein  
44 are cumulative and nothing herein contained shall be  
45 construed as a bar to the plaintiff in any action from  
46 having process or notice in such action served in any other  
47 mode and manner provided by law.

**CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

**ARTICLE 4. FORGERY AND CRIMES AGAINST THE CURRENCY.**

**§61-4-5. Forging or uttering other writing; penalty; creation of unauthorized demand draft.**

1 (a) If any person forge any writing, other than such as  
2 is mentioned in the first and third sections of this article, to  
3 the prejudice of another's right, or utter or attempt to  
4 employ as true such forged writing, knowing it to be  
5 forged, he shall be guilty of a felony, and, upon  
6 conviction, shall be confined in the penitentiary not less  
7 than one nor more than ten years, or, in the discretion of  
8 the court, be confined in jail not more than one year and  
9 be fined not exceeding five hundred dollars.

10 (b) It is a violation of this section to create a demand  
11 draft under the purported authority of another person for  
12 the purpose of charging the other person's account with a  
13 bank or other financial institution, or to utter or attempt to  
14 employ as true such demand draft, if the demand draft is  
15 created with the intent to defraud, and either or both of the  
16 following elements is present:

17 (1) The person does not, in fact, have the authority to  
18 charge the other person's account; or

19 (2) The amount of the demand draft exceeds the  
20 amount authorized to be charged.

21 (c) If a person creates a demand draft without  
22 authority or which exceeds the amount authorized to be  
23 charged to an account, and the demand draft contains the  
24 account holder's printed or typewritten name or account  
25 number, or a notation that the account holder authorized  
26 the draft, or a statement "No signature required,"  
27 "Authorization on file," "Signature on file," or words to  
28 that effect, the demand draft is the equivalent of a check  
29 on which the drawer's signature is forged or altered.

30 (d) For purposes of this section, the term "demand  
31 draft" shall have the meaning ascribed to it in section one  
32 hundred four, article three, chapter forty-six of this code.



The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Rudy Sprosser*  
Chairman Senate Committee

*Neil Frankel*  
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

*Russell B. Baker*  
Clerk of the Senate

*Bugsy M. Biny*  
Clerk of the House of Delegates

*Earl Ray Tomblin*  
President of the Senate

*[Signature]*  
Speaker of the House of Delegates

The within *approved* this the *8th*  
day of *April*, 1998.

*[Signature]*  
Governor

PRESENTED TO THE

GOVERNOR

Date 4/6/98

Time 11:49am