

**ACTS**  
**OF THE**  
**LEGISLATURE**  
**OF**  
**WEST VIRGINIA**



**Regular Session, 1996**  
**First Extraordinary Session, 1996**

**Volume II**  
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(H. B. 4853—By Delegates Douglas, Hutchins, Kominar, Faircloth,  
Seacrist, Walters and Louisos)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section twenty-seven, article twenty-four, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to establishing the priority of distribution of claims against the estates of hospital service corporations, medical service corporations, dental service corporations and health service corporations in liquidation.

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

That section twenty-seven, article twenty-four, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 24. HOSPITAL SERVICE CORPORATIONS, MEDICAL SERVICE CORPORATIONS, DENTAL SERVICE CORPORATIONS AND HEALTH SERVICE CORPORATIONS.**

**§33-24-27. Order of distribution.**

1 This section, as amended by this act, which  
2 amendment shall be effective from passage, shall  
3 retrospectively apply to and govern all claims filed in any  
4 proceeding to liquidate a corporation which is pending on  
5 the effective date of this section and to all claims filed in  
6 any proceeding to liquidate a corporation that is  
7 commenced on or after the effective date of this revised  
8 section, notwithstanding any other provision of this article.

9 This act is hereby declared to be an emergency  
10 measure necessary for the immediate preservation of the  
11 public peace, health, and safety. Such immediate action is  
12 required to ensure the orderly and prompt payment of  
13 claims filed in pending proceedings to liquidate

14 corporations under this article and such proceedings that  
15 are commenced on or after the effective date of this act.  
16 Therefore, this act shall go into immediate effect upon  
17 passage and have retrospective effect on pending  
18 liquidation proceedings under this article.

19 The priority of distribution of claims from the  
20 corporation estate shall be in accordance with the order in  
21 which each class of claims is herein set forth. Every claim  
22 in each class shall be paid in full or adequate funds  
23 retained for such payment before the members of the next  
24 class receive any payment. No subclasses shall be  
25 established within any class. No claim by a policyholder  
26 or other creditor shall be permitted to circumvent the  
27 priority classes through the use of equitable remedies.  
28 The order of distribution shall be:

29 (a) Class I. The costs and expenses of administration,  
30 including, but not limited to, the following:

31 (1) The actual and necessary costs of preserving or  
32 recovering the assets of the corporation;

33 (2) Compensation for all services rendered in the  
34 liquidation;

35 (3) Any necessary filing fees;

36 (4) The fees and mileage payable to witnesses;

37 (5) Reasonable attorney's fees; and

38 (6) All expenses incurred by the department of  
39 insurance arising out of the enforcement of chapter  
40 thirty-three and its regulations.

41 (b) Class II. All claims for refund of unearned  
42 premiums under nonassessable policies and all claims of  
43 policyholders including such claims of the federal or any  
44 state or local government as policyholders for losses  
45 incurred and third party claims of an insolvent insurer.

46 (c) Class III. Claims of the federal government other  
47 than as an insured policyholder.

48 (d) Class IV. Debts due to employees for compen-  
49 sation under the provision of section thirty-four of this  
50 article and all reasonable claims of the West Virginia

51 insurance guaranty associations and associations or entities  
52 performing a similar function in other states.

53 (e) Class V. Claims of general creditors including  
54 claims of ceding and assuming companies in their capaci-  
55 ty as such.

56 (f) Class VI. Claims of any state or local government.  
57 Claims, including those of any governmental body for a  
58 penalty or forfeiture, shall be allowed in this class only to  
59 the extent of the pecuniary loss sustained from the act,  
60 transaction, or proceeding out of which the penalty or  
61 forfeiture arose, with reasonable and actual costs occa-  
62 sioned thereby. The remainder of such claims shall be  
63 postponed to the class of claims under subdivision (h) of  
64 this section.

65 (g) Class VII. Claims filed late or any other claims  
66 other than claims under subdivision (h) of this section.

67 (h) Class VIII. Surplus or contribution notes, or simi-  
68 lar obligations and premium refunds on assessable poli-  
69 cies. Payments to members of domestic mutual corpora-  
70 tions shall be limited in accordance with law.

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## CHAPTER 151

(Com. Sub. for H. B. 4511—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)  
[By Request of the Executive]

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections two, three, three-a, four, seven, seven-a, eight, nine, ten, eleven, fourteen, fifteen, seventeen, eighteen, twenty-two and twenty-four, article twenty-five-a, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article by adding thereto three new sections, designated sections seventeen-a, thirty-four and thirty five, all relating to health maintenance organizations;

definitions; application for certificate of authority; conditions precedent to issuance or maintenance of a certificate of authority; renewal of certificate of authority; issuance of certificate of authority; fidelity bond; provider contracts; evidence of coverage; annual report; information to enrollees; open enrollment period; prohibited practices; regulation of marketing; examinations; quality assurance; suspension or revocation of certificate of authority; fees; statutory construction; relationship to other laws; directing the commissioner and the tax department to study the imposition of municipal business and occupation taxes; authorizing the commissioner to promulgate legislative rules regarding reimbursement for nonemergency transportation by nonparticipating providers and dispatching systems; and authorizing the study of rural health maintenance organizations.

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

That sections two, three, three-a, four, seven, seven-a, eight, nine, ten, eleven, fourteen, fifteen, seventeen, eighteen, twenty-two and twenty-four, article twenty-five-a, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said article be further amended by adding thereto three new sections, designated sections seventeen-a, thirty-four and thirty-five, all to read as follows:

**ARTICLE 25A. HEALTH MAINTENANCE ORGANIZATION ACT.**

- §33-25A-2. Definitions.
- §33-25A-3. Application for certificate of authority.
- §33-25A-3a. Conditions precedent to issuance or maintenance of a certificate of authority; renewal of certificate of authority; effect of bankruptcy proceedings.
- §33-25A-4. Issuance of certificate of authority.
- §33-25A-7. Fiduciary responsibilities of officers; fidelity bond; approval of contracts by commissioner.
- §33-25A-7a. Provider contracts.
- §33-25A-8. Evidence of coverage; charges for health care services; review of enrollee records; cancellation of contract by enrollee.
- §33-25A-9. Annual report.
- §33-25A-10. Information to enrollees.

- §33-25A-11. Open enrollment period.
- §33-25A-14. Prohibited practices.
- §33-25A-15. Agent licensing and appointment required; regulation of marketing.
- §33-25A-17. Examinations.
- §33-25A-17a. Quality assurance.
- §33-25A-18. Suspension or revocation of certificate of authority.
- §33-25A-22. Fees.
- §33-25A-24. Statutory construction and relationship to other laws.
- §33-25A-34. Ambulance services.
- §33-25A-35. Rural health maintenance organizations.

### §33-25A-2. Definitions.

- 1       (1) "Basic health care services" means physician, hos-  
2       pital, out-of-area, podiatric, chiropractic, laboratory, X ray,  
3       emergency, short-term mental health services not exceed-  
4       ing twenty outpatient visits in any twelve-month period,  
5       and cost-effective preventive services including immuniza-  
6       tions, well-child care, periodic health evaluations for  
7       adults, voluntary family planning services, infertility ser-  
8       vices and children's eye and ear examinations conducted  
9       to determine the need for vision and hearing corrections,  
10      which services need not necessarily include all procedures  
11      or services offered by a service provider.
- 12      (2) "Capitation" means the fixed amount paid by a  
13      health maintenance organization to a health care provider  
14      under contract with the health maintenance organization  
15      in exchange for the rendering of health care services.
- 16      (3) "Commissioner" means the commissioner of insur-  
17      ance.
- 18      (4) "Consumer" means any person who is not a pro-  
19      vider of care or an employee, officer, director or stock-  
20      holder of any provider of care.
- 21      (5) "Copayment" means a specific dollar amount,  
22      except as otherwise provided for by statute, that the sub-  
23      scriber must pay upon receipt of covered health care ser-  
24      vices and which is set at an amount consistent with allow-  
25      ing subscriber access to health care services.
- 26      (6) "Employee" means a person in some official em-

27 ployment or position working for a salary or wage contin-  
28 uously for no less than one calendar quarter and who is in  
29 such a relation to another person that the latter may con-  
30 trol the work of the former and direct the manner in which  
31 the work shall be done.

32 (7) "Employer" means any individual, corporation,  
33 partnership, other private association, or state or local  
34 government that employs the equivalent of at least two  
35 full-time employees during any four consecutive calendar  
36 quarters.

37 (8) "Enrollee", "subscriber" or "member" means an  
38 individual who has been voluntarily enrolled in a health  
39 maintenance organization, including individuals on whose  
40 behalf a contractual arrangement has been entered into  
41 with a health maintenance organization to receive health  
42 care services.

43 (9) "Evidence of coverage" means any certificate,  
44 agreement or contract issued to an enrollee setting out the  
45 coverage and other rights to which the enrollee is entitled.

46 (10) "Health care services" means any services or  
47 goods included in the furnishing to any individual of  
48 medical, mental or dental care, or hospitalization or inci-  
49 dent to the furnishing of the care or hospitalization, osteo-  
50 pathic services, chiropractic services, podiatric services,  
51 home health, health education, or rehabilitation, as well as  
52 the furnishing to any person of any and all other services  
53 or goods for the purpose of preventing, alleviating, curing  
54 or healing human illness or injury.

55 (11) "Health maintenance organization" or "HMO"  
56 means a public or private organization which provides, or  
57 otherwise makes available to enrollees, health care services,  
58 including at a minimum basic health care services which:

59 (a) Receives premiums for the provision of basic  
60 health care services to enrollees on a prepaid per capita or  
61 prepaid aggregate fixed sum basis, excluding copayments;

62 (b) Provides physicians' services primarily: (i) Directly  
63 through physicians who are either employees or partners  
64 of the organization; or (ii) through arrangements with



65 individual physicians or one or more groups of physicians  
66 organized on a group practice or individual practice ar-  
67 rangement; or (iii) through some combination of para-  
68 graphs (i) and (ii) of this subdivision;

69 (c) Assures the availability, accessibility and quality,  
70 including effective utilization, of the health care services  
71 which it provides or makes available through clearly iden-  
72 tifiable focal points of legal and administrative responsi-  
73 bility; and

74 (d) Offers services through an organized delivery  
75 system in which a primary care physician is designated for  
76 each subscriber upon enrollment. The primary care physi-  
77 cian is responsible for coordinating the health care of the  
78 subscriber and is responsible for referring the subscriber  
79 to other providers when necessary: *Provided*, That when  
80 dental care is provided by the health maintenance organi-  
81 zation the dentist selected by the subscriber from the list  
82 provided by the health maintenance organization shall  
83 coordinate the covered dental care of the subscriber, as  
84 approved by the primary care physician or the health  
85 maintenance organization.

86 (12) "Impaired" means a financial situation in which,  
87 based upon the financial information which would be  
88 required by this chapter for the preparation of the health  
89 maintenance organization's annual statement, the assets of  
90 the health maintenance organization are less than the sum  
91 of all of its liabilities and required reserves including any  
92 minimum capital and surplus required of the health main-  
93 tenance organization by this chapter so as to maintain its  
94 authority to transact the kinds of business or insurance it is  
95 authorized to transact.

96 (13) "Individual practice arrangement" means any  
97 agreement or arrangement to provide medical services on  
98 behalf of a health maintenance organization among or  
99 between physicians or between a health maintenance orga-  
100 nization and individual physicians or groups of physi-  
101 cians, where the physicians are not employees or partners  
102 of the health maintenance organization and are not mem-  
103 bers of or affiliated with a medical group.

104 (14) "Insolvent" or "insolvency" means a financial  
105 situation in which, based upon the financial information  
106 that would be required by this chapter for the preparation  
107 of the health maintenance organization's annual statement,  
108 the assets of the health maintenance organization are less  
109 than the sum of all of its liabilities and required reserves.

110 (15) "Medical group" or "group practice" means a  
111 professional corporation, partnership, association or other  
112 organization composed solely of health professionals  
113 licensed to practice medicine or osteopathy and of other  
114 licensed health professionals, including podiatrists, dentists  
115 and optometrists, as are necessary for the provision of  
116 health services for which the group is responsible: (a) A  
117 majority of the members of which are licensed to practice  
118 medicine or osteopathy; (b) who as their principal profes-  
119 sional activity engage in the coordinated practice of their  
120 profession; (c) who pool their income for practice as  
121 members of the group and distribute it among themselves  
122 according to a prearranged salary, drawing account or  
123 other plan; and (d) who share medical and other records  
124 and substantial portions of major equipment and profes-  
125 sional, technical and administrative staff.

126 (16) "Premium" means a prepaid per capita or prepaid  
127 aggregate fixed sum unrelated to the actual or potential  
128 utilization of services of any particular person which is  
129 charged by the health maintenance organization for health  
130 services provided to an enrollee.

131 (17) "Primary care physician" means the general prac-  
132 titioner, family practitioner, obstetrician/gynecologist,  
133 pediatrician or specialist in general internal medicine who  
134 is chosen or designated for each subscriber who will be  
135 responsible for coordinating the health care of the sub-  
136 scriber, including necessary referrals to other providers:  
137 *Provided*, That a certified nurse-midwife may be chosen  
138 or designated in lieu of as a subscriber's primary care  
139 physician during the subscriber's pregnancy and for a  
140 period extending through the end of the month in which  
141 the sixty-day period following termination of pregnancy  
142 ends: *Provided, however*, That nothing in this subsection  
143 shall expand the scope of practice for certified nurse-

144 midwives as defined in article fifteen, chapter thirty of this  
145 code.

146 (18) "Provider" means any physician, hospital or other  
147 person or organization which is licensed or otherwise  
148 authorized in this state to furnish health care services.

149 (19) "Uncovered expenses" means the cost of health  
150 care services that are covered by a health maintenance  
151 organization, for which a subscriber would also be liable  
152 in the event of the insolvency of the organization.

153 (20) "Service area" means the county or counties ap-  
154 proved by the commissioner within which the health main-  
155 tenance organization may provide or arrange for health  
156 care services to be available to its subscribers.

157 (21) "Statutory surplus" means the minimum amount  
158 of unencumbered surplus which a corporation must main-  
159 tain pursuant to the requirements of this article.

160 (22) "Surplus" means the amount by which a corpora-  
161 tion's assets exceeds its liabilities and required reserves  
162 based upon the financial information which would be  
163 required by this chapter for the preparation of the corpo-  
164 ration's annual statement except that assets pledged to  
165 secure debts not reflected on the books of the health  
166 maintenance organization shall not be included in surplus.

167 (23) "Surplus notes" means debt which has been sub-  
168 ordinated to all claims of subscribers and general creditors  
169 of the organization.

170 (24) "Qualified independent actuary" means an actu-  
171 ary who is a member of the American academy of actuar-  
172 ies or the society of actuaries and has experience in estab-  
173 lishing rates for health maintenance organizations and  
174 who has no financial or employment interest in the health  
175 maintenance organization.

176 (25) "Quality assurance" means an ongoing program  
177 designed to objectively and systematically monitor and  
178 evaluate the quality and appropriateness of the enrollee's  
179 care, pursue opportunities to improve the enrollee's care  
180 and to resolve identified problems at the prevailing profes-  
181 sional standard of care.

182 (26) "Utilization management" means a system for the  
183 evaluation of the necessity, appropriateness and efficiency  
184 of the use of health care services, procedures and facilities.

**§33-25A-3. Application for certificate of authority.**

1 (1) Notwithstanding any law of this state to the con-  
2 trary, any person may apply to the commissioner for and  
3 obtain a certificate of authority to establish or operate a  
4 health maintenance organization in compliance with this  
5 article. No person shall sell health maintenance organiza-  
6 tion enrollee contracts, nor shall any health maintenance  
7 organization commence services, prior to receipt of a  
8 certificate of authority as a health maintenance organiza-  
9 tion. Any person may, however, establish the feasibility of  
10 a health maintenance organization prior to receipt of a  
11 certificate of authority through funding drives and by  
12 receiving loans and grants.

13 (2) Every health maintenance organization in opera-  
14 tion as of the effective date of this article shall submit an  
15 application for a certificate of authority under this section  
16 within thirty days of the effective date of this article. Each  
17 applicant may continue to operate until the commissioner  
18 acts upon the application. In the event that an application  
19 is denied pursuant to section four of this article, the appli-  
20 cant shall be treated as a health maintenance organization  
21 whose certificate of authority has been revoked: *Provided*-  
22 *ed*, That all health maintenance organizations in operation  
23 for at least five years are exempt from filing applications  
24 for a new certificate of authority.

25 (3) The commissioner may require any organization  
26 providing or arranging for health care services on a pre-  
27 paid per capita or prepaid aggregate fixed sum basis to  
28 apply for a certificate of authority as a health maintenance  
29 organization. The commissioner shall promulgate rules to  
30 facilitate the enforcement of this subsection: *Provided*,  
31 That any provider who is assuming risk by virtue of a  
32 contract or other arrangement with a health maintenance  
33 organization or entity which has a certificate, may not be  
34 required to file for a certificate: *Provided, however*, That  
35 the commissioner may require the exempted entities to file  
36 complete financial data for a determination as to their

37 solvency. Any organization directed to apply for a certifi-  
38 cate of authority is subject to the provisions of subsection  
39 (2) of this section.

40 (4) Each application for a certificate of authority shall  
41 be verified by an officer or authorized representative of  
42 the applicant, shall be in a form prescribed by the com-  
43 missioner and shall set forth or be accompanied by any  
44 and all information required by the commissioner, includ-  
45 ing:

46 (a) The basic organizational document;

47 (b) The bylaws or rules;

48 (c) A list of names, addresses and official positions of  
49 each member of the governing body, which shall contain a  
50 full disclosure in the application of any financial interest  
51 by the officer or member of the governing body or any  
52 provider or any organization or corporation owned or  
53 controlled by that person and the health maintenance  
54 organization and the extent and nature of any contract or  
55 financial arrangements between that person and the health  
56 maintenance organization;

57 (d) A description of the health maintenance organiza-  
58 tion;

59 (e) A copy of each evidence of coverage form and of  
60 each enrollee contract form;

61 (f) Financial statements which include the assets, liabil-  
62 ities and sources of financial support of the applicant and  
63 any corporation or organization owned or controlled by  
64 the applicant;

65 (g) (i) A description of the proposed method of mar-  
66 keting the plan; (ii) a schedule of proposed charges; and  
67 (iii) a financial plan which includes a three-year projection  
68 of the expenses and income and other sources of future  
69 capital;

70 (h) A power of attorney duly executed by the appli-  
71 cant, if not domiciled in this state, appointing the commis-  
72 sioner and his or her successors in office, and duly autho-  
73 rized deputies, as the true and lawful attorney of the appli-

74 cant in and for this state upon whom all lawful process in  
75 any legal action or proceeding against the health mainte-  
76 nance organization on a cause of action arising in this  
77 state may be served;

78 (i) A statement reasonably describing the service area  
79 or areas to be served and the type or types of enrollees to  
80 be served;

81 (j) A description of the complaint procedures to be  
82 utilized as required under section twelve of this article;

83 (k) A description of the mechanism by which  
84 enrollees will be afforded an opportunity to participate in  
85 matters of policy and operation under section six of this  
86 article;

87 (l) A complete biographical statement on forms pre-  
88 scribed by the commissioner and an independent investi-  
89 gation report on all of the individuals referred to in subdivi-  
90 sion (c) of this subsection and all officers, directors and  
91 persons holding five percent or more of the common  
92 stock of the organization;

93 (m) A comprehensive feasibility study, performed by  
94 a qualified independent actuary in conjunction with a  
95 certified public accountant which shall contain a certifica-  
96 tion by the qualified actuary and an opinion by the certi-  
97 fied public accountant as to the feasibility of the proposed  
98 organization. The study shall be for the greater of three  
99 years or until the health maintenance organization has  
100 been projected to be profitable for twelve consecutive  
101 months. The study must show that the health maintenance  
102 organization would not, at the end of any month of the  
103 projection period, have less than the minimum capital and  
104 surplus as required by subparagraph (ii), subdivision (c),  
105 subsection (2), section four of this article. The qualified  
106 independent actuary shall certify that: The rates are nei-  
107 ther inadequate nor excessive nor unfairly discriminatory;  
108 the rates are appropriate for the classes of risks for which  
109 they have been computed; the rating methodology is ap-  
110 propriate: *Provided*, That the certification shall include an  
111 adequate description of the rating methodology showing  
112 that the methodology follows consistent and equitable

113 actuarial principles; the health maintenance organization is  
114 actuarially sound: *Provided, however,* That the certifica-  
115 tion shall consider the rates, benefits, and expenses of, and  
116 any other funds available for the payment of obligations  
117 of, the organization; the rates being charged or to be  
118 charged are actuarially adequate to the end of the period  
119 for which rates have been guaranteed; and incurred but  
120 not reported claims and claims reported but not fully paid  
121 have been adequately provided for;

122 (n) A description of the health maintenance organiza-  
123 tion's quality assurance program; and

124 (o) Such other information as the commissioner may  
125 require to be provided.

126 (5) A health maintenance organization shall, unless  
127 otherwise provided for by rules promulgated by the com-  
128 missioner, file notice prior to any modification of the  
129 operations or documents filed pursuant to this section or  
130 as the commissioner may require by rule. If the commis-  
131 sioner does not disapprove of the filing within ninety days  
132 of filing, it shall be considered approved and may be im-  
133 plemented by the health maintenance organization.

**§33-25A-3a. Conditions precedent to issuance or maintenance  
of a certificate of authority; renewal of certifi-  
cate of authority; effect of bankruptcy pro-  
ceedings.**

1 (1) As a condition precedent to the issuance or main-  
2 tenance of a certificate of authority, a health maintenance  
3 organization must file or have on file with the commis-  
4 sioner:

5 (a) An acknowledgment that a delinquency proceed-  
6 ing pursuant to article ten of this chapter or supervision by  
7 the commissioner pursuant to article thirty-four of this  
8 chapter constitutes the sole and exclusive method for the  
9 liquidation, rehabilitation, reorganization or conservation  
10 of a health maintenance organization;

11 (b) A waiver of any right to file or be subject to a  
12 bankruptcy proceeding;

13 (c) Within thirty days of any change in the member-

14 ship of the governing body of the organization or in the  
15 officers or persons holding five percent or more of the  
16 common stock of the organization, or as otherwise re-  
17 quired by the commissioner:

18 (i) An amended list of the names, addresses and offi-  
19 cial positions of each member of the governing body, and  
20 a full disclosure of any financial interest by a member of  
21 the governing body or any provider or any organization  
22 or corporation owned or controlled by that person and the  
23 health maintenance organization and the extent and nature  
24 of any contract or financial arrangements between that  
25 person and the health maintenance organization; and

26 (ii) A complete biographical statement on forms pre-  
27 scribed by the commissioner and an independent investi-  
28 gation report on each person for whom a biographical  
29 statement and independent investigation report have not  
30 previously been submitted; and

31 (d) Effective the first day of May, one thousand nine  
32 hundred ninety-eight, for health maintenance organiza-  
33 tions that have been in existence at least three years, a  
34 copy of the current quality assurance report submitted to  
35 the health maintenance organization by a nationally re-  
36 cognized accreditation and review organization approved  
37 by the commissioner, or in the case of the issuance of an  
38 initial certificate of authority to a health maintenance  
39 organization, a determination by the commissioner as to  
40 the feasibility of the health maintenance organization's  
41 proposed quality assurance program: *Provided*, That if a  
42 health maintenance organization files proof found in the  
43 commissioner's discretion to be sufficient to demonstrate  
44 that the health maintenance organization has timely ap-  
45 plied for and reasonably pursued a review of its quality  
46 assurance program, but a quality report has not been is-  
47 sued by the accreditation and review organization, the  
48 health maintenance organization shall be deemed to have  
49 complied with this subdivision.

50 (2) After the effective date of this section, as a condi-  
51 tion precedent to the issuance of a certificate of authority,  
52 any organization that has not yet obtained a certificate of  
53 authority to operate a health maintenance organization in



54 this state shall be incorporated under the provisions of  
55 article one, chapter thirty-one of this code.

56 (3) After the effective date of this subsection, all certif-  
57 icates of authority issued to health maintenance organiza-  
58 tions shall expire at midnight on the thirty-first day of  
59 May of each year. The commissioner shall renew annually  
60 the certificates of authority of all health maintenance or-  
61 ganizations that continue to meet all requirements of this  
62 section and subsection (2), section four of this article,  
63 make application therefor upon a form prescribed by the  
64 commissioner and pay the renewal fee prescribed: *Provid-*  
65 *ed*, That a health maintenance organization shall not qual-  
66 ify for renewal of its certificate of authority if the organi-  
67 zation has no subscribers in this state within twelve months  
68 after issuance of the certificate of authority: *Provided*,  
69 *however*, That an organization not qualifying for renewal  
70 may apply for a new certificate of authority under section  
71 three of this article.

72 (4) The commencement of a bankruptcy proceeding  
73 either by or against a health maintenance organization  
74 shall, by operation of law:

75 (a) Terminate the health maintenance organization's  
76 certificate of authority; and

77 (b) Vest in the commissioner for the use and benefit  
78 of the subscribers of the health maintenance organization  
79 the title to any deposits of the health maintenance organi-  
80 zation held by the commissioner.

81 (5) If the bankruptcy proceeding is initiated by a  
82 party other than the health maintenance organization, the  
83 operation of subsection (4) of this section shall be stayed  
84 for a period of sixty days following the date of com-  
85 mencement of the proceeding.

#### §33-25A-4. Issuance of certificate of authority.

1 (1) Upon receipt of an application for a certificate of  
2 authority, the commissioner shall determine whether the  
3 application for a certificate of authority, with respect to  
4 health care services to be furnished, has demonstrated:

5 (a) The willingness and potential ability of the organi-

6 zation to assure that basic health services will be provided  
7 in a manner to enhance and assure both the availability  
8 and accessibility of adequate personnel and facilities;

9 (b) Arrangements for an ongoing evaluation of the  
10 quality of health care provided by the organization and  
11 utilization review which meet those standards as the com-  
12 missioner shall by rule require; and

13 (c) That the organization has a procedure to develop,  
14 compile, evaluate and report statistics relating to the cost  
15 of its operations, the pattern of utilization of its services,  
16 the quality, availability and accessibility of its services, and  
17 such other matters as may be reasonably required by rule.

18 (2) The commissioner shall issue or deny a certificate  
19 of authority to any person filing an application within one  
20 hundred twenty days after receipt of the application. Issu-  
21 ance of a certificate of authority shall be granted upon  
22 payment of the application fee prescribed, if the commis-  
23 sioner is satisfied that the following conditions are met:

24 (a) The health maintenance organization's proposed  
25 plan of operation meets the requirements of subsection (1)  
26 of this section;

27 (b) The health maintenance organization will effec-  
28 tively provide or arrange for the provision of at least basic  
29 health care services on a prepaid basis except for  
30 copayments: *Provided*, That nothing in this section shall  
31 be construed to relieve a health maintenance organization  
32 from the obligations to provide health care services be-  
33 cause of the nonpayment of copayments unless the  
34 enrollee fails to make payment in at least three instances  
35 over any twelve-month period: *Provided, however*, That  
36 nothing in this section shall permit a health maintenance  
37 organization to charge copayments to medicare beneficia-  
38 raries or medicaid recipients in excess of the copayments  
39 permitted under those programs, nor shall a health mainte-  
40 nance organization be required to provide services to the  
41 medicare beneficiaries or medicaid recipients in excess of  
42 the benefits compensated under those programs;

43 (c) The health maintenance organization is financially  
44 responsible and may reasonably be expected to meet its

45 obligations to enrollees and prospective enrollees. In mak-  
46 ing this determination, the commissioner may consider:

47 (i) The financial soundness of the health maintenance  
48 organization's arrangements for health care services and  
49 the proposed schedule of charges used in connection with  
50 the health care services;

51 (ii) That the health maintenance organization has and  
52 maintains the following:

53 (A) If a for-profit stock corporation, at least one mil-  
54 lion dollars of fully paid-in capital stock; or

55 (B) If a nonprofit corporation, at least one million  
56 dollars of statutory surplus funds; and

57 (C) Both for-profit and nonprofit health maintenance  
58 organization, additional surplus funds of at least one mil-  
59 lion dollars;

60 (iii) Any arrangements that will guarantee for the  
61 continuation of benefits and payments to providers for  
62 services rendered both prior to and after insolvency for  
63 the duration of the contract period for which payment has  
64 been made, except that benefits to members who are con-  
65 fined on the date of insolvency in an inpatient facility  
66 shall be continued until their discharge; and

67 (iv) Any agreement with providers for the provision of  
68 health care services;

69 (d) Reasonable provisions have been made for emer-  
70 gency and out-of-area health care services;

71 (e) The enrollees will be afforded an opportunity to  
72 participate in matters of policy and operation pursuant to  
73 section six of this article;

74 (f) The health maintenance organization has demon-  
75 strated that it will assume full financial risk on a prospec-  
76 tive basis for the provision of health care services, includ-  
77 ing hospital care: *Provided*, That the requirement of this  
78 subdivision shall not prohibit a health maintenance orga-  
79 nization from obtaining reinsurance acceptable to the  
80 commissioner from an accredited reinsurer or making  
81 other arrangements acceptable to the commissioner;

82 (i) For the cost of providing to any enrollee health  
83 care services, the aggregate value of which exceeds four  
84 thousand dollars in any year;

85 (ii) For the cost of providing health care services to its  
86 members on a nonelective emergency basis, or while they  
87 are outside the area served by the organization; or

88 (iii) For not more than ninety-five percent of the  
89 amount by which the health maintenance organization's  
90 costs for any of its fiscal years exceed one hundred five  
91 percent of its income for those fiscal years;

92 (g) The ownership, control and management of the  
93 organization is competent and trustworthy and possesses  
94 managerial experience that would make the proposed  
95 health maintenance organization operation beneficial to  
96 the subscribers. The commissioner may, at his or her dis-  
97 cretion, refuse to grant or continue authority to transact  
98 the business of a health maintenance organization in this  
99 state at any time during which the commissioner has prob-  
100 able cause to believe that the ownership, control or man-  
101 agement of the organization includes any person whose  
102 business operations are or have been marked by business  
103 practices or conduct that is to the detriment of the public,  
104 stockholders, investors or creditors;

105 (h) The health maintenance organization has deposit-  
106 ed and maintained in trust with the state treasurer, for the  
107 protection of its subscribers or its subscribers and credi-  
108 tors, cash or government securities eligible for the invest-  
109 ment of capital funds of domestic insurers as described in  
110 section seven, article eight of this chapter in the amount of  
111 one hundred thousand dollars; and

112 (i) Effective the first day of May, one thousand nine  
113 hundred ninety-eight, the health maintenance organization  
114 has a quality assurance program which has been reviewed  
115 by the commissioner or by a nationally recognized ac-  
116 creditation and review organization approved by the com-  
117 missioner; meets at least those standards set forth in sec-  
118 tion seventeen-a of this article; and is deemed satisfactory  
119 by the commissioner. If the commissioner determines that  
120 the quality assurance program of a health maintenance

121 organization is deficient in any significant area, the com-  
122 missioner, in addition to other remedies provided in this  
123 chapter, may establish a corrective action plan that the  
124 health maintenance organization must follow as a condi-  
125 tion to the issuance of a certificate of authority: *Provided*,  
126 That in those instances where a health maintenance orga-  
127 nization has timely applied for and reasonably pursued a  
128 review of its quality assurance program, but the review has  
129 not been completed, the health maintenance organization  
130 shall submit proof to the commissioner of its application  
131 for that review.

132 (3) A certificate of authority shall be denied only after  
133 compliance with the requirements of section twenty-one of  
134 this article.

135 (4) No person who has not been issued a certificate of  
136 authority shall use the words "health maintenance organi-  
137 zation" or the initials "HMO" in its name, contracts, logo or  
138 literature: *Provided*, That persons who are operating un-  
139 der a contract with, operating in association with, enrolling  
140 enrollees for, or otherwise authorized by a health mainte-  
141 nance organization licensed under this article to act on its  
142 behalf may use the terms "health maintenance organiza-  
143 tion", or "HMO" for the limited purpose of denoting or  
144 explaining their association or relationship with the autho-  
145 rized health maintenance organization. No health mainte-  
146 nance organization which has a minority of board mem-  
147 bers who are consumers shall use the words "consumer  
148 controlled" in its name or in any way represent to the  
149 public that it is controlled by consumers.

**§33-25A-7. Fiduciary responsibilities of officers; fidelity bond;  
approval of contracts by commissioner.**

1 (a) Any director, officer or partner of a health mainte-  
2 nance organization who receives, collects, disburses or  
3 invests funds in connection with the activities of the orga-  
4 nization is responsible for the funds in a fiduciary rela-  
5 tionship to the enrollees.

6 (b) A health maintenance organization shall maintain  
7 a blanket fidelity bond covering all directors, officers,  
8 managers and employees of the organization who receive,

9 collect, disburse or invest funds in connection with the  
10 activities of the organization, issued by an insurer licensed  
11 in this state or, if the fidelity bond required by this subsection  
12 is not available from an insurer licensed in this state, a  
13 fidelity bond procured by an excess line broker licensed  
14 in this state, in an amount at least equal to the minimum  
15 amount of fidelity insurance as provided in the national  
16 association of insurance commissioners handbook, as  
17 amended, or as determined under a rule promulgated by  
18 the commissioner.

19 (c) Any contracts made with providers of health care  
20 services enabling a health maintenance organization to  
21 provide health care services authorized under this article  
22 shall be filed with the commissioner. The commissioner  
23 has the power to require immediate cancellation of the  
24 contracts or the immediate renegotiation of the contract  
25 by the parties whenever he or she determines that they  
26 provide for excessive payments, or that they fail to include  
27 reasonable incentives for cost control, or that they otherwise  
28 substantially and unreasonably contribute to escalation  
29 of the costs of providing health care services to  
30 enrollees.

**§33-25A-7a. Provider contracts.**

1 (1) Whenever a contract exists between a health main-  
2 tenance organization and a provider and the organization  
3 fails to meet its obligations to pay fees for services already  
4 rendered to a subscriber, the health maintenance organiza-  
5 tion is liable for the fee or fees rather than the subscriber;  
6 and the contract shall state that liability.

7 (2) No subscriber of a health maintenance organiza-  
8 tion is liable to any provider of health care services for  
9 any services covered by the health maintenance organiza-  
10 tion if at any time during the provision of the services, the  
11 provider, or its agents, are aware the subscriber is a health  
12 maintenance organization enrollee.

13 (3) If at any time during the provision of the services,  
14 a provider, or its agents, are aware that the subscriber is a  
15 health maintenance organization enrollee, that provider of  
16 services or any representative of the provider may not

17 collect or attempt to collect from a health maintenance  
18 organization subscriber any money for services covered  
19 by a health maintenance organization and no provider or  
20 representative of the provider may maintain any action at  
21 law against a subscriber of a health maintenance organiza-  
22 tion to collect money owed to the provider by a health  
23 maintenance organization.

24 (4) Every contract between a health maintenance orga-  
25 nization and a provider of health care services shall be in  
26 writing and shall contain a provision that the subscriber is  
27 not liable to the provider for any services covered by the  
28 subscriber's contract with the health maintenance organi-  
29 zation.

30 (5) The provisions of this section shall not be con-  
31 strued to apply to the amount of any deductible or  
32 copayment which is not covered by the contract of the  
33 health maintenance organization.

34 (6) When a subscriber receives covered emergency  
35 health care services from a noncontracting provider, the  
36 health maintenance organization shall be responsible for  
37 payment of the providers normal charges for those health  
38 care services, exclusive of any applicable deductibles or  
39 copayments.

40 (7) For all provider contracts executed on or after the  
41 fifteenth day of April, one thousand nine hundred  
42 ninety-five, and within one hundred eighty days of that  
43 date for contracts in existence on that date:

44 (a) The contracts must provide that the provider shall  
45 provide sixty days advance written notice to the health  
46 maintenance organization and the commissioner before  
47 canceling the contract with the health maintenance organi-  
48 zation for any reason; and

49 (b) The contract must also provide that nonpayment  
50 for goods or services rendered by the provider to the  
51 health maintenance organization is not a valid reason for  
52 avoiding the sixty day advance notice of cancellation.

53 (8) Upon receipt by the health maintenance organiza-  
54 tion of a sixty day cancellation notice, the health mainte-

55 nance organization may, if requested by the provider,  
56 terminate the contract in less than sixty days if the health  
57 maintenance organization is not financially impaired or  
58 insolvent.

**§33-25A-8. Evidence of coverage; charges for health care services; review of enrollee records; cancellation of contract by enrollee.**

1 (1) (a) Every enrollee is entitled to evidence of cover-  
2 age in accordance with this section. The health mainte-  
3 nance organization or its designated representative shall  
4 issue the evidence of coverage.

5 (b) No evidence of coverage, or amendment thereto,  
6 shall be issued or delivered to any person in this state until  
7 a copy of the form of the evidence of coverage, or amend-  
8 ment thereto, has been filed with and approved by the  
9 commissioner.

10 (c) An evidence of coverage shall contain a clear,  
11 concise and complete statement of:

12 (i) The health care services and the insurance or other  
13 benefits, if any, to which the enrollee is entitled;

14 (ii) Any exclusions or limitations on the services, kind  
15 of services, benefits, or kind of benefits, to be provided,  
16 including any copayments;

17 (iii) Where and in what manner information is avail-  
18 able as to how services, including emergency and  
19 out-of-area services, may be obtained;

20 (iv) The total amount of payment and copayment, if  
21 any, for health care services and the indemnity or service  
22 benefits, if any, which the enrollee is obligated to pay with  
23 respect to individual contracts, or an indication whether  
24 the plan is contributory or noncontributory with respect to  
25 group certificates;

26 (v) A description of the health maintenance organiza-  
27 tion's method for resolving enrollee grievances; and

28 (vi) The following exact statement in bold print: "Each  
29 subscriber or enrollee, by acceptance of the benefits de-  
30 scribed in this evidence of coverage, shall be deemed to



31 have consented to the examination of his or her medical  
32 records for purposes of utilization review, quality assur-  
33 ance and peer review by the health maintenance organiza-  
34 tion or its designee."

35 (d) Any subsequent approved change in an evidence  
36 of coverage shall be issued to each enrollee.

37 (e) A copy of the form of the evidence of coverage to  
38 be used in this state, and any amendment thereto, is subject  
39 to the filing and approval requirements of subdivision (b),  
40 subsection (1) of this section, unless the commissioner  
41 promulgates a rule dispensing with this requirement or  
42 unless it is subject to the jurisdiction of the commissioner  
43 under the laws governing health insurance or, hospital or  
44 medical service corporations, in which event the filing and  
45 approval provisions of those laws apply. To the extent,  
46 however, that those provisions do not apply the require-  
47 ments in subdivision (c), subsection (1) of this section, are  
48 applicable.

49 (2) Premiums may be established in accordance with  
50 actuarial principles: *Provided*, That premiums shall not be  
51 excessive, inadequate or unfairly discriminatory. A certifi-  
52 cation by a qualified independent actuary shall accompa-  
53 ny a rate filing and shall certify that: The rates are neither  
54 inadequate nor excessive nor unfairly discriminatory; that  
55 the rates are appropriate for the classes of risks for which  
56 they have been computed; provide an adequate descrip-  
57 tion of the rating methodology showing that the method-  
58 ology follows consistent and equitable actuarial principles;  
59 and the rates being charged are actuarially adequate to the  
60 end of the period for which rates have been guaranteed. In  
61 determining whether the charges are reasonable, the com-  
62 missioner shall consider whether the health maintenance  
63 organization has: (a) Made a vigorous, good faith effort to  
64 control rates paid to health care providers; (b) established  
65 a premium schedule, including copayments, if any, which  
66 encourages enrollees to seek out preventive health care  
67 services; (c) made a good faith effort to secure arrange-  
68 ments whereby basic services can be obtained by subscrib-  
69 ers from local providers to the extent that the providers  
70 offer the services; and (d) made a good faith effort to

71 support community health assessments and efforts direct-  
72 ed at community health needs.

73 (3) Rates are inadequate if the premiums derived from  
74 the rating structure, plus investment income, copayments,  
75 and revenues from coordination of benefits and subroga-  
76 tion, fees-for-service and reinsurance recoveries are not set  
77 at a level at least equal to the anticipated cost of medical  
78 and hospital benefits during the period for which the rates  
79 are to be effective, and the other expenses which would be  
80 incurred if other expenses were at the level for the current  
81 or nearest future period during which the health mainte-  
82 nance organization is projected to make a profit. For this  
83 analysis, investment income shall not exceed three percent  
84 of total projected revenues.

85 (4) The commissioner shall within a reasonable period  
86 approve any form if the requirements of subsection (1) of  
87 this section are met and any schedule of charges if the  
88 requirements of subsection (2) of this section are met. It is  
89 unlawful to issue the form or to use the schedule of charg-  
90 es until approved. If the commissioner disapproves of the  
91 filing, he or she shall notify the filer promptly. In the  
92 notice, the commissioner shall specify the reasons for his  
93 or her disapproval and the findings of fact and conclu-  
94 sions which support his or her reasons. A hearing will be  
95 granted by the commissioner within fifteen days after a  
96 request in writing, by the person filing, has been received  
97 by the commission. If the commissioner does not disap-  
98 prove any form or schedule of charges within sixty days  
99 of the filing of the forms or charges, they shall be consid-  
100 ered approved.

101 (5) The commissioner may require the submission of  
102 whatever relevant information in addition to the schedule  
103 of charges which he or she considers necessary in deter-  
104 mining whether to approve or disapprove a filing made  
105 pursuant to this section.

106 (6) An individual enrollee may cancel a contract with  
107 a health maintenance organization at any time for any  
108 reason: *Provided*, That a health maintenance organization  
109 may require that the enrollee give thirty days advance  
110 notice: *Provided, however*, That an individual enrollee

111 whose premium rate was determined pursuant to a group  
112 contract may cancel a contract with a health maintenance  
113 organization pursuant to the terms of that contract.

**§33-25A-9. Annual report.**

1 Every health maintenance organization shall comply  
2 with and is subject to the provisions of section fourteen,  
3 article four of this chapter relating to filing of financial  
4 statements with the commissioner and the national associa-  
5 tion of insurance commissioners. The annual financial  
6 statement required by that section shall include, but not be  
7 limited to, the following:

8 (a) A statutory financial statement of the organization,  
9 including its balance sheet and receipts and disbursements  
10 for the preceding year certified by an independent certi-  
11 fied public accountant, reflecting at least: (i) All prepay-  
12 ment and other payments received for health care services  
13 rendered; (ii) expenditures to all providers, by classes or  
14 groups of providers, and insurance companies or nonprof-  
15 it health service plan corporations engaged to fulfill obli-  
16 gations arising out of the health maintenance contract; (iii)  
17 expenditures for capital improvements, or additions there-  
18 to, including, but not limited to, construction, renovation  
19 or purchase of facilities and capital equipment; and (iv)  
20 the organization's fidelity bond;

21 (b) The number of new enrollees enrolled during the  
22 year, the number of enrollees as of the end of the year and  
23 the number of enrollees terminated during the year on a  
24 form prescribed by the commissioner;

25 (c) A summary of information compiled pursuant to  
26 subdivision (c), subsection (1), section four of this article  
27 in such form as may be required by the department of  
28 health and human resources or a nationally recognized  
29 accreditation and review organization or as the commis-  
30 sioner may by rule require;

31 (d) A report of the names and residence addresses of  
32 all persons set forth in subdivision (c), subsection (4),  
33 section three of this article who were associated with the  
34 health maintenance organization during the preceding  
35 year, and the amount of wages, expense reimbursements

36 or other payments to those individuals for services to the  
37 health maintenance organization, including a full disclo-  
38 sure of all financial arrangements during the preceding  
39 year required to be disclosed pursuant to subdivision (c),  
40 subsection (4), section three of this article; and

41 (e) Any other information relating to the performance  
42 of the health maintenance organization as is reasonably  
43 necessary to enable the commissioner to carry out his or  
44 her duties under this article.

**§33-25A-10. Information to enrollees.**

1 Every health maintenance organization or its represen-  
2 tative shall annually, before the first day of April, provide  
3 to its enrollees a summary of: Its most recent annual fi-  
4 nancial statement, including a balance sheet and statement  
5 of receipts and disbursements; a description of the health  
6 maintenance organization, its basic health care services, its  
7 facilities and personnel, any material changes therein since  
8 the last report, the current evidence of coverage, and a  
9 clear and understandable description of the health mainte-  
10 nance organization's method for resolving enrollee com-  
11 plaints: *Provided*, That with respect to enrollees who have  
12 been enrolled through contracts between a health mainte-  
13 nance organization and an employer, the health mainte-  
14 nance organization shall be deemed to have satisfied the  
15 requirement of this section by providing the requisite  
16 summary to each enrolled employee: *Provided, however*,  
17 That with respect to medicaid recipients enrolled under a  
18 group contract between a health maintenance organization  
19 and the governmental agency responsible for administer-  
20 ing the medicaid program, the health maintenance organi-  
21 zation shall be deemed to have satisfied the requirement of  
22 this section by providing the requisite summary to each  
23 local office of the governmental agency responsible for  
24 administering the medicaid program for inspection by  
25 enrollees of the health maintenance organization.

**§33-25A-11. Open enrollment period.**

1 (1) Once a health maintenance organization has been  
2 in operation at least five years, or has enrollment of not  
3 less than fifty thousand persons, the health maintenance

4 organization shall, in any year following a year in which  
5 the health maintenance organization has achieved an oper-  
6 ating surplus, maintain an open enrollment period of at  
7 least thirty days during which time the health maintenance  
8 organization shall, within the limits of its capacity, accept  
9 individuals in the order in which they apply without re-  
10 gard to preexisting illness, medical conditions or degree of  
11 disability except for individuals who are confined to an  
12 institution because of chronic illness or permanent injury:  
13 *Provided*, That no health maintenance organization shall  
14 be required to continue an open enrollment period after  
15 such time as enrollment pursuant to the open enrollment  
16 period is equal to three percent of the health maintenance  
17 organization's net increase in enrollment during the previ-  
18 ous year.

19 (2) Where a health maintenance organization demon-  
20 strates to the satisfaction of the commissioner that it has a  
21 disproportionate share of high-risk enrollees and that, by  
22 maintaining open enrollment, it would be required to  
23 enroll so disproportionate a share of high-risk enrollees as  
24 to jeopardize its economic viability, the commissioner  
25 may:

26 (a) Waive the requirement for open enrollment for a  
27 period of not more than three years; or

28 (b) Authorize the organization to impose any under-  
29 writing restrictions upon open enrollment as are necessary:  
30 (i) To preserve its financial stability; (ii) to prevent exces-  
31 sive adverse selection by prospective enrollees; or (iii) to  
32 avoid unreasonably high or unmarketable charges for  
33 enrollee coverage of health services. A health maintenance  
34 organization may receive more than one waiver or autho-  
35 rization.

#### §33-25A-14. Prohibited practices.

1 (1) No health maintenance organization, or represen-  
2 tative thereof, may cause or knowingly permit the use of  
3 advertising which is untrue or misleading, solicitation  
4 which is untrue or misleading, or any form of evidence of  
5 coverage which is deceptive. No advertising may be used  
6 until it has been approved by the commissioner. Advertis-

7 ing which has not been disapproved by the commissioner  
8 within sixty days of filing shall be considered approved.  
9 For purposes of this article:

10 (a) A statement or item of information shall be consid-  
11 ered to be untrue if it does not conform to fact in any  
12 respect which is or may be significant to an enrollee of, or  
13 person considering enrollment in, a health maintenance  
14 organization;

15 (b) A statement or item of information shall be con-  
16 sidered to be misleading, whether or not it may be literally  
17 untrue if, in the total context in which the statement is  
18 made or the item of information is communicated, the  
19 statement or item of information may be reasonably un-  
20 derstood by a reasonable person, not possessing special  
21 knowledge regarding health care coverage, as indicating  
22 any benefit or advantage or the absence of any exclusion,  
23 limitation, or disadvantage of possible significance to an  
24 enrollee of, or person considering enrollment in, a health  
25 maintenance organization, if the benefit or advantage or  
26 absence of limitation, exclusion or disadvantage does not  
27 in fact exist;

28 (c) An evidence of coverage shall be considered to be  
29 deceptive if the evidence of coverage taken as a whole, and  
30 with consideration given to typography and format, as well  
31 as language, shall be such as to cause a reasonable person,  
32 not possessing special knowledge regarding health mainte-  
33 nance organizations, and evidences of coverage therefor,  
34 to expect benefits, services or other advantages which the  
35 evidence of coverage does not provide or which the health  
36 maintenance organization issuing the evidence of cover-  
37 age does not regularly make available for enrollees cov-  
38 ered under such evidence of coverage; and

39 (d) The commissioner may further define practices  
40 which are untrue, misleading or deceptive.

41 (2) No health maintenance organization may cancel or  
42 fail to renew the coverage of an enrollee except for: (a)  
43 Failure to pay the charge for health care coverage; (b)  
44 termination of the health maintenance organization; (c)  
45 termination of the group plan; (d) enrollee moving out of

46 the area served; (e) enrollee moving out of an eligible  
47 group; or (f) other reasons established in rules promulgat-  
48 ed by the commissioner. No health maintenance organiza-  
49 tion shall use any technique of rating or grouping to can-  
50 cel or fail to renew the coverage of an enrollee. An  
51 enrollee shall be given thirty days' notice of any cancella-  
52 tion or nonrenewal and the notice shall include the reasons  
53 for the cancellation or nonrenewal: *Provided*, That each  
54 enrollee moving out of an eligible group shall be granted  
55 the opportunity to enroll in the health maintenance orga-  
56 nization on an individual basis. A health maintenance  
57 organization may not disenroll an enrollee for nonpay-  
58 ment of copayments unless the enrollee has failed to make  
59 payment in at least three instances over any twelve-month  
60 period: *Provided, however*, That the enrollee may not be  
61 disenrolled if the disenrollment would constitute abandon-  
62 ment of a patient. Any enrollee wrongfully disenrolled  
63 shall be reenrolled.

64 (3) (a) No health maintenance organization may use  
65 in its name, contracts, logo or literature any of the words  
66 "insurance", "casualty", "surety", "mutual" or any other  
67 words which are descriptive of the insurance, casualty or  
68 surety business or deceptively similar to the name or de-  
69 scription of any insurance or surety corporation doing  
70 business in this state: *Provided*, That when a health main-  
71 tenance organization has contracted with an insurance  
72 company for any coverage permitted by this article, it may  
73 so state; and

74 (b) Only those persons that have been issued a certifi-  
75 cate of authority under this article may use the words  
76 "health maintenance organization" or the initials "HMO" in  
77 its name, contracts, logo or literature to imply, directly or  
78 indirectly, that it is a health maintenance organization or  
79 hold itself out to be a health maintenance organization.

80 (4) The providers of a health maintenance organiza-  
81 tion who provide health care services and the health main-  
82 tenance organization shall not have recourse against  
83 enrollees for amounts above those specified in the evi-  
84 dence of coverage as the periodic prepayment or  
85 copayment for health care services.

86 (5) No health maintenance organization shall enroll  
87 more than three hundred thousand persons in this state:  
88 *Provided*, That a health maintenance organization may  
89 petition the commissioner to exceed an enrollment of  
90 three hundred thousand persons and, upon notice and  
91 hearing, good cause being shown and a determination  
92 made that such an increase would be beneficial to the  
93 subscribers, creditors and stockholders of the organization  
94 or would otherwise increase the availability of coverage to  
95 consumers within the state, the commissioner may, by  
96 written order only, allow the petitioning organization to  
97 exceed an enrollment of three hundred thousand persons.

98 (6) No health maintenance organization shall discrimi-  
99 nate in enrollment policies or quality of services against  
100 any person on the basis of race, sex, age, religion, place of  
101 residence, health status or source of payment: *Provided*,  
102 That differences in rates based on valid actuarial distinc-  
103 tions, including distinctions relating to age and sex, shall  
104 not be considered discrimination in enrollment policies.

105 (7) No agent of a health maintenance organization or  
106 person selling enrollments in a health maintenance organi-  
107 zation shall sell an enrollment in a health maintenance  
108 organization unless the agent or person shall first disclose  
109 in writing to the prospective purchaser the following infor-  
110 mation using the following exact terms in bold print: (a)  
111 "Services offered", including any exclusions or limitations;  
112 (b) "full cost", including copayments; (c) "facilities avail-  
113 able"; (d) "transportation services"; (e) "disenrollment  
114 rate"; and (f) "staff", including the names of all full-time  
115 staff physicians, consulting specialists, hospitals and phar-  
116 macies associated with the health maintenance organiza-  
117 tion. In any home solicitation, any three-day cooling-off  
118 period applicable to consumer transactions generally ap-  
119 plies in the same manner as consumer transactions.

120 The form disclosure statement shall not be used in  
121 sales until it has been approved by the commissioner or  
122 submitted to the commissioner for sixty days without  
123 disapproval. Any person who fails to disclose the requisite  
124 information prior to the sale of an enrollment may be held  
125 liable in an amount equivalent to one year's subscription



126 rate to the health maintenance organization, plus costs and  
127 a reasonable attorney's fee.

128 (8) No contract with an enrollee shall prohibit an  
129 enrollee from canceling his or her enrollment at any time  
130 for any reason except that the contract may require thirty  
131 days' notice to the health maintenance organization.

132 (9) Any person who in connection with an enrollment  
133 violates any subsection of this section may be held liable  
134 for an amount equivalent to one year's subscription rate,  
135 plus costs and a reasonable attorney's fee.

**§33-25A-15. Agent licensing and appointment required; regulation of marketing.**

1 (1) Health maintenance organizations are subject to  
2 the provisions of article twelve of this chapter.

3 (2) With respect to individual and group contracts  
4 covering fewer than twenty-five subscribers, after a sub-  
5 scriber signs a health maintenance organization enroll-  
6 ment application and before the health maintenance orga-  
7 nization may process the application changing or initiat-  
8 ing the subscriber coverage, each health maintenance  
9 organization must verify in writing, in a form prescribed  
10 by the commissioner, the intent and desire of the individu-  
11 al subscriber to join the health maintenance organization.  
12 The verification shall be conducted by someone outside  
13 the health maintenance organization marketing depart-  
14 ment and shall show that:

15 (a) The subscriber intends and desires to join the  
16 health maintenance organization;

17 (b) If the subscriber is a medicare or medicaid recipi-  
18 ent, the subscriber understands that by joining the health  
19 maintenance organization he or she will be limited to the  
20 benefits provided by the health maintenance organization,  
21 and medicare or medicaid will pay the health maintenance  
22 organization for the subscriber coverage;

23 (c) The subscriber understands the applicable restric-  
24 tions of health maintenance organizations especially that  
25 he or she must use the health maintenance organization  
26 providers and secure approval from the health mainte-

27 nance organization to use health care providers outside the  
28 plan; and

29 (d) If the subscriber is a member of a health mainte-  
30 nance organization, the subscriber understands that he or  
31 she is transferring to another health maintenance organi-  
32 zation.

33 (3) The health maintenance organization shall not pay  
34 a commission, fee, money or any other form of scheduled  
35 compensation to any health insurance agent until the sub-  
36 scriber's application has been processed and the health  
37 maintenance organization has confirmed the subscriber's  
38 enrollment by written notice in the form prescribed by the  
39 commissioner. The confirmation notice shall be accompa-  
40 nied by the evidence of coverage required by section eight  
41 of this article and shall confirm:

42 (a) The subscriber's transfer from his or her existing  
43 coverage (i.e. from medicare, medicaid, another health  
44 maintenance organization, etc.) to the new health mainte-  
45 nance organization; and

46 (b) The date enrollment begins and when benefits will  
47 be available.

48 (4) The enrollment process shall be considered com-  
49 plete seven days after the health maintenance organization  
50 mails the confirmation notice and evidence of coverage to  
51 the subscriber. Each health maintenance organization is  
52 directly responsible for enrollment abuses.

53 (5) The commissioner may, in his or her discretion,  
54 after notice and hearing, promulgate rules as are necessary  
55 to regulate marketing of health maintenance organizations  
56 by persons compensated directly or indirectly by the  
57 health maintenance organizations. When necessary the  
58 rules may prohibit door-to-door solicitations, may prohib-  
59 it commission sales, and may provide for such other pro-  
60 scriptions and other rules as are required to effectuate the  
61 purposes of this article.

### §33-25A-17. Examinations.

1 (1) The commissioner may make an examination of  
2 the affairs of any health maintenance organization and

3 providers with whom the organization has contracts, agree-  
4 ments or other arrangements as often as he or she consid-  
5 ers it necessary for the protection of the interests of the  
6 people of this state but not less frequently than once every  
7 three years.

8 (2) The commissioner may contract with the depart-  
9 ment of health and human resources, any entity which has  
10 been accredited by a nationally recognized accrediting  
11 organization and has been approved by the commissioner  
12 to make examinations concerning the quality of health  
13 care services of any health maintenance organization and  
14 providers with whom the organization has contracts, agree-  
15 ments or other arrangements, or any entity contracted with  
16 by the department of health and human resources, as often  
17 as it considers necessary for the protection of the interests  
18 of the people of this state, but not less frequently than  
19 once every three years: *Provided*, That in making the  
20 examination, the department of health and human re-  
21 sources or the accredited entity shall utilize the services of  
22 persons or organizations with demonstrable expertise in  
23 assessing quality of health care.

24 (3) Every health maintenance organization and affili-  
25 ated provider shall submit its books and records to the  
26 examinations and in every way facilitate them. For the  
27 purpose of examinations, the commissioner and the de-  
28 partment of health and human resources have all powers  
29 necessary to conduct the examinations, including, but not  
30 limited to, the power to issue subpoenas, the power to  
31 administer oaths to and examine the officers and agents of  
32 the health maintenance organization and the principals of  
33 the providers concerning their business.

34 (4) The health maintenance organization is subject to  
35 the provisions of section nine, article two of this chapter in  
36 regard to the expense and conduct of examinations.

37 (5) In lieu of the examination, the commissioner may  
38 accept the report of an examination made by other states.

39 (6) The expenses of an examination assessing quality  
40 of health care under subsection (2) of this section and  
41 section seventeen-a of this article shall be reimbursed

42 pursuant to subdivision (i), subsection (5), section nine,  
43 article two of this chapter.

**§33-25A-17a. Quality assurance.**

1 (a) Each health maintenance organization shall have in  
2 writing a quality assurance program that describes the  
3 program's objectives, organization and problem solving  
4 activities.

5 (b) The scope of the quality assurance program shall  
6 include, at a minimum:

7 (1) Organizational arrangements and responsibilities  
8 for quality management and improvement processes;

9 (2) A documented utilization management program;

10 (3) Written policies and procedures for credentialing  
11 and recredentialing physicians and other licensed provid-  
12 ers who fall under the scope of authority of the health  
13 maintenance organization;

14 (4) A written policy that addresses enrollee's rights and  
15 responsibilities;

16 (5) The adoption of practice guidelines for the use of  
17 preventive health services; and

18 (6) Any other criteria deemed necessary by the com-  
19 missioner.

20 (c) As a condition of doing business in this state, each  
21 health maintenance organization which has been in exist-  
22 tence for at least three years shall apply for and submit to  
23 an accreditation examination to be performed by a nation-  
24 ally recognized accreditation and review organization  
25 approved by the commissioner. The accreditation and  
26 review organization must be experienced in health mainte-  
27 nance organization activities and in the appraisal of medi-  
28 cal practice and quality assurance in a health maintenance  
29 organization setting: *Provided*, That in those instances  
30 where a health maintenance organization has timely ap-  
31 plied for and reasonably pursued an accreditation exami-  
32 nation, but the examination has not been completed, the  
33 health maintenance organization may, upon compliance  
34 with all other provisions of this article, engage in business

35 in this state upon submission of proof to the commissioner  
36 of its application for review.

37 (d) Within thirty days of receipt of the written report  
38 of the accreditation and review organization by the health  
39 maintenance organization, the health maintenance organi-  
40 zation shall submit a copy of this report to the commis-  
41 sioner.

42 (e) This section shall become effective on the first day  
43 of May, one thousand nine hundred ninety-eight.

**§33-25A-18. Suspension or revocation of certificate of author-  
ity.**

1 (1) The commissioner may suspend or revoke any  
2 certificate of authority issued to a health maintenance  
3 organization under this article if he or she finds that any  
4 of the following conditions exist:

5 (a) The health maintenance organization is operating  
6 significantly in contravention of its basic organization  
7 document, in any material breach of contract with an  
8 enrollee, or in a manner contrary to that described in and  
9 reasonably inferred from any other information submitted  
10 under section three of this article unless amendments to  
11 the submissions have been filed with an approval of the  
12 commissioner;

13 (b) The health maintenance organization issues evi-  
14 dence of coverage or uses a schedule of premiums for  
15 health care services which do not comply with the require-  
16 ments of section eight of this article;

17 (c) The health maintenance organization does not  
18 provide or arrange for basic health care services;

19 (d) The department of health and human resources or  
20 other accredited entity certifies to the commissioner that:  
21 (i) The health maintenance organization is unable to fulfill  
22 its obligations to furnish health care services as required  
23 under its contract with enrollees; or (ii) the health mainte-  
24 nance organization does not meet the requirements of  
25 subsection (l), section four of this article;

26 (e) The health maintenance organization is no longer

27 financially responsible and may reasonably be expected to  
28 be unable to meet its obligations to enrollees or prospec-  
29 tive enrollees or is otherwise determined by the commis-  
30 sioner to be in a hazardous financial condition;

31 (f) The health maintenance organization has failed to  
32 implement a mechanism affording the enrollees an oppor-  
33 tunity to participate in matters of policy and operation  
34 under section six of this article;

35 (g) The health maintenance organization has failed to  
36 implement the grievance procedure required by section  
37 twelve of this article in a manner to reasonably resolve  
38 valid grievances;

39 (h) The health maintenance organization, or any per-  
40 son on its behalf, has advertised or merchandised its ser-  
41 vices in an untrue, misrepresentative, misleading, deceptive  
42 or unfair manner;

43 (i) The continued operation of the health maintenance  
44 organization would be hazardous to its enrollees;

45 (j) The health maintenance organization has otherwise  
46 failed to substantially comply with this article;

47 (k) The health maintenance organization has violated  
48 a lawful order of the commissioner; or

49 (l) The health maintenance organization has not com-  
50 plied with the requirements of section seventeen-a of this  
51 article.

52 (2) A certificate of authority shall be suspended or  
53 revoked only after compliance with the requirements of  
54 section twenty-one of this article.

55 (3) When the certificate of authority of a health main-  
56 tenance organization is suspended, the health maintenance  
57 organization shall not, during the period of the suspen-  
58 sion, enroll any additional enrollees except newborn chil-  
59 dren or other newly acquired dependents of existing  
60 enrollees, and shall not engage in any advertising or solici-  
61 tation whatsoever.

62 (4) When the certificate of authority of a health main-  
63 tenance organization is revoked, the organization shall

64 proceed, immediately following the effective date of the  
65 order of revocation, to terminate its affairs, and shall con-  
66 duct no further business except as may be essential to the  
67 orderly conclusion of the affairs of the organization. It  
68 shall engage in no further advertising or solicitation what-  
69 soever. The commissioner may, by written order, permit  
70 such further operation of the organization as he or she  
71 may find to be in the best interests of enrollees, to the end  
72 that enrollees will be afforded the greatest practical oppor-  
73 tunity to obtain continuing health care coverage.

**§33-25A-22. Fees.**

1 Every health maintenance organization subject to this  
2 article shall pay to the commissioner the following fees:  
3 For filing an application for a certificate of authority or  
4 amendment thereto, two hundred dollars; for each renewal  
5 of a certificate of authority, the annual fee as provided in  
6 section thirteen, article three of this chapter; for each form  
7 filing and for each rate filing, the fee as provided in sec-  
8 tion thirty-four, article six of this chapter; and for filing  
9 each annual report, twenty-five dollars. Fees charged un-  
10 der this section shall be for the purposes set forth in sec-  
11 tion thirteen, article three of this chapter.

**\*§33-25A-24. Statutory construction and relationship to other laws.**

1 (a) Except as otherwise provided in this article, provi-  
2 sions of the insurance laws and provisions of hospital or  
3 medical service corporation laws are not applicable to any  
4 health maintenance organization granted a certificate of  
5 authority under this article. The provisions of this article  
6 shall not apply to an insurer or hospital or medical service  
7 corporation licensed and regulated pursuant to the insur-  
8 ance laws or the hospital or medical service corporation  
9 laws of this state except with respect to its health mainte-  
10 nance corporation activities authorized and regulated  
11 pursuant to this article. The provisions of this article shall  
12 not apply to an entity properly licensed by a reciprocal  
13 state to provide health care services to employer groups,  
14 where residents of West Virginia are members of an em-  
15 ployer group, and the employer group contract is entered

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\*Clerk's Note: This section was also amended by S. B. 312 (Chapter 148), which passed prior to this act.

16 into in the reciprocal state. For purposes of this subsection,  
17 a "reciprocal state" means a state which physically borders  
18 West Virginia and which has subscriber or enrollee hold  
19 harmless requirements substantially similar to those set out  
20 in section seven-a of this article.

21 (b) Factually accurate advertising or solicitation re-  
22 garding the range of services provided, the premiums and  
23 copayments charged, the sites of services and hours of  
24 operation, and any other quantifiable, nonprofessional  
25 aspects of its operation by a health maintenance organiza-  
26 tion granted a certificate of authority, or its representative  
27 shall not be construed to violate any provision of law relat-  
28 ing to solicitation or advertising by health professions:  
29 *Provided*, That nothing contained in this subsection shall  
30 be construed as authorizing any solicitation or advertising  
31 which identifies or refers to any individual provider or  
32 makes any qualitative judgment concerning any provider.

33 (c) Any health maintenance organization authorized  
34 under this article shall not be considered to be practicing  
35 medicine and is exempt from the provisions of chapter  
36 thirty of this code, relating to the practice of medicine.

37 (d) The provisions of section fifteen, article four (gen-  
38 eral provisions); section seventeen, article six (noncomply-  
39 ing forms); article six-c (guaranteed loss ratio); article  
40 seven (assets and liabilities); article eight (investments);  
41 article nine (administration of deposits); article twelve  
42 (agents, brokers, solicitors and excess line); section four-  
43 teen, article fifteen (individual accident and sickness insur-  
44 ance); section sixteen, article fifteen (coverage of chil-  
45 dren); section eighteen, article fifteen (equal treatment of  
46 state agency); section nineteen, article fifteen (coordina-  
47 tion of benefits with medicaid); article fifteen-b (uniform  
48 health care administration act); section three, article six-  
49 teen (required policy provisions); section three-f, article  
50 sixteen (treatment of temporomandibular disorder and  
51 craniomandibular disorder); section eleven, article sixteen  
52 (coverage of children); section thirteen, article sixteen  
53 (equal treatment of state agency); section fourteen, article  
54 sixteen (coordination of benefits with medicaid); article



55 sixteen-a (group health insurance conversion); article  
56 sixteen-c (small employer group policies); article  
57 sixteen-d (marketing and rate practices for small employ-  
58 ers); article twenty-seven (insurance holding company  
59 systems); article thirty-four-a (standards and commission-  
60 er's authority for companies deemed to be in hazardous  
61 financial condition); article thirty-five (criminal sanctions  
62 for failure to report impairment); article thirty-seven  
63 (managing general agents); and article thirty-nine (disclo-  
64 sure of material transactions) shall be applicable to any  
65 health maintenance organization granted a certificate of  
66 authority under this article. In circumstances where the  
67 code provisions made applicable to health maintenance  
68 organizations by this section refer to the "insurer", the  
69 "corporation" or words of similar import, the language  
70 shall be construed to include health maintenance organi-  
71 zations.

72 (e) Any long-term care insurance policy delivered or  
73 issued for delivery in this state by a health maintenance  
74 organization shall comply with the provisions of article  
75 fifteen-a of this chapter.

76 (f) A health maintenance organization granted a cer-  
77 tificate of authority under this article shall be exempt from  
78 paying municipal business and occupation taxes on gross  
79 income it receives from its enrollees, or from their em-  
80 ployers or others on their behalf, for health care items or  
81 services provided directly or indirectly by the health main-  
82 tenance organization. This exemption applies to all tax-  
83 able years through the thirty-first day of December, one  
84 thousand nine hundred ninety-six. The commissioner and  
85 the tax department shall conduct a study of the appropri-  
86 ateness of imposition of the municipal business and occu-  
87 pation tax or other tax on health maintenance organiza-  
88 tions, and shall report to the regular session of the Legisla-  
89 ture, one thousand nine hundred ninety-seven, on their  
90 findings, conclusions and recommendations, together with  
91 drafts of any legislation necessary to effectuate their rec-  
92 ommendations.

§33-25A-34. Ambulance services.

1       The Legislature finds that ambulance services in this  
2 state are performed by various volunteer emergency ser-  
3 vice squads, county operations and small businesses, which  
4 may lack the sophistication and expertise required to ne-  
5 gotiate a contract with a health maintenance organization  
6 for the provision of ambulance services, and that the best  
7 interests of the citizens of the state require the continued  
8 development and preservation of an emergency medical  
9 system to serve all the citizens of the state, including those  
10 citizens who do not receive health care services through a  
11 health maintenance organization. Therefore, the commis-  
12 sioner shall promulgate legislative rules, pursuant to the  
13 provisions of article twenty-nine-a of this code, to regulate  
14 contracting for emergency medical services. The rules  
15 shall be promulgated as expeditiously as possible in order  
16 to be considered by the Legislature in the regular session  
17 in the year one thousand nine hundred ninety-seven. The  
18 rules shall consider the following: Reimbursement for  
19 nonemergency transportation by nonparticipating provid-  
20 ers and the appropriate use of 911 or community dis-  
21 patching, as well as other items the commissioner may  
22 deem necessary.

**§33-25A-35. Rural health maintenance organizations.**

1       The Legislature finds that the provisions of this article,  
2 and in particular, the financial requirements that are con-  
3 ditions precedent to the establishment of a health mainte-  
4 nance organization, may be unnecessarily restrictive as  
5 applied to small managed care organizations to operate in  
6 rural areas of the state, and that the public interest may be  
7 served by the development of less restrictive standards  
8 permitting the creation of rural health maintenance orga-  
9 nizations. Therefore, the commissioner shall develop and  
10 present to the joint committee on government and finance,  
11 not later than the fifteenth day of January, one thousand  
12 nine hundred ninety-seven, a proposal for legislation to be  
13 considered during the regular session of the Legislature in  
14 the year one thousand nine hundred ninety-seven, provid-  
15 ing standards for the development and operation of rural  
16 health maintenance organizations.

## CHAPTER 152

(H. B. 4207—By Delegates Gallagher, Adkins, Walters, Hutchins,  
Thompson and Greear)

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{Passed March 9, 1996; in effect from passage. Approved by the Governor.}

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AN ACT to amend chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article twenty-six-b, relating to the establishment of a health maintenance organization guaranty association to protect residents of this state against the failure of a domestic health maintenance organization to fulfill its contractual obligations due to insolvency, and to be funded by domestic health maintenance organizations; short title; purpose; scope; construction; definitions; creation of association; board of directors; powers and duties of association; assessments; plan of operation; powers and duties of the commissioner; records; annual report of the association; tax exemptions; immunity; and prohibited advertisements.

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

That chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article twenty-six-b, to read as follows:

**ARTICLE 26B. WEST VIRGINIA HEALTH MAINTENANCE ORGANIZATION GUARANTY ASSOCIATION.**

- §33-26B-1. Short title.
- §33-26B-2. Purpose.
- §33-26B-3. Scope.
- §33-26B-4. Construction.
- §33-26B-5. Definitions.
- §33-26B-6. Creation of association.
- §33-26B-7. Board of directors.
- §33-26B-8. Powers and duties of the association.
- §33-26B-9. Assessments.
- §33-26B-10. Plan of operation.

§33-26B-11. Powers and duties of the commissioner.

§33-26B-12. Records.

§33-26B-13. Annual report of the association.

§33-26B-14. Tax exemptions.

§33-26B-15. Immunity.

§33-26B-16. Prohibited advertisements.

### **§33-26B-1. Short title.**

1        This article shall be known and may be cited as the  
2 "West Virginia Health Maintenance Organization Guaranty  
3 Association Act."

### **§33-26B-2. Purpose.**

1        The purpose of this article is to protect, subject to  
2 certain limitations, covered individuals against the failure  
3 or inability of a health maintenance organization to per-  
4 form its contractual obligations due to its insolvency.

### **§33-26B-3. Scope.**

1        This article shall provide prospective coverage for any  
2 individual resident of this state who is entitled to receive  
3 health care services under a policy, certificate or contract,  
4 other than one purchased under this state's medicaid pro-  
5 gram, which has been issued by a health maintenance  
6 organization possessing a valid certificate of authority  
7 issued by the commissioner pursuant to article  
8 twenty-five-a of this chapter.

### **§33-26B-4. Construction.**

1        This article shall be liberally construed to effect its  
2 purpose as set forth in section two of this article, which  
3 shall constitute an aid and guide to its interpretation.

### **§33-26B-5. Definitions.**

1        (a) As used in this article:

2        (1) "Association" means the West Virginia health  
3 maintenance organization guaranty association created by  
4 section six of this article.

5        (2) "Board of directors" means the board of directors  
6 of the association, formed pursuant to section seven of this  
7 article.

8       (3) "Commissioner" means the commissioner of insur-  
9       ance or his designee.

10       (4) "Contractual obligation(s)" means any and all  
11       obligations to covered individuals under a covered health  
12       care policy.

13       (5) "Covered health care policy" means any policy,  
14       certificate or contract issued by a health maintenance  
15       organization for health care services.

16       (6) "Covered individual" means a subscriber, enrollee  
17       or member of an insolvent health maintenance organiza-  
18       tion who is a resident of this state, but shall not include an  
19       individual enrolled in such health maintenance organiza-  
20       tion under this state's medicaid program.

21       (7) "Date of insolvency" means the date upon which  
22       an order of liquidation is entered by a court of competent  
23       jurisdiction, even if such order has not become final by  
24       the exhaustion of appellate reviews, or if the health main-  
25       tenance organization is incorporated in another state, the  
26       date upon which the commissioner enters an order revok-  
27       ing the health maintenance organization's certificate of  
28       authority as described in subdivision (9) of this subsec-  
29       tion.

30       (8) "Health maintenance organization" means a health  
31       maintenance organization possessing a valid certificate of  
32       authority issued by the commissioner pursuant to article  
33       twenty-five-a of this chapter, but shall not include any  
34       health maintenance organization with one hundred per-  
35       cent of its enrollees participating in the health mainte-  
36       nance organization under this state's medicaid program or  
37       any health maintenance organization which is not re-  
38       quired, as a condition of being allowed to transact business  
39       as a health maintenance organization in this state, to main-  
40       tain at least two million dollars of either surplus or of  
41       surplus and fully paid in capital stock.

42       (9) "Insolvent health maintenance organization" or  
43       "insolvent" means a health maintenance organization  
44       against which an order of liquidation has been entered by  
45       a court of competent jurisdiction, even if such order has  
46       not become final by the exhaustion of appellate reviews,

47 or a health maintenance organization which is incorporat-  
48 ed in another state and which has had its certificate of  
49 authority revoked by an order of the commissioner con-  
50 taining a finding by the commissioner that the health  
51 maintenance organization either is no longer financially  
52 responsible and may reasonably be expected to be unable  
53 to meet its obligations to its enrollees, or is in a hazardous  
54 financial condition.

55 (10) "Person" means any individual, corporation, part-  
56 nership, association, or voluntary organization, or any  
57 other legal entity.

58 (b) Words and phrases which are not defined in this  
59 section, but are defined in article twenty-five-a of this  
60 chapter, shall have the meanings established in that article  
61 unless the context in which a word or phrase appears  
62 clearly requires otherwise.

#### **§33-26B-6. Creation of association.**

1 There is created a nonprofit legal entity to be known  
2 as the West Virginia health maintenance organization  
3 guaranty association. All health maintenance organiza-  
4 tions shall be and must remain members of the association  
5 as a condition of the continuation of their certificates of  
6 authority to transact business in this state as health mainte-  
7 nance organizations. The association shall perform its  
8 functions under the plan of operation to be established  
9 and approved pursuant to the provisions of section ten of  
10 this article and shall exercise its powers through a board of  
11 directors to be established and approved pursuant to the  
12 provisions of section seven of this article. The association  
13 shall come under the immediate supervision of the com-  
14 missioner.

#### **§33-26B-7. Board of directors.**

1 (a) The board of directors of the association shall  
2 consist of not less than five nor more than nine individuals  
3 serving terms as established in the plan of operation. The  
4 members of the board of directors shall be selected by a  
5 vote of the health maintenance organizations, subject to  
6 the approval of the commissioner, with each health main-  
7 tenance organization being entitled to one vote. Vacan-

8 cies on the board of directors shall be filled for the re-  
9 maining period of the term in the same manner as initial  
10 appointments.

11 (b) To allow for the selection the original board of  
12 directors and the organization of the association, the com-  
13 missioner shall give notice to all health maintenance orga-  
14 nizations of the time and place of an organizational meet-  
15 ing. If the health maintenance organizations have not  
16 selected a suitable board of directors within sixty days  
17 following the organizational meeting, the commissioner  
18 may appoint the initial members of the board of directors.

19 (c) In approving or appointing members to the board  
20 of directors, the commissioner shall consider, among other  
21 things, whether all health maintenance organizations are  
22 fairly represented.

23 (d) Members of the board of directors may be reim-  
24 bursed from the assets of the association for reasonable  
25 expenses incurred by them as members of the board of  
26 directors, but shall not otherwise be compensated by the  
27 association for their services.

### §33-26B-8. Powers and duties of the association.

1 (a) Upon being notified by the commissioner that a  
2 health maintenance organization is insolvent, the associa-  
3 tion, with the approval of the commissioner, shall appoint  
4 one or more health maintenance organizations to enroll  
5 covered individuals.

6 (1) Except as otherwise provided in this article, a  
7 health maintenance organization operating in a given  
8 service area shall be appointed to enroll covered individu-  
9 als within that service area. If more than one health main-  
10 tenance organization is operating in a given service area,  
11 the association shall allocate the covered individuals within  
12 that service area among those health maintenance organi-  
13 zations. The ratio of covered individuals allocated to each  
14 health maintenance organization shall approximate the  
15 ratio of that health maintenance organization's subscribers  
16 in the service area to the total number of health mainte-  
17 nance organization subscribers in the service area. In com-  
18 puting the latter ratio, the association shall use the most

19 recent membership data filed with the commissioner by  
20 the health maintenance organizations and shall exclude  
21 from the computation all covered individuals.

22 (2) If no health maintenance organization is operating  
23 within a given service area, the association shall appoint to  
24 enroll covered individuals within that service area the  
25 health maintenance organization(s) that it deems best  
26 suited to provide health care services to those individuals.  
27 In determining which health maintenance organization(s)  
28 are best suited, the association shall consider the health  
29 care delivery systems and financial resources of all candi-  
30 date health maintenance organizations.

31 (3) A health maintenance organization appointed by  
32 the association shall enroll covered individuals under its  
33 own contract containing terms which are, in the opinion of  
34 the association, comparable to those which were extended  
35 to the covered individuals by the insolvent health mainte-  
36 nance organization. The rate for said contract shall be  
37 determined by the health maintenance organization's rate  
38 methodology for the contract. In selecting a contract of  
39 the appointed health maintenance organization to be used  
40 to provide services to covered individuals, the association  
41 shall consider the services, benefits, and exclusions under  
42 the contract.

43 (4) A health maintenance organization appointed by  
44 the association shall not exclude from coverage a preexist-  
45 ing condition which was not excluded under the covered  
46 individual's policy with the insolvent health maintenance  
47 organization.

48 (5) Except as specifically provided elsewhere in this  
49 section, a health maintenance organization appointed by  
50 the association may not terminate the coverage of a cov-  
51 ered individual for any reason other than:

- 52 (A) Nonpayment of premiums;
- 53 (B) Attainment of medicare or medicaid eligibility;
- 54 (C) Nonresidency in the service area;
- 55 (D) Fraud;



56 (E) Termination of eligibility.

57 (6) If the association appoints a health maintenance  
58 organization to enroll covered individuals residing in a  
59 service area in which the health maintenance organization  
60 is not currently functioning, the association, at the request  
61 of the health maintenance organization and with the ap-  
62 proval of the commissioner, shall transfer to the health  
63 maintenance organization some or all of the contracts  
64 existing between the insolvent health maintenance organi-  
65 zation and providers or other participating entities. Such  
66 transfers shall be prospective only, and the health mainte-  
67 nance organization receiving the contract shall not be  
68 subject to liability, of any type whatsoever, which is based  
69 upon the contract and arose before its transfer.

70 (7) The liability of a health maintenance organization  
71 appointed to enroll covered individuals under this subsec-  
72 tion shall be based only upon the policy issued by the  
73 health maintenance organization, as limited by this article.  
74 In no event shall the health maintenance organization be  
75 subject to liability, of any kind whatsoever, that is based  
76 upon the covered policy issued by the insolvent health  
77 maintenance organization or upon a statement, act or  
78 omission of the insolvent health maintenance organiza-  
79 tion. The liability of the health maintenance organization  
80 shall be strictly limited by the terms of its contract with the  
81 covered individual and shall not include any liability for  
82 any amount or obligation in excess of the applicable limits  
83 of coverage for contractually covered matters, and as lim-  
84 ited by the terms of this article.

85 (8) Notwithstanding any other provision of this chap-  
86 ter, a covered individual shall not be entitled to convert or  
87 renew a contract which has been issued by a health main-  
88 tenance organization pursuant to this subsection unless the  
89 health maintenance organization, in its discretion, agrees  
90 to the conversion or renewal.

91 (b) Notwithstanding any other provision of this article,  
92 coverage provided to a covered individual under this sec-  
93 tion shall terminate when the value of the benefits provid-  
94 ed to the covered individual exceeds one hundred thou-  
95 sand dollars. If the value of the benefits is less than this

96 amount, coverage nonetheless shall terminate one year  
97 from the insolvent health maintenance organization's date  
98 of insolvency or upon the expiration of the policy issued  
99 by the insolvent health maintenance organization, which-  
100 ever is earlier, but in no event prior to one hundred and  
101 eighty days from the insolvent health maintenance organi-  
102 zation's date of insolvency. When the value of the benefits  
103 provided do not exceed one hundred thousand dollars, no  
104 covered individual may be terminated under the provi-  
105 sions of this subsection if, at the time such coverage could  
106 otherwise be terminated:

107 (1) The individual is undergoing treatment for an  
108 acute injury which occurred while the individual was cov-  
109 ered, in which case coverage shall last until such treatment  
110 is completed, but shall be limited to such treatment; or

111 (2) The individual is undergoing treatment for an  
112 acute illness which was diagnosed while the individual was  
113 covered, in which case coverage shall continue until such  
114 treatment is completed, but shall be limited to such treat-  
115 ment; or

116 (3) The individual is undergoing a course of inpatient  
117 treatment which began while the individual was covered, in  
118 which case coverage shall continue until such treatment is  
119 completed, but shall be limited to such treatment.

120 (c) If the association fails to appoint a health mainte-  
121 nance organization to enroll a covered individual within a  
122 reasonable period of time, the commissioner, in his or her  
123 discretion, may appoint a health maintenance organization  
124 on behalf of the association.

125 (d) At the request of a covered individual, the associa-  
126 tion shall defend any suit brought against that covered  
127 individual contrary to the provisions of section seven-a,  
128 article twenty-five-a of this chapter. If the association  
129 prevails in such a suit, it shall be entitled to recover its  
130 costs and attorney's fees from the plaintiff.

131 (e) The association shall render assistance and advice  
132 to the commissioner, upon his or her request, in any delib-  
133 eration, proceeding, inquiry or presentation which con-  
134 cerns an insolvent health maintenance organization.

135 (f) The association shall have standing to appear be-  
136 fore any court which has jurisdiction over an insolvent  
137 health maintenance organization. Such standing shall  
138 extend to all matters germane to the powers and duties of  
139 the association including, but not limited to, the liquida-  
140 tion of the health maintenance organization, and the deter-  
141 mination or transfer of the contractual obligations, assets  
142 or liabilities of the health maintenance organization.

143 (g) In addition to exercising such other powers as may  
144 be granted or implied elsewhere in this article, the associa-  
145 tion may:

146 (1) Enter into contracts or perform such other actions  
147 as are necessary and appropriate to carry out its duties  
148 under this article;

149 (2) Take any legal actions as are necessary and appro-  
150 priate including, but not limited to, actions for the recov-  
151 ery of any unpaid assessments made under section nine of  
152 this article;

153 (3) Borrow money as necessary to effectuate the pur-  
154 poses of this article and issue evidence of such indebted-  
155 ness, which if not in default, shall be treated as legal invest-  
156 ments for domestic insurers or health maintenance organi-  
157 zations and may be carried by a domestic insurer or health  
158 maintenance organization as an admitted asset;

159 (4) Employ or retain such persons to handle the finan-  
160 cial transactions of the association and to perform such  
161 other functions as become necessary or appropriate; and

162 (5) Negotiate and contract with any liquidator, conser-  
163 vator, or ancillary receiver of an insolvent health mainte-  
164 nance organization.

### §33-26B-9. Assessments.

1 (a) For the purpose of providing the funds necessary  
2 for the association to carry out its duties under this article,  
3 the initial assessment of health maintenance organizations  
4 shall be as follows:

5 (1) Each health maintenance organization possessing a  
6 valid certificate of authority issued by the commissioner

7 on or before the effective date of this article shall pay an  
8 initial assessment of five thousand dollars.

9 (2) Prior to and as a condition of first receiving a  
10 certificate of authority from the commissioner after the  
11 effective date of this article, a health maintenance organi-  
12 zation shall pay an initial assessment of five thousand  
13 dollars.

14 (b) To obtain funds to pay administrative expenses,  
15 including, but not limited to legal costs, the association  
16 may make additional assessments. The association shall  
17 make only such assessments as are necessary to pay ex-  
18 penses or debts which have been incurred by the associa-  
19 tion, or are reasonably foreseeable. Assessments shall be  
20 based on the annual earned premium revenue for  
21 nonmedicare and nonmedicaid contracts allocated to West  
22 Virginia in the preceding calendar year unless the associa-  
23 tion, in its discretion, substitutes such other amount that  
24 more accurately reflects a health maintenance organiza-  
25 tion's current activity within this state. The rate used to  
26 compute the assessment shall be the same for all health  
27 maintenance organizations.

28 (c) Assessments shall be made by issuing written no-  
29 tice of the assessment to the health maintenance organiza-  
30 tions, and shall be due thirty days after the issuance of  
31 such written notice. Assessments which are not paid when  
32 due shall accrue interest at a reasonable rate to be set by  
33 the association, subject to the approval of the commission-  
34 er.

35 (d) With the approval of the commissioner, the associ-  
36 ation may abate or defer, in whole or in part, the assess-  
37 ment of a health maintenance organization if, in the opin-  
38 ion of the association, immediate payment of the assess-  
39 ment would materially impair the health maintenance  
40 organization's ability to fulfill its contractual obligations.  
41 The amount by which an assessment is abated or deferred  
42 may be assessed against the other health maintenance  
43 organizations in addition to all other assessments called  
44 for by this section.

45 (e) The association may, by an equitable method es-  
46 tablished in its plan of operation, refund to health mainte-

47 nance organizations all or part of an assessment which the  
48 association determines is unnecessary to carry out its du-  
49 ties. Refunds shall be proportional to the amounts actual-  
50 ly paid by the health maintenance organizations to satisfy  
51 the assessment.

52 (f) It shall be proper for any health maintenance orga-  
53 nization, in determining its premium rates, to consider the  
54 amount reasonably necessary to meet its assessment obli-  
55 gations under this article.

56 (g) The association shall issue to each health mainte-  
57 nance organization paying an assessment under this article  
58 a certificate of contribution for the amount paid. All out-  
59 standing certificates shall be of equal dignity and priority  
60 without reference to amounts or dates of issue. For pur-  
61 poses of determining the financial condition of the health  
62 maintenance organization, a certificate of contribution  
63 shall be treated as an asset of such form, amount and dura-  
64 tion as the commissioner may prescribe.

#### §33-26B-10. Plan of operation.

1 (a) The association shall submit to the commissioner a  
2 proposed plan of operation and all subsequent amend-  
3 ments thereto to assure the equitable, efficient administra-  
4 tion of the association. The proposed plan of operation  
5 and any amendments thereto shall become effective upon  
6 approval by the commissioner.

7 (b) If the association fails to submit a suitable pro-  
8 posed plan of operation within one hundred and eighty  
9 days following the effective date of this article, or if at any  
10 time thereafter, the association fails to submit suitable  
11 amendments to the plan of operation within a reasonable  
12 time, the commissioner, after notice and hearing, shall  
13 promulgate by order such plan provisions as he deems  
14 necessary or appropriate. Plan provisions promulgated by  
15 the commissioner shall continue in force until modified  
16 by the commissioner or superseded by a plan or amend-  
17 ments thereto which has been submitted by the association  
18 and approved by the commissioner.

19 (c) All health maintenance organizations shall comply  
20 with the plan of operation.

21 (d) In addition to such requirements as are set forth

22 elsewhere in this article, the plan of operation shall:

23 (1) Establish procedures for handling the assets of the  
24 association;

25 (2) Establish the amount and method of reimbursing  
26 members of the board of directors for reasonable expenses;  
27

28 (3) Provide for regular meetings of the board of directors  
29 and establish methods by which meetings of the board  
30 of directors may be conducted, including, but not limited  
31 to, telephone conferences;

32 (4) Establish procedures for keeping records of all  
33 financial transactions of the association, its agents, and the  
34 board of directors;

35 (5) Establish criteria for board members, and procedures  
36 for selecting board members and submitting such  
37 selections to the commissioner;

38 (6) Establish procedures for making assessments under  
39 this article;

40 (7) Contain additional provisions necessary for the  
41 exercise of the association's powers and the fulfillment of  
42 the association's duties.

43 (e) The plan of operation may provide that any or all  
44 powers of the association, except those set forth in subsection  
45 (f), section eight of this article, and in subdivision (2),  
46 subsection (g), section eight of this article, and in section  
47 nine of this article, may be delegated to an administrator,  
48 which may be a corporation, association, or other organization,  
49 and which performs or will perform functions  
50 similar to those of the association, or its equivalent. Such a  
51 delegation shall take effect only with the approval of the  
52 commissioner, who may revoke such delegation at any  
53 time. The administrator shall be reimbursed for any payments  
54 it makes on behalf of the association and shall be paid for the  
55 services it renders to the association. The  
56 delegation of powers to an administrator shall not absolve  
57 the association of any duty imposed upon it by this article.

58 (f) If the plan of operation provides for the delegation  
59 of powers to an administrator, the association shall select  
60 an administrator, with the approval of the commissioner.

61 The selection of an administrator shall be exempt from the  
62 competitive bidding process which may apply to certain  
63 state agencies. The association shall evaluate potential  
64 administrators based upon reasonable criteria, which shall  
65 include, but not be limited to:

66 (1) The administrator's proven ability to manage large  
67 group health insurance plans or health maintenance orga-  
68 nizations;

69 (2) The efficiency of the administrator's procedures;

70 (3) An estimate of the administrator's charges for  
71 services rendered to the association.

### §33-26B-11. Powers and duties of the commissioner.

1 (a) The commissioner may suspend or revoke, after  
2 notice and hearing, the certificate of authority of a health  
3 maintenance organization for:

4 (1) Failure to pay an assessment when due; or

5 (2) Failure to comply with the plan of operation; or

6 (3) Failure either timely to comply with or timely to  
7 appeal its appointment under section eight of this article.

8 (b) Any action of the board of directors may be ap-  
9 pealed to the commissioner by any health maintenance  
10 organization within thirty days of the action. The resulting  
11 action or order of the commissioner shall be subject to  
12 judicial review in a court of competent jurisdiction.

13 (c) The commissioner may require the association to  
14 notify the enrollees of an insolvent health maintenance  
15 organization, and any other interested parties, of the deter-  
16 mination of insolvency and of their rights under this arti-  
17 cle. Such notification shall be by mail at their last known  
18 addresses, or by publication in a newspaper of general  
19 circulation, if sufficient information for notification by  
20 mail is not available.

21 (d) Powers of the commissioner established in this  
22 section are in addition to those granted or implied else-  
23 where in this chapter, and this section shall not be con-  
24 strued to diminish or eliminate those other powers.

### §33-26B-12. Records.

1 The association shall keep records of all meetings of  
2 the board of directors and of all transactions by which the  
3 association or its representatives carry out its duties. All  
4 records shall be made available to the commissioner upon  
5 his or her request.

**§33-26B-13. Annual report of the association.**

1 The association shall be subject to examination and  
2 regulation by the commissioner. The board of directors  
3 shall submit to the commissioner, not later than the first  
4 day of May of each year and in a form approved by the  
5 commissioner, a financial report for the preceding calen-  
6 dar year and a report of its activities during the preceding  
7 calendar year.

**§33-26B-14. Tax exemptions.**

1 The association shall be exempt from payment of all  
2 fees and all taxes levied by this state or any of its subdivi-  
3 sions except ad valorem taxes.

**§33-26B-15. Immunity.**

1 There shall be no liability on the part of and no cause  
2 of action of any nature shall arise against the association,  
3 members of the board of directors, the commissioner, or  
4 the representatives, agents or employees of the aforemen-  
5 tioned persons for statements made or actions taken or not  
6 taken in the good faith exercise of their powers under this  
7 article, or for the statements, acts or omissions of a health  
8 maintenance organization appointed pursuant to section  
9 eight of this article or an insolvent health maintenance  
10 organization.

**§33-26B-16. Prohibited advertisements.**

1 No person shall make, publish, disseminate, circulate  
2 or place before the public, or cause, directly or indirectly,  
3 to be made, published, disseminated, circulated, or placed  
4 before the public, in any newspaper, magazine, or other  
5 publication, or in the form of a notice, circular, pamphlet,  
6 letter, or poster, or over any radio station or television  
7 station, or in any other way, an advertisement, announce-  
8 ment, or statement which uses the existence of the associa-  
9 tion or of this article for the purpose of soliciting sub-  
10 scriptions to a health maintenance organization: *Provided,*  
11 That this section shall not apply to the association.



# CHAPTER 153

(S. B. 332—By Senators Helmick and Ross)

[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact section five-b, article twenty-eight, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to medicare supplement insurance.

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

That section five-b, article twenty-eight, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

## ARTICLE 28. INDIVIDUAL ACCIDENT AND SICKNESS INSURANCE MINIMUM STANDARDS.

### §33-28-5b. Medicare supplement insurance.

1 (a) *Definitions.*—

2 (1) "Applicant" means, in the case of an individual  
3 medicare supplement policy or subscriber contract, the  
4 person who seeks to contract for insurance benefits.

5 (2) "Medicare supplement policy" means an individual  
6 policy of accident and sickness insurance or a subscriber  
7 contract (of hospital and medical service corporations or  
8 health maintenance organizations), other than a policy  
9 issued pursuant to a contract under Section 1876 of the  
10 federal Social Security Act (42 U.S.C. Section 1395 et  
11 seq.), or an issued policy under a demonstration project  
12 specified in 42 U.S.C. §1395ss(g)(1), which is advertised,  
13 marketed or designed primarily as a supplement to reim-  
14 bursements under medicare for the hospital, medical or  
15 surgical expenses of persons eligible for medicare. Such  
16 term does not include:

17 (A) A policy or contract of one or more employers or  
18 labor organizations, or of the trustees of a fund established

19 by one or more employers or labor organizations, or a  
20 combination thereof, for employees or former employees,  
21 or combination thereof, or for members or former mem-  
22 bers, or combination thereof, of the labor organizations;  
23 or

24 (B) A policy or contract of any professional, trade or  
25 occupational association for its members or former or  
26 retired members, or combination thereof, if such associa-  
27 tion is composed of individuals all of whom are actively  
28 engaged in the same profession, trade or occupation; has  
29 been maintained in good faith for purposes other than  
30 obtaining insurance; and has been in existence for at least  
31 two years prior to the date of its initial offering of such  
32 policy or plan to its members; or

33 (C) Individual policies or contracts issued pursuant to  
34 a conversion privilege under a policy or contract of group  
35 or individual insurance when such group or individual  
36 policy or contract includes provisions which are inconsis-  
37 tent with the requirements of this section.

38 (3) "Medicare" means the Health Insurance for the  
39 Aged Act, Title XVIII of the Social Security Amendments  
40 of 1965, as then constituted or later amended.

41 (b) *Standards for policy provisions.* —

42 (1) The commissioner shall issue reasonable rules to  
43 establish specific standards for policy provisions of medi-  
44 care supplement policies. Such standards shall be in addi-  
45 tion to and in accordance with the applicable laws of this  
46 state and may cover, but shall not be limited to:

47 (A) Terms of renewability;

48 (B) Initial and subsequent conditions of eligibility;

49 (C) Nonduplication of coverage;

50 (D) Probationary period;

51 (E) Benefit limitations, exceptions and reductions;

52 (F) Elimination period;

53 (G) Requirements for replacement;

54 (H) Recurrent conditions; and

55 (I) Definitions of terms.

56 (2) The commissioner may issue reasonable rules that  
57 specify prohibited policy provisions not otherwise specifi-  
58 cally authorized by statute which, in the opinion of the  
59 commissioner, are unjust, unfair or unfairly discriminatory  
60 to any person insured or proposed for coverage under a  
61 medicare supplement policy.

62 (3) Notwithstanding any other provisions of the law, a  
63 medicare supplement policy may not deny a claim for  
64 losses incurred more than six months from the effective  
65 date of coverage for a preexisting condition. The policy  
66 may not define a preexisting condition more restrictively  
67 than a condition for which medical advice was given or  
68 treatment was recommended by or received from a physi-  
69 cian within six months before the effective date of cover-  
70 age.

71 (c) *Minimum standards for benefits.* — The commis-  
72 sioner shall issue reasonable rules to establish minimum  
73 standards for benefits under medicare supplement poli-  
74 cies.

75 (d) *Loss ratio standards.* — Medicare supplement  
76 policies shall be expected to return to policyholders bene-  
77 fits which are reasonable in relation to the premium  
78 charge. The commissioner shall issue reasonable rules to  
79 establish minimum standards for loss ratios for medicare  
80 supplement policies on the basis of incurred claims expe-  
81 rience and earned premiums for the entire period for  
82 which rates are computed to provide coverage and in ac-  
83 cordance with accepted actuarial principles and practices.  
84 For purposes of rules issued pursuant to this subsection,  
85 medicare supplement policies issued as a result of solicita-  
86 tions of individuals through the mail or mass media adver-  
87 tising, including both print and broadcast advertising, shall  
88 be treated as individual policies.

89 (e) *Disclosure standards.* —

90 (1) In order to provide for full and fair disclosure in  
91 the sale of accident and sickness policies, to persons eligi-  
92 ble for medicare, the commissioner may require by rule  
93 that no policy of accident and sickness insurance may be  
94 issued for delivery in this state and no certificate may be  
95 delivered pursuant to such a policy unless an outline of  
96 coverage is delivered to the applicant at the time applica-  
97 tion is made.

98 (2) The commissioner shall prescribe the format and  
99 content of the outline of coverage required by subdivision  
100 (1) of this subsection. For purposes of this subdivision,  
101 "format" means style, arrangements and overall appear-  
102 ance, including such items as size, color and prominence  
103 of type and the arrangement of text and captions. Such  
104 outline of coverage shall include:

105 (A) A description of the principal benefits and cover-  
106 age provided in the policy;

107 (B) A statement of the exceptions, reductions and  
108 limitations contained in the policy;

109 (C) A statement of the renewal provisions including  
110 any reservation by the insurer of the right to change pre-  
111 miums and disclosure of the existence of any automatic  
112 renewal premium increases based on the policyholder's  
113 age;

114 (D) A statement that the outline of coverage is a sum-  
115 mary of the policy issued or applied for and that the poli-  
116 cy should be consulted to determine governing contractu-  
117 al provisions.

118 (3) The commissioner may prescribe by rule a stan-  
119 dard form and the contents of an informational brochure  
120 for persons eligible for medicare, which is intended to  
121 improve the buyer's ability to select the most appropriate  
122 coverage and improve the buyer's understanding of medi-  
123 care. Except in the case of direct response insurance poli-  
124 cies, the commissioner may require by rule that the infor-  
125 mation brochure be provided to any prospective insureds  
126 eligible for medicare concurrently with delivery of the  
127 outline of coverage. With respect to direct response insur-

128 ance policies, the commissioner may require by rule that  
129 the prescribed brochure be provided upon request to any  
130 prospective insureds eligible for medicare, but in no event  
131 later than the time of policy delivery.

132 (4) The commissioner may further promulgate rea-  
133 sonable rules to govern the full and fair disclosure of the  
134 information in connection with the replacement of acci-  
135 dent and sickness policies, subscriber contracts or certifi-  
136 cates by persons eligible for medicare.

137 (f) *Notice of free examination.* — Medicare supple-  
138 ment policies or certificates, other than those issued pursu-  
139 ant to direct response solicitation, shall have a notice  
140 prominently printed on the first page of the policy or  
141 attached thereto stating in substance that the applicant  
142 shall have the right to return the policy or certificate with-  
143 in thirty days from its delivery and have the premium  
144 refunded if, after examination of the policy or certificate,  
145 the applicant is not satisfied for any reason. Any refund  
146 made pursuant to this section shall be paid directly to the  
147 applicant by the issuer in a timely manner. Medicare  
148 supplement policies or certificates issued pursuant to a  
149 direct response solicitation to persons eligible for medi-  
150 care shall have a notice prominently printed on the first  
151 page or attached thereto stating in substance that the appli-  
152 cant shall have the right to return the policy or certificate  
153 within thirty days of its delivery and to have the premium  
154 refunded if, after examination, the applicant is not satisfied  
155 for any reason. Any refund made pursuant to this section  
156 shall be paid directly to the applicant by the issuer in a  
157 timely manner.

158 (g) *Administrative procedures.* — Rules promulgated  
159 pursuant to this section shall be subject to the provisions  
160 of chapter twenty-nine-a (the West Virginia Administrative  
161 Procedures Act) of this code.

162 (h) *Severability.* — If any provision of this section or  
163 the application thereof to any person or circumstance is  
164 for any reason held to be invalid, the remainder of the  
165 section and the application of such provision to other  
166 persons or circumstances shall not be affected thereby.

## CHAPTER 154

(H. B. 4866—By Delegates Love, Osborne, Varner, Cann,  
Harrison, Sprouse and Calvert)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section eleven, article two, chapter five-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section one, article three, chapter twelve of said code; and to further amend article six of said chapter by adding thereto a new section, designated section nine-h, all relating to furnishing certain reports to the board of investments requiring the secretary of the department of administration to provide the board of investments with monthly revenue projections and projections of the daily revenue flows for the general revenue fund; requiring the auditor to present daily reports to the board of investments on warrants issued; and requiring that securities shall be held by the board of investments, its custodian bank or a neutral third party when the board enters into repurchase agreements.

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

That section eleven, article two, chapter five-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that section one, article three, chapter twelve of said code be amended and reenacted; and that article six, chapter twelve be amended by adding thereto a new section, designated section nine-h, all to read as follows:

### **Chapter**

**5A. Department of Administration.**

**12. Public Moneys and Securities.**

### **CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.**

#### **ARTICLE 2. FINANCE DIVISION.**

**§5A-2-11. Estimates of revenue; reports on revenue collections; withholding department funds on noncompliance.**

1 (a) Prior to the beginning of each fiscal year the secre-  
2 tary shall estimate the revenue to be collected month by  
3 month by each classification of tax for that fiscal year as it  
4 relates to the official estimate of revenue for each tax for  
5 that fiscal year and the secretary shall certify this estimate  
6 to the governor and the legislative auditor and the board  
7 of investments by the first day of July for that fiscal year.

8 The secretary shall ascertain the collection of the reve-  
9 nue of the state and shall determine for each month of the  
10 fiscal year the proportion which the amount actually col-  
11 lected during a month bears to the collection estimated by  
12 him or her for that month. The secretary shall certify to  
13 the governor, the legislative auditor and the board of in-  
14 vestments, as soon as possible after the close of each  
15 month, and not later than the fifteenth day of each month,  
16 and at such other times as the governor, the legislative  
17 auditor or the board of investments may request, the con-  
18 dition of the state revenues and of the several funds of the  
19 state and the proportion which the amount actually col-  
20 lected during the preceding month bears to the collection  
21 estimated by him or her for that month. The secretary  
22 shall include in this certification the same information  
23 previously certified for prior months in each fiscal year.  
24 For the purposes of this section, the secretary shall have  
25 the authority to require all necessary estimates and reports  
26 from any spending unit of the state government.

27 If the secretary fails to certify to the governor, the  
28 legislative auditor and the board of investments the infor-  
29 mation required by this subsection within the time speci-  
30 fied herein, the legislative auditor shall notify the auditor  
31 and treasurer of the failure, and thereafter no funds appro-  
32 priated to the department of administration may be ex-  
33 pended until the secretary has certified the information  
34 required by this subsection.

35 (b) Prior to the first day of July of each fiscal year, the  
36 secretary shall estimate daily revenue flows for the general  
37 revenue fund for the next fiscal year as it relates to the

38 official estimate of revenue. Subsequent to the end of each  
39 fiscal year, the secretary shall compare the projected daily  
40 revenue flows with the actual daily revenue flows from the  
41 previous year. The secretary may for any month or  
42 months, at his or her discretion, revise the annual projec-  
43 tions of the daily revenue flows. The secretary shall certify  
44 to the governor, the legislative auditor and the board of  
45 investments, as soon as possible after the close of each  
46 month, and not later than the fifteenth day of each month,  
47 and at such other times as the governor, the legislative  
48 auditor or the board of investments may request, the con-  
49 dition of the general revenue fund and the comparison of  
50 the projected daily revenue flows with the actual daily  
51 revenue flows. If the secretary fails to certify to the gover-  
52 nor, the legislative auditor and the board of investments  
53 the information required by this subsection within the time  
54 specified herein, the legislative auditor shall notify the  
55 auditor and treasurer of the failure, and thereafter no  
56 funds appropriated to the department of administration  
57 may be expended until the secretary has certified the in-  
58 formation required by this subsection.

## CHAPTER 12. PUBLIC MONEYS AND SECURITIES.

### Article

3. Appropriations, Expenditures and Deductions.
6. West Virginia State Board of Investments.

### ARTICLE 3. APPROPRIATIONS, EXPENDITURES AND DEDUCTIONS.

#### §12-3-1. Manner of payment from treasury; form of checks.

1 Every person claiming to receive money from the  
2 treasury of the state shall apply to the auditor for a warrant  
3 for same. The auditor shall thereupon examine the claim,  
4 and the vouchers, certificates and evidence, if any, offered  
5 in support thereof, and for so much thereof as he or she  
6 finds to be justly due from the state, if payment thereof is  
7 authorized by law, and if there is an appropriation not  
8 exhausted or expired out of which it is properly payable,  
9 the auditor shall issue his or her warrant on the treasurer,  
10 specifying to whom and on what account the money men-  
11 tioned therein is to be paid, and to what appropriation it is



12 to be charged. The auditor shall present to the board of  
13 investments daily reports on the number of warrants is-  
14 sued, the amounts of the warrants and the dates on the  
15 warrants for the purpose of effectuating the investment  
16 policy of the board of investments. On the presentation of  
17 the warrant to the treasurer, the treasurer shall ascertain  
18 whether the warrant has been drawn in pursuance of an  
19 appropriation made by law, and if he or she finds it to be  
20 so, he or she shall in that case, but not otherwise, endorse  
21 his or her check upon the warrant, directed to some depos-  
22 itory, which check shall be payable to the order of the  
23 person who is to receive the money therein specified; or  
24 the treasurer may issue a bank wire in payment of the  
25 warrant. If the check is not presented for payment within  
26 six months after it is drawn, it shall then be the duty of the  
27 treasurer to credit it to the depository on which it was  
28 drawn, to credit the state fund with the amount, and imme-  
29 diately notify the auditor to make corresponding entries  
30 on the auditor's books. No state depository may pay a  
31 check unless it is presented within six months after it is  
32 drawn and every check shall bear upon its face the words,  
33 "Void, unless presented for payment within six months."  
34 All claims required by law to be allowed by any court, and  
35 payable out of the state treasury, shall have the seal of the  
36 court allowing or authorizing the payment of the claim  
37 affixed by the clerk of the court to his or her certificate of  
38 its allowance; and no such claim may be audited and paid  
39 by the auditor unless the seal of the court is thereto at-  
40 tached as aforesaid. No tax or fee may be charged by the  
41 clerk for affixing his or her seal to the certificate, referred  
42 to in this section. The treasurer and the board of invest-  
43 ments shall jointly promulgate rules in accordance with  
44 the provisions of chapter twenty-nine-a of this code gov-  
45 erning the procedure for such payments from the trea-  
46 sury.

**ARTICLE 6. WEST VIRGINIA STATE BOARD OF INVEST-  
MENTS.**

**§12-6-9h. Securities handling.**

1 In financial transactions whereby securities are pur-  
2 chased by the board under an agreement providing for the  
3 resale of such securities to the original seller at a stated  
4 price, the board shall take physical possession of the secu-  
5 rities, directly, by its custodian bank or through a neutral  
6 third party: *Provided*, That an agreement with a neutral  
7 third party may not waive liability for the handling of the  
8 securities: *Provided, however*, That when the board is  
9 unable to take possession, directly, by its custodian bank  
10 or through a mutual third party, the board may leave secu-  
11 rities in a segregated account with the original seller, pro-  
12 vided the amount of the securities with any one seller may  
13 not exceed one hundred fifty million dollars.

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## CHAPTER 155

(H. B. 2748—By Delegates Michael, J. Martin and Mezzatesta)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section five, article twelve, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to allowing premiums collected by the state board of risk and insurance management to be invested with the West Virginia state board of investments, which will allow the funds to accumulate the necessary interest to meet its payment obligation.

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

That section five, article twelve, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 12. STATE INSURANCE.

#### §29-12-5. Powers and duties of board.

1 (a) The board shall have general supervision and con-  
2 trol over the insurance of all state property, activities and  
3 responsibilities, including the acquisition and cancellation

4 thereof; determination of amount and kind of coverage,  
5 including, but not limited to, deductible forms of insur-  
6 ance coverage, inspections or examinations relating there-  
7 to, reinsurance, and any and all matters, factors and con-  
8 siderations entering into negotiations for advantageous  
9 rates on and coverage of all such state property, activities  
10 and responsibilities. Any policy of insurance purchased  
11 or contracted for by the board shall provide that the insur-  
12 er shall be barred and estopped from relying upon the  
13 constitutional immunity of the state of West Virginia  
14 against claims or suits: *Provided*, That nothing herein  
15 shall bar the insurer of political subdivisions from relying  
16 upon any statutory immunity granted such political subdivi-  
17 sions against claims or suits. The board may enter into  
18 any contracts necessary to the execution of the powers  
19 granted to it by this article. It shall endeavor to secure the  
20 maximum of protection against loss, damage or liability to  
21 state property and on account of state activities and re-  
22 sponsibilities by proper and adequate insurance coverage  
23 through the introduction and employment of sound and  
24 accepted methods of protection and principles of insur-  
25 ance. It is empowered and directed to make a complete  
26 survey of all presently owned and subsequently acquired  
27 state property subject to insurance coverage by any form  
28 of insurance, which survey shall include and reflect in-  
29 spections, appraisals, exposures, fire hazards, construction,  
30 and any other objectives or factors affecting or which  
31 might affect the insurance protection and coverage re-  
32 quired. It shall keep itself currently informed on new and  
33 continuing state activities and responsibilities within the  
34 insurance coverage herein contemplated. The board shall  
35 work closely in cooperation with the state fire marshal's  
36 office in applying the rules of that office insofar as the  
37 appropriations and other factors peculiar to state property  
38 will permit. The board is given power and authority to  
39 make rules governing its functions and operations and the  
40 procurement of state insurance, but shall not make or  
41 promulgate any rules in contravention of or inconsistent  
42 with the laws or rules governing the office of insurance  
43 commissioner of West Virginia.

44 The board is hereby authorized and empowered to  
45 negotiate and effect settlement of any and all insurance  
46 claims arising on or incident to losses of and damages to  
47 state properties, activities and responsibilities hereunder  
48 and shall have authority to execute and deliver proper  
49 releases of all such claims when settled. The board may  
50 adopt rules and procedures for handling, negotiating and  
51 settlement of all such claims. All such settlements and  
52 releases shall be effected with the knowledge and consent  
53 of the attorney general.

54 (b) If requested by a political subdivision or by a  
55 charitable or public service organization, the board is  
56 authorized to provide property and liability insurance to  
57 the political subdivisions or such organizations to insure  
58 their property, activities and responsibilities. Such board  
59 is authorized to enter into any necessary contract of insur-  
60 ance to further the intent of this subsection.

61 The property insurance provided by the board, pursu-  
62 ant to this subsection, may also include insurance on prop-  
63 erty leased to or loaned to the political subdivision or such  
64 organization which is required to be insured under a writ-  
65 ten agreement.

66 The cost of this insurance, as determined by the board,  
67 shall be paid by the political subdivision or the organiza-  
68 tion and may include administrative expenses. All funds  
69 received by the board, (including, but not limited to, state  
70 agency premiums, mine subsidence premiums, and politi-  
71 cal subdivision premiums) shall be deposited with the West  
72 Virginia state board of investments with the interest in-  
73 come a proper credit to such property insurance trust fund  
74 or liability insurance trust fund, as applicable.

75 Political subdivision as used in this subsection shall  
76 have the same meaning as in section three, article twelve-a  
77 of this chapter.

78 Charitable or public service organization as used in  
79 this subsection means a bona fide, not for profit,  
80 tax-exempt, benevolent, educational, philanthropic, hu-  
81 mane, patriotic, civic, religious, eleemosynary, incorporat-  
82 ed or unincorporated association or organization or a

83 rescue unit or other similar volunteer community service  
84 organization or association, but does not include any  
85 nonprofit association or organization, whether  
86 incorporated or not, which is organized primarily for the  
87 purposes of influencing legislation or supporting or  
88 promoting the campaign of any candidate for public  
89 office.

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## CHAPTER 156

(H. B. 4718—By Delegate Hunt)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section two hundred three, article two, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to reporting by broker dealers, agents and investment advisors.

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

That section two hundred three, article two, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### **ARTICLE 2. REGISTRATION OF BROKER-DEALERS, AGENTS AND INVESTMENT ADVISERS.**

#### **§32-2-203. Post-registration provisions.**

1 (a) Every registered broker-dealer and investment  
2 adviser shall make and keep such accounts,  
3 correspondence, memoranda, papers, books and other  
4 records as the commissioner by rule prescribes. All  
5 records so required shall be preserved for three years  
6 unless the commissioner by rule prescribes otherwise for  
7 particular types of records.

8 (b) Every registered broker-dealer and investment  
9 adviser shall file such financial reports as the  
10 commissioner by rule prescribes.

11 (c) If the information contained in any document  
12 filed with the commissioner is or becomes inaccurate or  
13 incomplete in any material respect, the registrant shall  
14 promptly file a correcting amendment unless notification  
15 of the correction has been given under subsection (b),  
16 section two hundred one of this article.

17 (d) In addition to any other report required by the  
18 commissioner, each registered broker-dealer with a  
19 physical office location within this state shall file an  
20 annual report, as of the thirty-first day of December, and  
21 due on or before the fifteenth day of February, including  
22 certain aggregate product sales information. The report  
23 shall include the following, by office location (regardless  
24 of whether such location constitutes a branch): (i) The  
25 aggregate dollar amount of certificates of deposits or  
26 other federally insured deposit products sold to customers  
27 which are held by or accounted for by the broker-dealer  
28 on behalf of its customers; and (ii) the aggregate dollar  
29 amount of money market accounts or other accounts  
30 accessible by draft, order or check which are held by or  
31 accounted for by the broker-dealer on behalf of its  
32 customers. The commissioner may prescribe the form of  
33 such report and may promulgate rules to implement the  
34 requirements of this section.

35 (e) All the records referred to in subsection (a) of this  
36 section are subject at any time or from time to time to  
37 such reasonable periodic, special or other examinations by  
38 representatives of the commissioner, within or without this  
39 state, as the commissioner deems necessary or appropriate  
40 in the public interest or for the protection of investors.  
41 For the purpose of avoiding unnecessary duplication of  
42 examinations, the commissioner, insofar as he deems it  
43 practicable in administering this subsection, may co-  
44 operate with the securities administrators of other states,  
45 the securities and exchange commission, and any national  
46 securities exchange or national securities association  
47 registered under the Securities Exchange Act of 1934.

## CHAPTER 157

(Com. Sub. for S. B. 19—By Senators Buckalew, Kimble, Minear, Ross, Sharpe and Wiedebusch)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section four, article two-a, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections one and two, article three, chapter fifty of said code; to amend and reenact section seventeen, article one, chapter fifty-one of said code; to amend article three of said chapter by adding thereto four new sections, designated sections fourteen, fifteen, sixteen and seventeen; to amend and reenact section eleven, article one, chapter fifty-nine of said code; and to amend article five, chapter sixty-two of said code by adding thereto a new section, designated section ten, all relating generally to increasing judicial fees which are dedicated to specific purposes; removing the ten dollar assessment for felony convictions; instituting a mandatory assessment of fifty dollars for each felony conviction which shall be paid to the crime victims compensation fund; increasing filing fees in magistrate court for civil and criminal actions to be deposited in the court security fund; designating the administrative director of the supreme court of appeals to serve as chairperson of the court security board; creating the court security fund; requiring appropriation of the fund; creating the court security board; setting forth the terms of members and their duties; providing for security plans and approval of those plans; providing for awards from the fund; providing for the training of personnel; requiring the board to promulgate legislative rules; and increasing fees in circuit court actions to be deposited in the court security fund.

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

That section four, article two-a, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that sections one and two, article three, chapter fifty of said code be amended and reenacted; that section seventeen, article one, chapter fifty-one of said

code be amended and reenacted; that article three of said chapter be amended by adding thereto four new sections, designated sections fourteen, fifteen, sixteen and seventeen; that section eleven, article one, chapter fifty-nine of said code be amended and reenacted; and that article five, chapter sixty-two of said code be amended by adding thereto a new section, designated section ten, all to read as follows:

### **Chapter**

**14. Claims Due and Against the State.**

**50. Magistrate Courts.**

**51. Courts and Their Officers.**

**59. Fees, Allowances and Costs; Newspapers; Legal Advertisements.**

**62. Criminal Procedure.**

## **CHAPTER 14. CLAIMS DUE AND AGAINST THE STATE.**

### **ARTICLE 2A. COMPENSATION AWARDS TO VICTIMS OF CRIMES.**

#### **§14-2A-4. Creation of crime victims compensation fund.**

1 (a) Every person within the state who is convicted of  
2 or pleads guilty to a misdemeanor offense, other than a  
3 traffic offense that is not a moving violation, in any magis-  
4 trate court or circuit court, shall pay the sum of ten dollars  
5 as costs in the case, in addition to any other court costs  
6 that the court is required by law to impose upon the con-  
7 victed person. Every person within the state who is con-  
8 victed of or pleads guilty to a misdemeanor offense, other  
9 than a traffic offense that is not a moving violation, in any  
10 municipal court, shall pay the sum of eight dollars as costs  
11 in the case, in addition to any other court costs that the  
12 court is required by law to impose upon the convicted  
13 person. In addition to any other costs previously speci-  
14 fied, every person within the state who is convicted of or  
15 pleads guilty to a violation of section two, article five,  
16 chapter seventeen-c of this code, shall pay a fee in the  
17 amount of twenty percent of any fine imposed under said  
18 section. This shall be in addition to any other court costs  
19 required by this section or which may be required by law.

20 (b) The clerk of the circuit court, magistrate court or  
21 municipal court wherein the additional costs are imposed



22 under the provisions of subsection (a) of this section shall,  
23 on or before the last day of each month, transmit all costs  
24 received under this article to the state treasurer for deposit  
25 in the state treasury to the credit of a special revenue fund  
26 to be known as the "Crime Victims Compensation Fund",  
27 which is hereby created. All moneys heretofore collected  
28 and received under the prior enactment or reenactments of  
29 this article and deposited or to be deposited in the "Crime  
30 Victims Reparation Fund" are hereby transferred to the  
31 crime victims compensation fund, and the treasurer shall  
32 deposit the moneys in the state treasury. All moneys col-  
33 lected and received under this article and paid into the  
34 state treasury and credited to the crime victims compensa-  
35 tion fund in the manner prescribed in section two, article  
36 two, chapter twelve of this code, shall be kept and main-  
37 tained for the specific purposes of this article, and shall  
38 not be treated by the auditor and treasurer as part of the  
39 general revenue of the state.

40 (c) Moneys in the crime victims compensation fund  
41 shall be available for the payment of the costs of adminis-  
42 tration of this article in accordance with the budget of the  
43 court approved therefor: *Provided*, That the services of  
44 the office of the attorney general, as may be required or  
45 authorized by any of the provisions of this article, shall be  
46 rendered without charge to the fund.

## CHAPTER 50. MAGISTRATE COURTS.

### ARTICLE 3. COSTS, FINES AND RECORDS.

§50-3-1. Costs in civil actions.

§50-3-2. Costs in criminal proceedings.

#### §50-3-1. Costs in civil actions.

1 The following costs shall be charged in magistrate  
2 courts in civil actions and shall be collected in advance:

3 (a) For filing and trying any civil action and for all  
4 services connected therewith, but excluding services re-  
5 garding enforcement of judgment, the following amounts  
6 dependent upon the amount of damages sought in the  
7 complaint:

8       Where the action is for five hundred dollars or  
 9       less ..... \$25.00

10       Where the action is for more than five  
 11       hundred dollars but not more than one  
 12       thousand dollars ..... \$30.00

13       Where the action is for more than one  
 14       thousand dollars but not more than  
 15       two thousand dollars ..... \$35.00

16       Where the action is for more than two  
 17       thousand dollars ..... \$45.00

18       Where the action seeks relief other than  
 19       money damages ..... \$25.00

20       On and after the first day of July, one thousand nine  
 21       hundred ninety-six, five dollars from each of the filing  
 22       fees listed above will be deposited in the court security  
 23       fund created by the provisions of section fourteen, article  
 24       three, chapter fifty-one of this code.

25       (b) For each service regarding enforcement of a judg-  
 26       ment including execution, suggestion, garnishment and  
 27       suggestee execution ..... \$ 5.00

28       (c) For each bond filed in a case ..... \$ 1.00

29       (d) For taking deposition of witness for each hour or  
 30       portion thereof ..... \$ 1.00

31       (e) For taking and certifying acknowledgment of a  
 32       deed or other writing or taking oath upon an  
 33       affidavit ..... \$ .50

34       (f) For mailing any matter required or provided by  
 35       law to be mailed by certified or registered mail with return  
 36       receipt ..... \$ 1.00

37       Costs incurred in a civil action shall be reflected in any  
 38       judgment rendered thereon. The provisions of section  
 39       one, article two, chapter fifty-nine of this code, relating to  
 40       the payment of costs by poor persons, shall be applicable  
 41       to all costs in civil actions.

**§50-3-2. Costs in criminal proceedings.**

1 In each criminal case tried in a magistrate court in  
2 which the defendant is convicted, there shall be imposed,  
3 in addition to such other costs, fines, forfeitures or penal-  
4 ties as may be allowed by law, costs in the amount of  
5 fifty-five dollars. No such costs shall be collected in ad-  
6 vance. On and after the first of July, one thousand nine  
7 hundred ninety-six, five dollars from each of the criminal  
8 proceedings fees collected pursuant to this section shall be  
9 deposited in the court security fund created in section  
10 fourteen, article three, chapter fifty-one of this code.

11 A magistrate shall assess costs in the amount of two  
12 dollars and fifty cents for issuing a sheep warrant, appoint-  
13 ment and swearing appraisers and docketing the same.

14 In each criminal case which must be tried by the cir-  
15 cuit court but in which a magistrate renders some service,  
16 costs in the amount of ten dollars shall be imposed by the  
17 magistrate court and shall be certified to the clerk of the  
18 circuit court in accordance with the provisions of section  
19 six, article five, chapter sixty-two of this code.

**CHAPTER 51. COURTS AND THEIR OFFICERS.****Article**

1. Supreme Court of Appeals.
3. Courts in General.

**ARTICLE 1. SUPREME COURT OF APPEALS.****§51-1-17. Administrative office of supreme court of appeals  
-- duties of director.**

1 The director shall, when authorized by the supreme  
2 court of appeals, be the administrative officer of said court  
3 and shall have charge, under the supervision and direction  
4 of the supreme court of appeals, of:

5 (a) All administrative matters relating to the offices of  
6 the clerks of the circuit and intermediary courts and of the  
7 offices of justice of the peace, and all other clerical and  
8 administrative personnel of said courts; but nothing con-  
9 tained in this act shall be construed as affecting the au-

10 thority of the courts to appoint their administrative or  
11 clerical personnel;

12 (b) Examining the state of the dockets of the various  
13 courts and securing information as to their needs for assis-  
14 tance, if any, and the preparation of statistical data and  
15 reports of the business transacted by the courts, including,  
16 as an integral part of the compensation of justices and  
17 judges, the development of a system of reporting by jus-  
18 tices and judges as to the actual amount of time, including  
19 travel time, spent by each justice or judge in the conduct  
20 of his official duties in court;

21 (c) The preparation of a proper budget to secure the  
22 appropriation of moneys for the maintenance, support and  
23 operation of the courts;

24 (d) The purchase, exchange, transfer and distribution  
25 of equipment and supplies, as may be needful or desir-  
26 able;

27 (e) Such other matters as may be assigned to him by  
28 the supreme court of appeals. The clerks of the circuit  
29 courts, intermediate courts and courts of the justices of the  
30 peace shall comply with any and all requests made by the  
31 director or his assistants for information and statistical data  
32 bearing on the state of the dockets of such courts, or such  
33 other information as may reflect the business transacted  
34 by them;

35 (f) *Annual report of activities and estimates of expen-*  
36 *ditures.* -- The director, when required to do so by the  
37 supreme court of appeals, shall submit annually to the  
38 court a report of the activities of the administrative office  
39 and of the state of business of the courts, together with the  
40 statistical data compiled by him, with his recommenda-  
41 tions.

42 (g) Serve as the chair of the court security board creat-  
43 ed under the provisions of section fifteen, article three of  
44 this chapter.

### ARTICLE 3. COURTS IN GENERAL.

§51-3-14. Court security fund.

§51-3-15. Court security board, terms.

§51-3-16. Security plans; approval by court security board; awards; training.

§51-3-17. Promulgation of legislative rules.

**§51-3-14. Court security fund.**

1       The offices and the clerks of the magistrate courts and  
2 the circuit courts shall, on or before the tenth day of each  
3 month, transmit all fees and costs received for the court  
4 security fund in accordance with the provisions of sections  
5 one and two, article three, chapter fifty of this code and  
6 section eleven, article one, chapter fifty-nine of this code  
7 for deposit in the state treasury to the credit of a special  
8 revenue fund to be known as the "Court Security Fund",  
9 which is hereby created under the department of military  
10 affairs and public safety. The court security fund may  
11 receive any gifts, grants, contributions or other money  
12 from any source which is specifically designated for de-  
13 posit in the fund. All moneys collected and received and  
14 paid into the state treasury and credited to the court secu-  
15 rity fund shall be expended by the board exclusively to  
16 implement the improvement measures agreed upon in  
17 accordance with the security plans submitted pursuant to  
18 section sixteen of this article and in accordance with an  
19 appropriation by the Legislature: *Provided*, That for the  
20 fiscal year ending the thirtieth day of June, one thousand  
21 nine hundred ninety-seven, expenditures are authorized  
22 from collections rather than pursuant to an appropriation  
23 by the Legislature. Amounts collected which are found  
24 from time to time to exceed the funds needed for the  
25 purposes set forth in this article may be transferred to  
26 other accounts or funds and redesignated for other pur-  
27 poses upon appropriation by the Legislature.

**§51-3-15. Court security board, terms.**

1       (a) There is hereby created a court security board who  
2 shall make decisions on how the money in the court secu-  
3 rity fund is to be spent to enhance the security of courts.  
4 The board shall consist of seven members and the admin-  
5 istrative director of the supreme court of appeals who shall  
6 serve *ex officio* and be the chair. The board shall be ap-  
7 pointed as follows: One circuit court judge appointed by

8 the judicial association; one magistrate appointed by the  
9 magistrate's association; one family law master appointed  
10 by the family law master's association; one member of the  
11 bar appointed by the president of the West Virginia state  
12 bar; one representative of counties appointed by the West  
13 Virginia association of counties; one representative of  
14 sheriffs appointed by the West Virginia sheriffs associa-  
15 tion; and one representative of the state police appointed  
16 by the secretary of the department of military affairs and  
17 public safety.

18 (b) The members of the board shall each serve terms  
19 that commence on the first day of July, one thousand nine  
20 hundred ninety-six. Of the initial appointments to the  
21 board, two shall serve for two-year terms, two shall serve  
22 for three-year terms and two shall serve for four-year  
23 terms. Thereafter, each appointment shall be for a  
24 four-year term commencing upon the expiration of his or  
25 her previous term or of his or her predecessor's term. No  
26 member may be appointed for more than three consecu-  
27 tive terms. Vacancies shall be appointed in a like manner  
28 for the balance of an unexpired term.

29 (c) The board shall compile and keep a list of able and  
30 available law-enforcement officers who have obtained  
31 certification in compliance with the provisions of section  
32 five, article twenty-nine, chapter thirty of this code and  
33 who have maintained all necessary qualifications and fire-  
34 arms certifications to enable them to serve as bailiffs in  
35 court facilities. The board shall make the list available to  
36 all county sheriffs for their use in recruiting and hiring  
37 temporary, part-time or occasional bailiffs to exercise all  
38 the powers and duties of bailiffs in the court facilities in  
39 their counties.

**§51-3-16. Security plans; approval by court security board;  
awards; training.**

1 (a) The sheriff of each county in conjunction with the  
2 circuit judges, magistrates and family law master may  
3 develop a security plan to enhance the security of all the  
4 court facilities in use in the county and submit said plan to  
5 the court security board.

6 (b) Each security plan shall include, but not be limited  
7 to:

8 (1) An assessment of the existing security measures in  
9 place and any problems or shortcomings with the existing  
10 procedures;

11 (2) A description of how the county responds to court  
12 security emergencies and whether the response is ade-  
13 quate;

14 (3) A prioritized listing of equipment or personnel, or  
15 both, needed to improve the security of the court facilities  
16 in the county, including cost estimates for such equipment  
17 and personnel;

18 (4) A description of the physical locations of court  
19 facilities around the county and a discussion of whether  
20 changes or consolidation of space could improve court  
21 security in the county; and

22 (5) An assessment of the training needs for bailiffs  
23 currently employed in the county or for additional bailiffs  
24 and the options for securing the necessary training.

25 (c) Each plan prepared under this section is subject to  
26 approval by the court security board. Any plan rejected  
27 by the court security board shall be returned to the county  
28 with a statement of the insufficiencies in such plan. The  
29 county shall revise the plan to eliminate the insufficiencies  
30 and resubmit it to the court security board.

31 (d) Upon receipt of the plans the court security board  
32 shall meet at least twice a year to review the plans and to  
33 award money from the court security fund to the circuit  
34 clerk, county commission or county sheriff to be used  
35 solely and exclusively to purchase equipment, hire person-  
36 nel or make other identified expenditures in accordance  
37 with the plan. The board shall develop an application  
38 form and establish criteria to assist them in making the  
39 decisions on which applications will receive money and  
40 how much money will be awarded. Once an award has  
41 been made, the recipient will have a fixed amount of time  
42 in which to execute the expenditures described in their  
43 plan. The board will set forth in writing the amount of the  
44 award, the time frame for accomplishing the plan objec-  
45 tives and the requirement that any unexpended money be

46 returned to the board for deposit in the court security  
47 fund. The award or decision not to award these funds shall  
48 not relieve any person or office of their duty or obligation  
49 to provide security services to courts in this state.

50 (e) The board is authorized to award money from the  
51 court security fund to be used by the counties for costs  
52 and expenses of training for bailiffs. The board may  
53 establish minimum standards for training and it may des-  
54 ignate specific agencies or institutions approved for ad-  
55 ministering such training.

#### §51-3-17. Promulgation of legislative rules.

1 The board shall promulgate legislative rules pursuant  
2 to the provisions of chapter twenty-nine-a of this code  
3 effectuating the purposes and intent of sections fourteen,  
4 fifteen and sixteen of this article. Such rules shall include,  
5 but shall not be limited to, operating procedures for the  
6 board and accounting for expenditures by the board.

### CHAPTER 59. FEES, ALLOWANCES AND COSTS; NEWSPAPERS; LEGAL ADVERTISEMENTS.

#### ARTICLE 1. FEES AND ALLOWANCES.

##### \*§59-1-11. Fees to be charged by clerk of circuit court.

1 The clerk of a circuit court shall charge and collect for  
2 services rendered as such clerk the following fees, and  
3 such fees shall be paid in advance by the parties for whom  
4 such services are to be rendered:

5 For instituting any civil action under the rules of civil  
6 procedure, any statutory summary proceeding, any ex-  
7 traordinary remedy, the docketing of civil appeals, or any  
8 other action, cause, suit or proceeding, seventy-five dol-  
9 lars: *Provided*, That the fee for instituting an action for  
10 divorce shall be twenty-five dollars plus the fee required  
11 by section six, article two-c, chapter forty-eight of this  
12 code.

13 In addition to the foregoing fees, the following fees  
14 shall likewise be charged and collected:

15 For any transcript, copy or paper made by the clerk

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\*Clerk's Note: This section was also amended by S. B. 359 (Chapter 110), which passed subsequent to this act.



- 16 for use in any other court or otherwise to go out of the  
17 office, for each page, twenty-five cents;
- 18 For action on suggestion, five dollars;
- 19 For issuing an execution, two dollars;
- 20 For issuing or renewing a suggestee execution, includ-  
21 ing copies, postage, registered or certified mail fees and  
22 the fee provided by section four, article five-a, chapter  
23 thirty-eight of this code, three dollars;
- 24 For vacation or modification of a suggestee execution,  
25 one dollar;
- 26 For docketing and issuing an execution on a transcript  
27 of judgment from magistrate's court, three dollars;
- 28 For arranging the papers in a certified question, writ of  
29 error, appeal or removal to any other court, five dollars;
- 30 For postage and express and for sending or receiving  
31 decrees, orders or records, by mail or express, three times  
32 the amount of the postage or express charges;
- 33 For each witness summons over and above five, on the  
34 part of either plaintiff or defendant, to be paid by the  
35 party requesting the same, twenty-five cents;
- 36 For additional services (plaintiff or appellant) where  
37 any case remains on the docket longer than three years,  
38 for each additional year or part year, five dollars.
- 39 The clerk shall tax the following fees for services in  
40 any criminal case against any defendant convicted in such  
41 court:
- 42 In the case of any misdemeanor, fifty-five dollars;
- 43 In the case of any felony, sixty-five dollars;
- 44 No such clerk shall be required to handle or accept for  
45 disbursement any fees, costs or accounts, of any other  
46 officer or party not payable into the county treasury, ex-  
47 cept it be on order of the court or in compliance with the  
48 provisions of law governing such fees, costs or accounts.
- 49 On and after the first day of July, one thousand nine  
50 hundred ninety-six, five dollars from each of the civil and  
51 criminal fees collected pursuant to this section shall be  
52 deposited in the court security fund created in section  
53 fourteen, article three, chapter fifty-one of this code.

## CHAPTER 62. CRIMINAL PROCEDURE.

### ARTICLE 5. COSTS IN CRIMINAL CASES.

#### §62-5-10. Mandatory cost assessed upon conviction of a felony.

1 (a) Every circuit court shall assess, in every felony criminal  
 2 matter, as a cost to the defendant, an assessment in the  
 3 sum of fifty dollars for each felony count of conviction.  
 4 The assessment referred to herein shall be paid upon adju-  
 5 dication of guilt unless the court determines that the def-  
 6 endant is unable to pay in such a manner in which case  
 7 payment of the assessment shall be paid prior to final  
 8 disposition. If the circuit court determines that a defen-  
 9 dant is financially unable to pay the assessment prior to  
 10 final disposition, payment of the assessment shall be a  
 11 mandatory condition of probation or parole.

12 (b) The clerk of the circuit court wherein the assessment  
 13 is imposed under the provisions of subsection (a) of this  
 14 section shall, on or before the last day of each month,  
 15 transmit all costs received pursuant to this section to the  
 16 state treasurer for deposit in the state treasury to the credit  
 17 of the "Crime Victims Compensation Fund".

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## CHAPTER 158

(S. B. 586—By Senators Wooton, Anderson, Bowman, Buckalew, Deem, Dittmar,  
 Grubb, Miller, Ross, Scott, Wagner, White and Wiedebusch)

[Passed March 7, 1996; in effect from passage. Approved by the Governor.]

AN ACT to amend and reenact section twelve, article nine, chapter twenty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to manufactured housing construction and safety standards; providing technical corrections in section numbers; and civil and criminal penalties for violations thereof.

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

That section twelve, article nine, chapter twenty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 9. MANUFACTURED HOUSING CONSTRUCTION AND SAFETY STANDARDS.****§21-9-12. Civil penalties; criminal penalties.**

1 (a) Any person who violates any of the following  
2 provisions relating to manufactured homes or any rule  
3 promulgated by the board pursuant to the provisions of  
4 this article is liable to the state for a penalty, as determined  
5 by the court, not to exceed one thousand dollars for each  
6 violation. Each violation constitutes a separate violation  
7 with respect to each manufactured home, except that the  
8 maximum penalty may not exceed one million dollars for  
9 any related series of violations occurring within one year  
10 from the date of the first violation. No person may:

11 (1) Manufacture for sale, lease, sell, offer for sale or  
12 lease, or introduce or deliver, or import into this state any  
13 manufactured home which is manufactured on or after the  
14 effective date of any applicable standard established by a  
15 rule promulgated by the board pursuant to the provisions  
16 of this article, or any applicable federal standard, which  
17 does not comply with that standard.

18 (2) Fail or refuse to permit access to or copying of  
19 records, or fail to make reports or provide information or  
20 fail or refuse to permit entry or inspection as required by  
21 the provisions of this article.

22 (3) Fail to furnish notification of any defect as re-  
23 quired by the provisions of 42 U.S.C. §5414.

24 (4) Fail to issue a certification required by the provi-  
25 sions of 42 U.S.C. §5415 or issue a certification to the  
26 effect that a manufactured home conforms to all applica-  
27 ble federal standards, when the person knows or in the  
28 exercise of due care would have reason to know that the  
29 certification is false or misleading in a material respect.

30 (5) Fail to establish and maintain records, make re-  
31 ports, and provide information as the board may reason-  
32 ably require to enable the board to determine whether  
33 there is compliance with the federal standards; or fail to  
34 permit, upon request of a person duly authorized by the  
35 board, the inspection of appropriate books, papers, records  
36 and documents relative to determining whether a manu-

37    factorer, dealer, distributor or contractor has acted or is  
38    acting in compliance with the provisions of this article or  
39    applicable federal standards.

40       (6) Issue a certification pursuant to the provisions of  
41    42 U.S.C. §5403(a), when the person knows or in the  
42    exercise of due care would have reason to know that the  
43    certification is false or misleading in a material respect.

44       (b) Subdivision (1), subsection (a) of this section does  
45    not apply to: (i) The sale or the offer for sale of any man-  
46    ufactured home after the first purchase of it in good faith  
47    for purposes other than resale; (ii) any person who estab-  
48    lishes that he did not have reason to know in the exercise  
49    of due care that such manufactured home is not in conform-  
50    ity with applicable federal standards; or (iii) any person  
51    who, prior to the first purchase, holds a certificate by the  
52    manufacturer or importer of the manufactured home to  
53    the effect that such manufactured home conforms to all  
54    applicable federal standards, unless that person knows that  
55    the manufactured home does not conform to those stan-  
56    dards.

57       (c) Any manufacturer, dealer, distributor or contractor  
58    who engages in business in this state without a current  
59    license as required by the provisions of this article or with-  
60    out furnishing a bond or other form of assurance as re-  
61    quired by the provisions of this article is guilty of a misde-  
62    meanor and, upon conviction thereof, shall be fined not  
63    more than fifty dollars for each day the violation contin-  
64    ues.

65       (d) Any person or officer, director, partner or agent of  
66    a corporation, partnership or other entity who willfully or  
67    knowingly violates any of the provisions listed in subsec-  
68    tion (a) of this section, in any manner which threatens the  
69    health or safety of any purchaser, is guilty of a misde-  
70    meanor and, upon conviction thereof, shall be fined not  
71    more than one thousand dollars or confined in the county  
72    or regional jail for a period of not more than one year, or  
73    both fined and imprisoned: *Provided*, That nothing in this  
74    article may apply to any bank or financial institution en-  
75    gaged in the disposal of foreclosed or repossessed manu-  
76    factured home(s).

## CHAPTER 159

(S. B. 589—By Senators Wooton, Anderson, Buckalew, Deem, Dittmar, Grubb, Oliverio, Ross, Scott and Yoder)

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[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend article eight, chapter thirty-six of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section eight-c, relating to law-enforcement disposition of unclaimed personal property consisting of children's toys and certain sporting goods.

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

That article eight, chapter thirty-six of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section eight-c, to read as follows:

**ARTICLE 8. UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT.**

**§36-8-8c. Disposition of unclaimed stolen toys and certain sporting goods.**

1 Notwithstanding any provision of this code to the  
2 contrary, whenever a state, county or local law-enforce-  
3 ment agency has in its possession unclaimed stolen prop-  
4 erty consisting of children's toys or certain sporting goods,  
5 that agency may donate the property to any nonprofit  
6 organization or agency which provides services to children  
7 if the chief law-enforcement officer of the agency deter-  
8 mines that the property has no evidentiary value, and also  
9 determines that there is no reasonable likelihood that the  
10 property can be returned to its rightful owner. The sport-  
11 ing goods which may be donated include, but are not  
12 limited to, such items as bicycles, tricycles, fishing equip-  
13 ment and equipment related to the games of football,  
14 baseball, basketball, hockey, track and field and soccer. It  
15 shall not include such items as hunting rifles or other  
16 hunting equipment, knives and motorboats. The chief  
17 law-enforcement officer of the agency which possesses the  
18 unclaimed stolen property shall use his or her discretion in  
19 determining whether certain property would be appropri-  
20 ate to give to children.

## CHAPTER 160

(Com. Sub. for H. B. 4371—By Delegates Beane, Doyle, Jenkins and Walters)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend article four-a, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section sixteen; to amend and reenact sections one hundred five and two hundred one, article one, chapter forty-six of said code; to further amend said chapter by adding thereto a new article, designated article two-a; to amend and reenact section one hundred thirteen, article nine of said chapter; to amend and reenact sections one hundred two, one hundred four, one hundred six and one hundred seven, article one, chapter forty-six-a of said code; to amend article two, chapter forty-six-a of said code by adding thereto a new section, designated section one hundred three-a; to amend and reenact sections one hundred four, one hundred six, one hundred thirteen, one hundred fourteen, one hundred sixteen, one hundred seventeen, one hundred eighteen, one hundred twenty-one, one hundred twenty-two, one hundred thirty, one hundred thirty-one and one hundred thirty-six, article two, chapter forty-six-a of said code; to amend and reenact section one hundred two, article six of said chapter; and to amend and reenact sections one hundred two and one hundred nine, article seven of said chapter, all relating to personal property leases which are not sales or security interests; territorial application of the uniform commercial code; parties' power to choose applicable law; definitions; adopting a new article in the uniform commercial code relating to leases; general provisions; short title; scope; definitions; leases subject to other laws; territorial application of article to goods covered by certificate of title; limitation on power of parties to consumer lease to choose applicable law and judicial forum; waiver or renunciation of claim or right after default; unconscionability; option to accelerate at will; formation and construction of lease contract; statute of frauds; final written expression; parol or extrinsic evidence; seals inoperative; formation in general; firm offers; offer and

acceptance in formation of lease contract; course of performance or practical construction; modification, rescission and waiver; lessee under finance contract as beneficiary of supply contract; express warranties; warranties against interference and infringement; lessee's obligation against infringement; implied warranty of merchantability; implied warranty of fitness for particular purpose; exclusion or modification of warranties; cumulation and conflict of warranties express or implied; third-party beneficiaries of express and implied warranties; identification; insurance and proceeds; risk of loss; effect of default on risk of loss; casualty to identified goods; effect of lease contract; enforceability of lease contract; title to and possession of goods; alienability of parties' interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights; subsequent lease of goods by lessor; sale or sublease of goods by lessee; priority of certain liens arising by operation of law; priority of liens arising by attachment or levy on, security interests in and other claims to goods; special rights of creditors; parties' rights when goods become fixtures; parties' rights when goods become accessions; priority subject to subordination; performance of lease contract: repudiated, substituted and excused; insecurity; adequate assurance of performance; anticipatory repudiation; retraction of anticipatory repudiation; substituted performance; excused performance; procedure on excused performance; irrevocable promises; finance leases; default; default procedure; notice after default; modification or impairment of rights and remedies; liquidation of damages; cancellation and termination and effect of cancellation, termination, rescission or fraud on rights and remedies; statute of limitations; proof of market rent; time and place; default by lessor; lessee's remedies; lessee's rights on improper delivery; rightful rejection; installment lease contracts; rejection and default; merchant lessee's duty as to rightfully rejected goods; lessee's duties as to rightfully rejected goods; cure by lessor of improper tender or delivery; replacement; waiver of lessee's objections; acceptance of goods; effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over; revocation of acceptance of goods; cover; substitute goods; lessee's damages for nondelivery, repudiation, default and

breach of warranty in regard to accepted goods; lessee's incidental and consequential damages; lessee's right to specific performance or replevin; lessee's right to goods on lessor's insolvency; default by lessee; lessor's remedies; lessor's right to identify goods to lease contract; lessor's right to possession of goods; lessor's stoppage of delivery in transit or otherwise; lessor's rights to dispose of goods; lessor's damages for nonacceptance, failure to pay, repudiation or other default; lessor's action for rent; lessor's incidental damages; standing to sue third parties for injury to goods; lessor's rights to residual interest; secured transactions; sales of accounts and chattel paper; security interests arising under the article on sales or under the article on leases; West Virginia Consumer Credit and Protection Act; definitions; application of chapter; sales, leases or loans subject to chapter by agreement of parties; waiver of rights and benefits under chapter; consumer credit protection; lessor subject to claims and defenses arising from leases; notice to cosigners; notice of consumer's right to cure default; cure; acceleration; notice of assignment; receipts; statements of account; evidence of payment; assignment of earnings; authorization to confess judgment prohibited; no garnishment before judgment; unconscionability; inducement by unconscionable conduct; definitions; limitation on garnishment; no discharge or reprisal because of garnishment; personal property exemptions; general consumer protection; definitions; power of attorney general; reliance on rules of attorney general or commissioner of banking; duty to report; and injunctions against unconscionable agreements and fraudulent or unconscionable conduct.

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

That article four-a, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section sixteen; that sections one hundred five and two hundred one, article one, chapter forty-six of said code be amended and reenacted; that said chapter be further amended by adding thereto a new article, designated article two-a; that section one hundred thirteen, article nine of said chapter be amended and reenacted; that sections one hundred two, one hundred four, one hundred six and one hundred seven, article one, chapter forty-six-a of



said code be amended and reenacted; that article two of said chapter be amended by adding thereto a new section, designated section one hundred three-a; that sections one hundred four, one hundred six, one hundred thirteen, one hundred fourteen, one hundred sixteen, one hundred seventeen, one hundred eighteen, one hundred twenty-one, one hundred twenty-two, one hundred thirty, one hundred thirty-one and one hundred thirty-six, article two, chapter forty-six-a of said code be amended and reenacted; that section one hundred two, article six of said chapter be amended and reenacted; and that sections one hundred two and one hundred nine, article seven of said chapter be amended and reenacted, all to read as follows:

### **Chapter**

**17A. Motor Vehicle Administration, Registration, Certificate of Title, and Antitheft Provisions.**

**46. Uniform Commercial Code.**

**46A. West Virginia Consumer Credit and Protection Act.**

### **CHAPTER 17A. MOTOR VEHICLE ADMINISTRATION, REGISTRATION, CERTIFICATE OF TITLE, AND ANTITHEFT PROVISIONS.**

#### **ARTICLE 4A. LIENS AND ENCUMBRANCES ON VEHICLES TO BE SHOWN ON CERTIFICATE OF TITLE; NO- TICE TO CREDITORS AND PURCHASERS.**

#### **§17A-4A-16. Vehicle leases which are not sales or security interests.**

1           In the case of motor vehicles or trailers, notwithstand-  
2           ing any other provision of law, a transaction does not  
3           create a conditional sale or security interest merely be-  
4           cause it provides that the rental price is permitted or re-  
5           quired to be adjusted under the agreement either upward  
6           or downward by reference to the amount realized upon  
7           sale or other disposition of the motor vehicle or trailer.

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

#### **Article**

**1. General Provisions.**

**2A. Leases.**

**9. Secured Transactions; Sales of Accounts and Chattel Paper.**

**ARTICLE 1. GENERAL PROVISIONS.**

§46-1-105. Territorial application of the act; parties' power to choose applicable law.

§46-1-201. General definitions.

**\*§46-1-105. Territorial application of the act; parties' power to choose applicable law.**

1 (1) Except as provided hereafter in this section, when a  
2 transaction bears a reasonable relation to this state and also  
3 to another state or nation the parties may agree that the  
4 law either of this state or of such other state or nation shall  
5 govern their rights and duties. Failing such agreement,  
6 this chapter applies to transactions bearing an appropriate  
7 relation to this state.

8 (2) Where one of the following provisions of this  
9 chapter specifies the applicable law, that provision governs  
10 and a contrary agreement is effective only to the extent  
11 permitted by the law (including the conflict of laws rules)  
12 so specified:

13 Sections 2A-105 and 2A-106, applicability of the  
14 article on leases.

15 Section 2-402, rights of creditors against sold goods.

16 Section 4-102, applicability of the article on bank  
17 deposits and collections.

18 Section 8-106, applicability of the article on invest-  
19 ment securities.

20 Section 9-103, perfection provisions of the article on  
21 secured transactions.

**PART 2. GENERAL DEFINITIONS  
AND PRINCIPLES OF INTERPRETATION.**

**§46-1-201. General definitions.**

1 Subject to additional definitions contained in the sub-  
2 sequent articles of this chapter which are applicable to  
3 specific articles or parts thereof, and unless the context  
4 otherwise requires, in this chapter:

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**\*Clerk's Note:** This section was also amended by H. B. 4669 (Chapter 254), which passed subsequent to this act.

- 5 (1) "Action" in the sense of a judicial proceeding in-  
6 cludes recoupment, counterclaim, setoff, suit in equity and  
7 any other proceedings in which rights are determined.
- 8 (2) "Aggrieved party" means a party entitled to resort  
9 to a remedy.
- 10 (3) "Agreement" means the bargain of the parties in  
11 fact as found in their language or by implication from  
12 other circumstances including course of dealing or usage  
13 of trade or course of performance as provided in this  
14 chapter (sections 1-205 and 2-208). Whether an agree-  
15 ment has legal consequences is determined by the provi-  
16 sions of this chapter, if applicable; otherwise by the law of  
17 contracts (section 1-103). (Compare "Contract.")
- 18 (4) "Bank" means any person engaged in the business  
19 of banking.
- 20 (5) "Bearer" means the person in possession of an  
21 instrument, document of title, or certificated security pay-  
22 able to bearer or indorsed in blank.
- 23 (6) "Bill of lading" means a document evidencing the  
24 receipt of goods for shipment issued by a person engaged  
25 in the business of transporting or forwarding goods, and  
26 includes an airbill. "Airbill" means a document serving  
27 for air transportation as a bill of lading for marine or rail  
28 transportation, and includes an air consignment note or air  
29 waybill.
- 30 (7) "Branch" includes a separately incorporated for-  
31 eign branch of a bank.
- 32 (8) "Burden of establishing a fact" means the burden  
33 of persuading the triers of fact that the existence of the  
34 fact is more probable than its nonexistence.
- 35 (9) "Buyer in ordinary course of business" means a  
36 person who in good faith and without knowledge that the  
37 sale to him or her is in violation of the ownership rights or  
38 security interest of a third party in the goods buys in ordi-  
39 nary course from a person in the business of selling goods  
40 of that kind but does not include a pawnbroker. All per-  
41 sons who sell minerals or the like (including oil and gas)

42 at wellhead or minehead shall be deemed to be persons in  
43 the business of selling goods of that kind. "Buying" may  
44 be for cash or by exchange of other property or on se-  
45 cured or unsecured credit and includes receiving goods or  
46 documents of title under a preexisting contract for sale but  
47 does not include a transfer in bulk or as security for or in  
48 total or partial satisfaction of a money debt.

49 (10) "Conspicuous" means a term or clause is conspic-  
50 uous when it is so written that a reasonable person against  
51 whom it is to operate ought to have noticed it. A printed  
52 heading in capitals (as: NONNEGOTIABLE BILL OF  
53 LADING) is conspicuous. Language in the body of a  
54 form is "conspicuous" if it is in larger or other contrasting  
55 type or color. But in a telegram any stated term is "con-  
56 spicuous." Whether a term or clause is "conspicuous" or  
57 not is for decision by the court.

58 (11) "Contract" means the total legal obligation which  
59 results from the parties' agreement as affected by this  
60 chapter and any other applicable rules of law. (Compare  
61 "Agreement.")

62 (12) "Creditor" includes a general creditor, a secured  
63 creditor, a lien creditor and any representative of creditors,  
64 including an assignee for the benefit of creditors, a trustee  
65 in bankruptcy, a receiver in equity and an executor or  
66 administrator of an insolvent debtor's or assignor's estate.

67 (13) "Defendant" includes a person in the position of  
68 defendant in a cross action or counterclaim.

69 (14) "Delivery" with respect to instruments, documents  
70 of title, chattel paper or certificated securities means vol-  
71 untary transfer of possession.

72 (15) "Document of title" includes bill of lading, dock  
73 warrant, dock receipt, warehouse receipt or order for the  
74 delivery of goods, and also any other document which in  
75 the regular course of business or financing is treated as  
76 adequately evidencing that the person in possession of it is  
77 entitled to receive, hold and dispose of the document and  
78 the goods it covers. To be a document of title a document  
79 must purport to be issued by or addressed to a bailee and  
80 purport to cover goods in the bailee's possession which are

81 either identified or are fungible portions of an identified  
82 mass.

83 (16) "Fault" means wrongful act, omission or breach.

84 (17) "Fungible" with respect to goods or securities  
85 means goods or securities of which any unit is, by nature  
86 or usage of trade, the equivalent of any other like unit.  
87 Goods which are not fungible shall be deemed fungible  
88 for the purposes of this chapter to the extent that under a  
89 particular agreement or document unlike units are treated  
90 as equivalents.

91 (18) "Genuine" means free of forgery or counterfeit-  
92 ing.

93 (19) "Good faith" means honesty in fact in the con-  
94 duct or transaction concerned.

95 (20) "Holder" with respect to a negotiable instrument  
96 means the person in possession if the instrument is pay-  
97 able to bearer or, in the case of an instrument payable to  
98 an identified person, if the identified person is in posses-  
99 sion. "Holder" with respect to a document of title means  
100 the person in possession if the goods are deliverable to the  
101 bearer or to the order of the person in possession.

102 (21) To "honor" is to pay or to accept and pay, or  
103 where a credit so engages to purchase or discount a draft  
104 complying with the terms of the credit.

105 (22) "Insolvency proceedings" includes any assign-  
106 ment for the benefit of creditors or other proceedings  
107 intended to liquidate or rehabilitate the estate of the per-  
108 son involved.

109 (23) A person is "insolvent" who either has ceased to  
110 pay his or her debts in the ordinary course of business or  
111 cannot pay his or her debts as they become due or is in-  
112 solvent within the meaning of the Federal Bankruptcy  
113 Law.

114 (24) "Money" means a medium of exchange autho-  
115 rized or adopted by a domestic or foreign government  
116 and includes a monetary unit of account established by an

117 intergovernmental organization or by agreement between  
118 two or more nations.

119 (25) A person has "notice" of a fact when:

120 (a) He has actual knowledge of it; or

121 (b) He has received a notice or notification of it; or

122 (c) From all the facts and circumstances known to him  
123 or her at the time in question he or she has reason to know  
124 that it exists. A person "knows" or has "knowledge" of a  
125 fact when he or she has actual knowledge of it. "Discover"  
126 or "learn" or a word or phrase of similar import refers to  
127 knowledge rather than to reason to know. The time and  
128 circumstances under which a notice or notification may  
129 cease to be effective are not determined by this chapter.

130 (26) A person "notifies" or "gives" a notice or notifica-  
131 tion to another by taking such steps as may be reasonably  
132 required to inform the other in ordinary course whether or  
133 not such other actually comes to know of it. A person  
134 "receives" a notice or notification when:

135 (a) It comes to his or her attention; or

136 (b) It is duly delivered at the place of business through  
137 which the contract was made or at any other place held out  
138 by him or her as the place for receipt of such communica-  
139 tions.

140 (27) Notice, knowledge or a notice or notification  
141 received by an organization is effective for a particular  
142 transaction from the time when it is brought to the atten-  
143 tion of the individual conducting that transaction, and in  
144 any event from the time when it would have been brought  
145 to his attention if the organization had exercised due dili-  
146 gence. An organization exercises due diligence if it main-  
147 tains reasonable routines for communicating significant  
148 information to the person conducting the transaction and  
149 there is reasonable compliance with the routines. Due  
150 diligence does not require an individual acting for the  
151 organization to communicate information unless such  
152 communication is part of his or her regular duties or un-  
153 less he or she has reason to know of the transaction and

154 that the transaction would be materially affected by the  
155 information.

156 (28) "Organization" includes a corporation, govern-  
157 ment or governmental subdivision or agency, business  
158 trust, estate, trust, partnership or association, two or more  
159 persons having a joint or common interest, or any other  
160 legal or commercial entity.

161 (29) "Party," as distinct from "third party," means a  
162 person who has engaged in a transaction or made an  
163 agreement within this chapter.

164 (30) "Person" includes an individual or an organiza-  
165 tion (see section 1-102).

166 (31) "Presumption" or "presumed" means that the trier  
167 of fact must find the existence of the fact presumed unless  
168 and until evidence is introduced which would support a  
169 finding of its nonexistence.

170 (32) "Purchase" includes taking by sale, discount,  
171 negotiation, mortgage, pledge, lien, issue or reissue, gift or  
172 any other voluntary transaction creating an interest in  
173 property.

174 (33) "Purchaser" means a person who takes by pur-  
175 chase.

176 (34) "Remedy" means any remedial right to which an  
177 aggrieved party is entitled with or without resort to a tribu-  
178 nal.

179 (35) "Representative" includes an agent, an officer of a  
180 corporation or association, and a trustee, executor or ad-  
181 ministrator of an estate, or any other person empowered to  
182 act for another.

183 (36) "Rights" includes remedies.

184 (37) "Security interest" means an interest in personal  
185 property or fixtures which secures payment or perfor-  
186 mance of an obligation. The retention or reservation of  
187 title by a seller of goods notwithstanding shipment or  
188 delivery to the buyer (section 2-401) is limited in effect to  
189 a reservation of a "security interest." The term also in-  
190 cludes any interest of a buyer of accounts or chattel paper,

191 which is subject to article nine. The special property inter-  
192 est of a buyer of goods on identification of those goods  
193 to a contract for sale under section 2-401 is not a "security  
194 interest," but a buyer may also acquire a "security interest"  
195 by complying with article nine. Unless a consignment is  
196 intended as security, reservation of title thereunder is not a  
197 "security interest", but a consignment in any event is sub-  
198 ject to the provisions on consignment sales (section  
199 2-326).

200 (a) Whether a transaction creates a lease or security  
201 interest is determined by the facts of each case; however, a  
202 transaction creates a security interest if the consideration  
203 the lessee is to pay the lessor for the right to possession  
204 and use of the goods is an obligation for the term of the  
205 lease not subject to termination by the lessee, and:

206 (i) The original term of the lease is equal to or greater  
207 than the remaining economic life of the goods;

208 (ii) The lessee is bound to renew the lease for the re-  
209 maining economic life of the goods or is bound to be-  
210 come the owner of the goods;

211 (iii) The lessee has an option to renew the lease for the  
212 remaining economic life of the goods for no additional  
213 consideration or nominal additional consideration upon  
214 compliance with the lease agreement; or

215 (iv) The lessee has an option to become the owner of  
216 the goods for no additional consideration or nominal  
217 additional consideration upon compliance with the lease  
218 agreement.

219 (b) A transaction does not create a security interest  
220 merely because it provides that:

221 (i) The present value of the consideration the lessee is  
222 obligated to pay the lessor for the right to possession and  
223 use of the goods is substantially equal to or is greater than  
224 the fair market value of the goods at the time the lease is  
225 entered into;

226 (ii) The lessee assumes risk of loss of the goods, or  
227 agrees to pay taxes, insurance, filing, recording or registra-



228 tion fees, or service or maintenance costs with respect to  
229 the goods;

230 (iii) The lessee has an option to renew the lease or to  
231 become the owner of the goods;

232 (iv) The lessee has an option to renew the lease for a  
233 fixed rent that is equal to or greater than the reasonably  
234 predictable fair market rent for the use of the goods for  
235 the term of the renewal at the time the option is to be per-  
236 formed; or

237 (v) The lessee has an option to become the owner of  
238 the goods for a fixed price that is equal to or greater than  
239 the reasonably predictable fair market value of the goods  
240 at the time the option is to be performed.

241 (c) For purposes of this subsection (37):

242 (i) Additional consideration is not nominal if: (i)  
243 When the option to renew the lease is granted to the lessee  
244 the rent is stated to be the fair market rent for the use of  
245 the goods for the term of the renewal determined at the  
246 time the option is to be performed; or (ii) when the option  
247 to become the owner of the goods is granted to the lessee  
248 the price is stated to be the fair market value of the goods  
249 determined at the time the option is to be performed.  
250 Additional consideration is nominal if it is less than the  
251 lessee's reasonably predictable cost of performing under  
252 the lease agreement if the option is not exercised;

253 (ii) "Reasonably predictable" and "remaining econom-  
254 ic life of the goods" are to be determined with reference to  
255 the facts and circumstances at the time the transaction is  
256 entered into; and

257 (iii) "Present value" means the amount as of a date  
258 certain of one or more sums payable in the future, dis-  
259 counted to the date certain. The discount is determined  
260 by the interest rate specified by the parties if the rate is not  
261 manifestly unreasonable at the time the transaction is en-  
262 tered into; otherwise, the discount is determined by a com-  
263 mercially reasonable rate that takes into account the facts  
264 and circumstances of each case at the time the transaction  
265 was entered into.

266 (38) "Send" in connection with any writing or notice  
267 means to deposit in the mail or deliver for transmission by  
268 any other usual means of communication with postage or  
269 cost of transmission provided for and properly addressed  
270 and in the case of an instrument to an address specified  
271 thereon or otherwise agreed, or if there be none to any  
272 address reasonable under the circumstances. The receipt  
273 of any writing or notice within the time at which it would  
274 have arrived if properly sent has the effect of a proper  
275 sending.

276 (39) "Signed" includes any symbol executed or adopt-  
277 ed by a party with present intention to authenticate a writ-  
278 ing.

279 (40) "Surety" includes guarantor.

280 (41) "Telegram" includes a message transmitted by  
281 radio, teletype, cable, any mechanical method of transmis-  
282 sion, or the like.

283 (42) "Term" means that portion of an agreement  
284 which relates to a particular matter.

285 (43) "Unauthorized signature" means one made with-  
286 out actual, implied or apparent authority and includes a  
287 forgery.

288 (44) "Value." Except as otherwise provided with re-  
289 spect to negotiable instruments and bank collections (sec-  
290 tions 3-303, 4-208 and 4-209), a person gives "value" for  
291 rights if he acquires them:

292 (a) In return for a binding commitment to extend  
293 credit or for the extension of immediately available credit  
294 whether or not drawn upon and whether or not a  
295 chargeback is provided for in the event of difficulties in  
296 collection; or

297 (b) As security for or in total or partial satisfaction of  
298 a preexisting claim; or

299 (c) By accepting delivery pursuant to a preexisting  
300 contract for purchase; or

301 (d) Generally, in return for any consideration suffi-  
302 cient to support a simple contract.

- 303 (45) "Warehouse receipt" means a receipt issued by a  
304 person engaged in the business of storing goods for hire.
- 305 (46) "Written" or "writing" includes printing, typewrit-  
306 ing or any other intentional reduction to tangible form.

**ARTICLE 2A. LEASES.****PART 1. GENERAL PROVISIONS.**

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- §46-2A-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.
- §46-2A-520. Lessee's incidental and consequential damages.
- §46-2A-521. Lessee's right to specific performance or replevin.
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- §46-2A-524. Lessor's right to identify goods to lease contract.  
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**§46-2A-101. Short title.**

- 1 This article shall be known and may be cited as the  
2 Uniform Commercial Code—Leases.

**§46-2A-102. Scope.**

- 1 This article applies to any transaction, regardless of  
2 form, that creates a lease.

**§46-2A-103. Definitions and index of definitions.**

- 1 (1) In this article unless the context otherwise requires:  
2 (a) "Buyer in ordinary course of business" means a  
3 person who in good faith and without knowledge that the  
4 sale to him or her is in violation of the ownership rights or  
5 security interest or leasehold interest of a third party in the  
6 goods, buys in ordinary course from a person in the busi-  
7 ness of selling goods of that kind but does not include a  
8 pawnbroker. "Buying" may be for cash or by exchange  
9 of other property or on secured or unsecured credit and  
10 includes receiving goods or documents of title under a  
11 preexisting contract for sale but does not include a trans-  
12 fer in bulk or as security for or in total or partial satisfac-  
13 tion of a money debt.  
14 (b) "Cancellation" occurs when either party puts an  
15 end to the lease contract for default by the other party.  
16 (c) "Commercial unit" means such a unit of goods as  
17 by commercial usage is a single whole for purposes of  
18 lease and division of which materially impairs its character  
19 or value on the market or in use. A commercial unit may  
20 be a single article, as a machine, or a set of articles, as a  
21 suite of furniture or a line of machinery, or a quantity, as a

22 gross or carload, or any other unit treated in use or in the  
23 relevant market as a single whole.

24 (d) "Conforming" goods or performance under a lease  
25 contract means goods or performance that are in accor-  
26 dance with the obligations under the lease contract.

27 (e) "Consumer lease" shall have the same meaning as  
28 that ascribed to it in section one hundred two, article one,  
29 chapter forty-six-a of this code.

30 (f) "Fault" means wrongful act, omission, breach or  
31 default.

32 (g) "Finance lease" means a lease with respect to  
33 which:

34 (i) The lessor does not select, manufacture or supply  
35 the goods;

36 (ii) The lessor acquires the goods or the right to pos-  
37 session and use of the goods in connection with the lease;  
38 and

39 (iii) One of the following occurs:

40 (A) The lessee receives a copy of the contract by  
41 which the lessor acquired the goods or the right to posses-  
42 sion and use of the goods before signing the lease con-  
43 tract;

44 (B) The lessee's approval of the contract by which the  
45 lessor acquired the goods or the right to possession and  
46 use of the goods is a condition to effectiveness of the lease  
47 contract;

48 (C) The lessee, before signing the lease contract, re-  
49 ceives an accurate and complete statement designating the  
50 promises and warranties, and any disclaimers of warranties,  
51 limitations or modifications of remedies, or liquidated  
52 damages, including those of a third party, such as the  
53 manufacturer of the goods, provided to the lessor by the  
54 person supplying the goods in connection with or as part  
55 of the contract by which the lessor acquired the goods or  
56 the right to possession and use of the goods; or

57 (D) If the lease is not a consumer lease, the lessor,  
58 before the lessee signs the lease contract, informs the les-

59 see in writing: (a) Of the identity of the person supplying  
60 the goods to the lessor, unless the lessee has selected that  
61 person and directed the lessor to acquire the goods or the  
62 right to possession and use of the goods from that person;  
63 (b) that the lessee is entitled under this article to the prom-  
64 ises and warranties, including those of any third party,  
65 provided to the lessor by the person supplying the goods  
66 in connection with or as part of the contract by which the  
67 lessor acquired the goods or the right to possession and  
68 use of the goods; and (c) that the lessee may communicate  
69 with the person supplying the goods to the lessor and  
70 receive an accurate and complete statement of those prom-  
71 ises and warranties, including any disclaimers and limita-  
72 tions of them or of remedies.

73 (h) "Goods" means all things that are movable at the  
74 time of identification to the lease contract, or are fixtures  
75 (section 2A-309), but the term does not include money,  
76 documents, instruments, accounts, chattel paper, general  
77 intangibles, or minerals or the like, including oil and gas,  
78 before extraction. The term also includes the unborn  
79 young of animals.

80 (i) "Installment lease contract" means a lease contract  
81 that authorizes or requires the delivery of goods in sepa-  
82 rate lots to be separately accepted, even though the lease  
83 contract contains a clause "each delivery is a separate  
84 lease" or its equivalent.

85 (j) "Lease" means a transfer of the right to possession  
86 and use of goods for a term in return for consideration,  
87 but a sale, including a sale on approval or a sale or return,  
88 or retention or creation of a security interest is not a lease.  
89 Unless the context clearly indicates otherwise, the term  
90 includes a sublease.

91 (k) "Lease agreement" means the bargain, with respect  
92 to the lease, of the lessor and the lessee in fact as found in  
93 their language or by implication from other circumstances  
94 including course of dealing or usage of trade or course of  
95 performance as provided in this article. Unless the context  
96 clearly indicates otherwise, the term includes a sublease  
97 agreement.

98 (l) "Lease contract" means the total legal obligation  
99 that results from the lease agreement as affected by this  
100 article and any other applicable rules of law. Unless the  
101 context clearly indicates otherwise, the term includes a  
102 sublease contract.

103 (m) "Leasehold interest" means the interest of the  
104 lessor or the lessee under a lease contract.

105 (n) "Lessee" means a person who acquires the right to  
106 possession and use of goods under a lease. Unless the  
107 context clearly indicates otherwise, the term includes a  
108 sublessee.

109 (o) "Lessee in ordinary course of business" means a  
110 person who in good faith and without knowledge that the  
111 lease to him or her is in violation of the ownership rights  
112 or security interest or leasehold interest of a third party in  
113 the goods leases in ordinary course from a person in the  
114 business of selling or leasing goods of that kind but does  
115 not include a pawnbroker. "Leasing" may be for cash or  
116 by exchange of other property or on secured or unse-  
117 cured credit and includes receiving goods or documents  
118 of title under a preexisting lease contract but does not  
119 include a transfer in bulk or as security for or in total or  
120 partial satisfaction of a money debt.

121 (p) "Lessor" means a person who transfers the right to  
122 possession and use of goods under a lease. Unless the  
123 context clearly indicates otherwise, the term includes a  
124 sublessor.

125 (q) "Lessor's residual interest" means the lessor's inter-  
126 est in the goods after expiration, termination or cancella-  
127 tion of the lease contract.

128 (r) "Lien" means a charge against or interest in goods  
129 to secure payment of a debt or performance of an obliga-  
130 tion, but the term does not include a security interest.

131 (s) "Lot" means a parcel or a single article that is the  
132 subject matter of a separate lease or delivery, whether or  
133 not it is sufficient to perform the lease contract.

134 (t) "Merchant lessee" means a lessee that is a merchant  
135 with respect to goods of the kind subject to the lease.



136 (u) "Present value" means the amount as of a date  
137 certain of one or more sums payable in the future, dis-  
138 counted to the date certain. The discount is determined  
139 by the interest rate specified by the parties if the rate was  
140 not manifestly unreasonable at the time the transaction was  
141 entered into; otherwise, the discount is determined by a  
142 commercially reasonable rate that takes into account the  
143 facts and circumstances of each case at the time the trans-  
144 action was entered into.

145 (v) "Purchase" includes taking by sale, lease, mortgage,  
146 security interest, pledge, gift or any other voluntary trans-  
147 action creating an interest in goods.

148 (w) "Sublease" means a lease of goods the right to  
149 possession and use of which was acquired by the lessor as  
150 a lessee under an existing lease.

151 (x) "Supplier" means a person from whom a lessor  
152 buys or leases goods to be leased under a finance lease.

153 (y) "Supply contract" means a contract under which a  
154 lessor buys or leases goods to be leased.

155 (z) "Termination" occurs when either party pursuant to  
156 a power created by agreement or law puts an end to the  
157 lease contract otherwise than for default.

158 (2) Other definitions applying to this article and the  
159 sections in which they appear are:

160 "Accessions." Section 2A-310(1).

161 "Construction mortgage." Section 2A-309(1)(d).

162 "Encumbrance." Section 2A-309(1)(e).

163 "Fixtures." Section 2A-309(1)(a).

164 "Fixture filing." Section 2A-309(1)(b).

165 "Purchase money lease." Section 2A-309(1)(c).

166 (3) The following definitions in other articles apply to  
167 this article:

168 "Account." Section 9-106.

169 "Between merchants." Section 2-104(3).

- 170 "Buyer." Section 2-103(1)(a).  
171 "Chattel paper." Section 9-105(1)(b).  
172 "Consumer goods." Section 9-109(1).  
173 "Document." Section 9-105(1)(f).  
174 "Entrusting." Section 2-403(3).  
175 "General intangibles." Section 9-106.  
176 "Good faith." Section 2-103(1)(b).  
177 "Instrument." Section 9-105(1)(i).  
178 "Merchant." Section 2-104(1).  
179 "Mortgage." Section 9-105(1)(j).  
180 "Pursuant to commitment." Section 9-105(1)(k).  
181 "Receipt." Section 2-103(1)(c).  
182 "Sale." Section 2-106(1).  
183 "Sale on approval." Section 2-326.  
184 "Sale or return." Section 2-326.  
185 "Seller." Section 2-103(1)(d).  
186 (4) In addition, article one contains general definitions  
187 and principles of construction and interpretation applica-  
188 ble throughout this article.

**§46-2A-104. Leases subject to other law.**

- 1 (1) A lease, although subject to this article, is also  
2 subject to any applicable:  
3 (a) Certificate of title statute of this state: Section  
4 17A-3-2;  
5 (b) Certificate of title statute of another jurisdiction  
6 (section 2A-105); or  
7 (c) Consumer protection statute of this state, or final  
8 consumer protection decision of a court of this state exist-  
9 ing on the effective date of this article.

10 (2) In case of conflict between this article, other than  
11 sections 2A-105, 2A-304(3), and 2A-305(3), and a statute  
12 or decision referred to in subsection (1), the statute or  
13 decision controls.

14 (3) Failure to comply with an applicable law has only  
15 the effect specified therein.

**§46-2A-105. Territorial application of article to goods covered by certificate of title.**

1 Subject to the provisions of sections 2A-304(3) and  
2 2A-305(3), with respect to goods covered by a certificate  
3 of title issued under a statute of this state or of another  
4 jurisdiction, compliance and the effect of compliance or  
5 noncompliance with a certificate of title statute are gov-  
6 erned by the law (including the conflict of laws rules) of  
7 the jurisdiction issuing the certificate until the earlier of:  
8 (a) Surrender of the certificate; or (b) four months after  
9 the goods are removed from that jurisdiction and thereaf-  
10 ter until a new certificate of title is issued by another juris-  
11 diction.

**§46-2A-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.**

1 (1) If the law chosen by the parties to a consumer  
2 lease is that of a jurisdiction other than a jurisdiction in  
3 which the lessee resides at the time the lease agreement  
4 becomes enforceable or within thirty days thereafter or in  
5 which the goods are to be used, the choice is not enforce-  
6 able.

7 (2) If the judicial forum chosen by the parties to a  
8 consumer lease is a forum that would not otherwise have  
9 jurisdiction over the lessee, the choice is not enforceable.

**§46-2A-107. Waiver or renunciation of claim or right after default.**

1 Any claim or right arising out of an alleged default or  
2 breach of warranty may be discharged, in whole or in part,  
3 without consideration by a written waiver or renunciation  
4 signed and delivered by the aggrieved party.

**§46-2A-108. Unconscionability.**

1 (1) If the court as a matter of law finds a lease contract  
2 or any clause of a lease contract to have been unconscio-  
3 nable at the time it was made the court may refuse to en-  
4 force the lease contract, or it may enforce the remainder  
5 of the lease contract without the unconscionable clause, or  
6 it may so limit the application of any unconscionable  
7 clause as to avoid any unconscionable result.

8 (2) With respect to a consumer lease, if the court as a  
9 matter of law finds that a lease contract or any clause of a  
10 lease contract has been induced by unconscionable con-  
11 duct or that unconscionable conduct has occurred in the  
12 collection of a claim arising from a lease contract, the  
13 court may grant appropriate relief.

14 (3) Before making a finding of unconscionability  
15 under subsection (1) or (2), the court, on its own motion  
16 or that of a party, shall afford the parties a reasonable  
17 opportunity to present evidence as to the setting, purpose,  
18 and effect of the lease contract or clause thereof, or of the  
19 conduct.

20 (4) In an action in which the lessee claims unconscio-  
21 nability with respect to a consumer lease:

22 (a) If the court finds unconscionability under subsec-  
23 tion (1) or (2), the court shall award reasonable attorney's  
24 fees to the lessee.

25 (b) If the court does not find unconscionability and  
26 the lessee claiming unconscionability has brought or  
27 maintained an action he or she knew to be groundless, the  
28 court shall award reasonable attorney's fees to the party  
29 against whom the claim is made.

30 (c) In determining attorney's fees, the amount of the  
31 recovery on behalf of the claimant under subsections (1)  
32 and (2) is not controlling.

**§46-2A-109. Option to accelerate at will.**

1 (1) A term providing that one party or his or her suc-  
2 cessor in interest may accelerate payment or performance  
3 or require collateral or additional collateral "at will" or  
4 "when he or she deems himself or herself insecure" or in  
5 words of similar import must be construed to mean that he

6 or she has power to do so only if he or she in good faith  
7 believes that the prospect of payment or performance is  
8 impaired.

9 (2) With respect to a consumer lease, the burden of  
10 establishing good faith under subsection (1) is on the  
11 party who exercised the power; otherwise the burden of  
12 establishing lack of good faith is on the party against  
13 whom the power has been exercised.

PART 2. FORMATION AND  
CONSTRUCTION OF LEASE CONTRACT.

**§46-2A-201. Statute of frauds.**

1 (1) A lease contract is not enforceable by way of ac-  
2 tion or defense unless:

3 (a) The total payments to be made under the lease  
4 contract, excluding payments for options to renew or buy,  
5 are less than one thousand dollars; or

6 (b) There is a writing, signed by the party against  
7 whom enforcement is sought or by that party's authorized  
8 agent, sufficient to indicate that a lease contract has been  
9 made between the parties and to describe the goods leased  
10 and the lease term.

11 (2) Any description of leased goods or of the lease  
12 term is sufficient and satisfies subsection (1)(b), whether  
13 or not it is specific, if it reasonably identifies what is de-  
14 scribed.

15 (3) A writing is not insufficient because it omits or  
16 incorrectly states a term agreed upon, but the lease con-  
17 tract is not enforceable under subsection (1)(b) beyond  
18 the lease term and the quantity of goods shown in the  
19 writing.

20 (4) A lease contract that does not satisfy the require-  
21 ments of subsection (1), but which is valid in other re-  
22 spects, is enforceable:

23 (a) If the goods are to be specially manufactured or  
24 obtained for the lessee and are not suitable for lease or  
25 sale to others in the ordinary course of the lessor's busi-  
26 ness, and the lessor, before notice of repudiation is re-

27 ceived and under circumstances that reasonably indicate  
28 that the goods are for the lessee, has made either a sub-  
29 stantial beginning of their manufacture or commitments  
30 for their procurement;

31 (b) If the party against whom enforcement is sought  
32 admits in that party's pleading, testimony or otherwise in  
33 court that a lease contract was made, but the lease contract  
34 is not enforceable under this provision beyond the quanti-  
35 ty of goods admitted; or

36 (c) With respect to goods that have been received and  
37 accepted by the lessee.

38 (5) The lease term under a lease contract referred to in  
39 subsection (4) is:

40 (a) If there is a writing signed by the party against  
41 whom enforcement is sought or by that party's authorized  
42 agent specifying the lease term, the term so specified;

43 (b) If the party against whom enforcement is sought  
44 admits in that party's pleading, testimony, or otherwise in  
45 court a lease term, the term so admitted; or

46 (c) A reasonable lease term.

**§46-2A-202. Final written expression: Parol or extrinsic evidence.**

1 Terms with respect to which the confirmatory memo-  
2 randa of the parties agree or which are otherwise set forth  
3 in a writing intended by the parties as a final expression of  
4 their agreement with respect to such terms as are included  
5 therein may not be contradicted by evidence of any prior  
6 agreement or of a contemporaneous oral agreement but  
7 may be explained or supplemented:

8 (a) By course of dealing or usage of trade or by  
9 course of performance; and

10 (b) By evidence of consistent additional terms unless  
11 the court finds the writing to have been intended also as a  
12 complete and exclusive statement of the terms of the  
13 agreement.

**§46-2A-203. Seals inoperative.**

1       The affixing of a seal to a writing evidencing a lease  
2 contract or an offer to enter into a lease contract does not  
3 render the writing a sealed instrument and the law with  
4 respect to sealed instruments does not apply to the lease  
5 contract or offer.

**§46-2A-204. Formation in general.**

1       (1) A lease contract may be made in any manner suf-  
2 ficient to show agreement, including conduct by both  
3 parties which recognizes the existence of a lease contract.

4       (2) An agreement sufficient to constitute a lease con-  
5 tract may be found although the moment of its making is  
6 undetermined.

7       (3) Although one or more terms are left open, a lease  
8 contract does not fail for indefiniteness if the parties have  
9 intended to make a lease contract and there is a reasonably  
10 certain basis for giving an appropriate remedy.

**§46-2A-205. Firm offers.**

1       An offer by a merchant to lease goods to or from  
2 another person in a signed writing that by its terms gives  
3 assurance it will be held open is not revocable, for lack of  
4 consideration, during the time stated or, if no time is stat-  
5 ed, for a reasonable time, but in no event may the period  
6 of irrevocability exceed three months. Any such term of  
7 assurance on a form supplied by the offeree must be sepa-  
8 rately signed by the offeror.

**§46-2A-206. Offer and acceptance in formation of lease con-  
tract.**

1       (1) Unless otherwise unambiguously indicated by the  
2 language or circumstances, an offer to make a lease con-  
3 tract must be construed as inviting acceptance in any man-  
4 ner and by any medium reasonable in the circumstances.

5       (2) If the beginning of a requested performance is a  
6 reasonable mode of acceptance, an offeror who is not  
7 notified of acceptance within a reasonable time may treat  
8 the offer as having lapsed before acceptance.

**§46-2A-207. Course of performance or practical construction.**

1       (1) If a lease contract involves repeated occasions for  
2 performance by either party with knowledge of the nature

3 of the performance and opportunity for objection to it by  
4 the other, any course of performance accepted or acqui-  
5 esced in without objection is relevant to determine the  
6 meaning of the lease agreement.

7 (2) The express terms of a lease agreement and any  
8 course of performance, as well as any course of dealing  
9 and usage of trade, must be construed whenever reason-  
10 able as consistent with each other; but if that construction  
11 is unreasonable, express terms control course of perfor-  
12 mance, course of performance controls both course of  
13 dealing and usage of trade and course of dealing controls  
14 usage of trade.

15 (3) Subject to the provisions of section 2A-208 on  
16 modification and waiver, course of performance is relevant  
17 to show a waiver or modification of any term inconsistent  
18 with the course of performance.

**§46-2A-208. Modification, rescission and waiver.**

1 (1) An agreement modifying a lease contract needs no  
2 consideration to be binding.

3 (2) A signed lease agreement that excludes modifica-  
4 tion or rescission except by a signed writing may not be  
5 otherwise modified or rescinded, but, except as between  
6 merchants, such a requirement on a form supplied by a  
7 merchant must be separately signed by the other party.

8 (3) Although an attempt at modification or rescission  
9 does not satisfy the requirements of subsection (2), it may  
10 operate as a waiver.

11 (4) A party who has made a waiver affecting an execu-  
12 tory portion of a lease contract may retract the waiver by  
13 reasonable notification received by the other party that  
14 strict performance will be required of any term waived,  
15 unless the retraction would be unjust in view of a material  
16 change of position in reliance on the waiver.

**§46-2A-209. Lessee under finance lease as beneficiary of sup-  
ply contract.**

1 (1) The benefit of a supplier's promises to the lessor  
2 under the supply contract and of all warranties, whether  
3 express or implied, including those of any third party



4 provided in connection with or as part of the supply con-  
5 tract, extends to the lessee to the extent of the lessee's  
6 leasehold interest under a finance lease related to the sup-  
7 ply contract, but is subject to the terms of the warranty and  
8 of the supply contract and all defenses or claims arising  
9 therefrom.

10 (2) The extension of the benefit of a supplier's prom-  
11 ises and of warranties to the lessee (section 2A-209(1))  
12 does not: (i) Modify the rights and obligations of the  
13 parties to the supply contract, whether arising therefrom or  
14 otherwise; or (ii) impose any duty or liability under the  
15 supply contract on the lessee.

16 (3) Any modification or rescission of the supply con-  
17 tract by the supplier and the lessor is effective between the  
18 supplier and the lessee unless, before the modification or  
19 rescission, the supplier has received notice that the lessee  
20 has entered into a finance lease related to the supply con-  
21 tract. If the modification or rescission is effective between  
22 the supplier and the lessee, the lessor is deemed to have  
23 assumed, in addition to the obligations of the lessor to the  
24 lessee under the lease contract, promises of the supplier to  
25 the lessor and warranties that were so modified or rescind-  
26 ed as they existed and were available to the lessee before  
27 modification or rescission.

28 (4) In addition to the extension of the benefit of the  
29 supplier's promises and of warranties to the lessee under  
30 subsection (1), the lessee retains all rights that the lessee  
31 may have against the supplier which arise from an agree-  
32 ment between the lessee and the supplier or under other  
33 law.

**§46-2A-210. Express warranties.**

1 (1) Express warranties by the lessor are created as  
2 follows:

3 (a) Any affirmation of fact or promise made by the  
4 lessor to the lessee which relates to the goods and becomes  
5 part of the basis of the bargain creates an express warranty  
6 that the goods will conform to the affirmation or promise.

7 (b) Any description of the goods which is made part  
8 of the basis of the bargain creates an express warranty that  
9 the goods will conform to the description.

10 (c) Any sample or model that is made part of the basis  
11 of the bargain creates an express warranty that the whole  
12 of the goods will conform to the sample or model.

13 (2) It is not necessary to the creation of an express  
14 warranty that the lessor use formal words, such as "war-  
15 rant" or "guarantee," or that the lessor have a specific in-  
16 tention to make a warranty, but an affirmation merely of  
17 the value of the goods or a statement purporting to be  
18 merely the lessor's opinion or commendation of the goods  
19 does not create a warranty.

**§46-2A-211. Warranties against interference and against  
infringement; lessee's obligation against  
infringement.**

1 (1) There is in a lease contract a warranty that for the  
2 lease term no person holds a claim to or interest in the  
3 goods that arose from an act or omission of the lessor,  
4 other than a claim by way of infringement or the like,  
5 which will interfere with the lessee's enjoyment of its lease-  
6 hold interest.

7 (2) Except in a finance lease, there is in a lease con-  
8 tract by a lessor who is a merchant regularly dealing in  
9 goods of the kind, a warranty that the goods are delivered  
10 free of the rightful claim of any person by way of in-  
11 fringement or the like.

12 (3) A lessee who furnishes specifications to a lessor or  
13 a supplier shall hold the lessor and the supplier harmless  
14 against any claim by way of infringement or the like that  
15 arises out of compliance with the specifications.

**§46-2A-212. Implied warranty of merchantability.**

1 (1) Except in a finance lease, a warranty that the goods  
2 will be merchantable is implied in a lease contract if the  
3 lessor is a merchant with respect to goods of that kind.

4 (2) Goods to be merchantable must be at least such as:

5 (a) Pass without objection in the trade under the de-  
6 scription in the lease agreement;

7 (b) In the case of fungible goods, are of fair average  
8 quality within the description;

9 (c) Are fit for the ordinary purposes for which goods  
10 of that type are used;

11 (d) Run, within the variation permitted by the lease  
12 agreement, of even kind, quality, and quantity within each  
13 unit and among all units involved;

14 (e) Are adequately contained, packaged and labeled as  
15 the lease agreement may require; and

16 (f) Conform to any promises or affirmations of fact  
17 made on the container or label.

18 (3) Other implied warranties may arise from course of  
19 dealing or usage of trade.

**§46-2A-213. Implied warranty of fitness for particular purpose.**

1 Except in a finance lease, if the lessor at the time the  
2 lease contract is made has reason to know of any particu-  
3 lar purpose for which the goods are required and that the  
4 lessee is relying on the lessor's skill or judgment to select  
5 or furnish suitable goods, there is in the lease contract an  
6 implied warranty that the goods will be fit for that pur-  
7 pose.

**§46-2A-214. Exclusion or modification of warranties.**

1 (1) Words or conduct relevant to the creation of an  
2 express warranty and words or conduct tending to negate  
3 or limit a warranty must be construed wherever reasonable  
4 as consistent with each other; but, subject to the provisions  
5 of section 2A-202 on parol or extrinsic evidence, negation  
6 or limitation is inoperative to the extent that the construc-  
7 tion is unreasonable.

8 (2) Subject to subsection (3), to exclude or modify the  
9 implied warranty of merchantability or any part of it the  
10 language must mention "merchantability," be by a writing,  
11 and be conspicuous. Subject to subsection (3), to exclude  
12 or modify any implied warranty of fitness the exclusion  
13 must be by a writing and be conspicuous. Language to  
14 exclude all implied warranties of fitness is sufficient if it is

15 in writing, is conspicuous and states, for example, "There is  
16 no warranty that the goods will be fit for a particular pur-  
17 pose."

18 (3) Notwithstanding subsection (2), but subject to  
19 subsection (4),

20 (a) Unless the circumstances indicate otherwise, all  
21 implied warranties are excluded by expressions like "as is,"  
22 or "with all faults," or by other language that in common  
23 understanding calls the lessee's attention to the exclusion  
24 of warranties and makes plain that there is no implied  
25 warranty, if in writing and conspicuous;

26 (b) If the lessee before entering into the lease contract  
27 has examined the goods or the sample or model as fully as  
28 desired or has refused to examine the goods, there is no  
29 implied warranty with regard to defects that an examina-  
30 tion ought in the circumstances to have revealed; and

31 (c) An implied warranty may also be excluded or  
32 modified by course of dealing, course of performance or  
33 usage of trade.

34 (4) To exclude or modify a warranty against interfer-  
35 ence or against infringement (section 2A-211) or any part  
36 of it, the language must be specific, be by a writing and be  
37 conspicuous, unless the circumstances, including course of  
38 performance, course of dealing or usage of trade, give the  
39 lessee reason to know that the goods are being leased  
40 subject to a claim or interest of any person.

**§46-2A-215. Cumulation and conflict of warranties express or implied.**

1 Warranties, whether express or implied, must be con-  
2 strued as consistent with each other and as cumulative, but  
3 if that construction is unreasonable, the intention of the  
4 parties determines which warranty is dominant. In ascer-  
5 taining that intention the following rules apply:

6 (a) Exact or technical specifications displace an incon-  
7 sistent sample or model or general language of descrip-  
8 tion.

9 (b) A sample from an existing bulk displaces inconsis-  
10 tent general language of description.

11 (c) Express warranties displace inconsistent implied  
12 warranties other than an implied warranty of fitness for a  
13 particular purpose.

**§46-2A-216. Third-party beneficiaries of express and implied warranties.**

1 A warranty to or for the benefit of a lessee under this  
2 article, whether express or implied, extends to any natural  
3 person who is in the family or household of the lessee or  
4 who is a guest in the lessee's home if it is reasonable to  
5 expect that such person may use, consume, or be affected  
6 by the goods and who is injured in person by breach of  
7 the warranty. This section does not displace principles of  
8 law and equity that extend a warranty to or for the benefit  
9 of a lessee to other persons. The operation of this section  
10 may not be excluded, modified or limited, but an exclu-  
11 sion, modification or limitation of the warranty, including  
12 any with respect to rights and remedies, effective against  
13 the lessee is also effective against any beneficiary desig-  
14 nated under this section.

**§46-2A-217. Identification.**

1 Identification of goods as goods to which a lease con-  
2 tract refers may be made at any time and in any manner  
3 explicitly agreed to by the parties. In the absence of ex-  
4 plicit agreement, identification occurs:

5 (a) When the lease contract is made if the lease con-  
6 tract is for a lease of goods that are existing and identified;

7 (b) When the goods are shipped, marked, or otherwise  
8 designated by the lessor as goods to which the lease con-  
9 tract refers, if the lease contract is for a lease of goods that  
10 are not existing and identified; or

11 (c) When the young are conceived, if the lease contract  
12 is for a lease of unborn young of animals.

**§46-2A-218. Insurance and proceeds.**

1 (1) A lessee obtains an insurable interest when existing  
2 goods are identified to the lease contract even though the

3 goods identified are nonconforming and the lessee has an  
4 option to reject them.

5 (2) If a lessee has an insurable interest only by reason  
6 of the lessor's identification of the goods, the lessor, until  
7 default or insolvency or notification to the lessee that  
8 identification is final, may substitute other goods for those  
9 identified.

10 (3) Notwithstanding a lessee's insurable interest under  
11 subsections (1) and (2), the lessor retains an insurable  
12 interest until an option to buy has been exercised by the  
13 lessee and risk of loss has passed to the lessee.

14 (4) Nothing in this section impairs any insurable inter-  
15 est recognized under any other statute or rule of law.

16 (5) The parties by agreement may determine that one  
17 or more parties have an obligation to obtain and pay for  
18 insurance covering the goods and by agreement may  
19 determine the beneficiary of the proceeds of the insur-  
20 ance.

**§46-2A-219. Risk of loss.**

1 (1) Except in the case of a finance lease, risk of loss is  
2 retained by the lessor and does not pass to the lessee. In  
3 the case of a finance lease, risk of loss passes to the lessee.

4 (2) Subject to the provisions of this article on the ef-  
5 fect of default on risk of loss (section 2A-220), if risk of  
6 loss is to pass to the lessee and the time of passage is not  
7 stated, the following rules apply:

8 (a) If the lease contract requires or authorizes the  
9 goods to be shipped by carrier:

10 (i) And it does not require delivery at a particular  
11 destination, the risk of loss passes to the lessee when the  
12 goods are duly delivered to the carrier; but

13 (ii) If it does require delivery at a particular destina-  
14 tion and the goods are there duly tendered while in the  
15 possession of the carrier, the risk of loss passes to the les-  
16 see when the goods are there duly so tendered as to enable  
17 the lessee to take delivery.

18 (b) If the goods are held by a bailee to be delivered  
19 without being moved, the risk of loss passes to the lessee  
20 on acknowledgment by the bailee of the lessee's right to  
21 possession of the goods.

22 (c) In any case not within subsection (a) or (b), the  
23 risk of loss passes to the lessee on the lessee's receipt of the  
24 goods if the lessor, or, in the case of a finance lease, the  
25 supplier, is a merchant; otherwise the risk passes to the  
26 lessee on tender of delivery.

**§46-2A-220. Effect of default on risk of loss.**

1 (1) Where risk of loss is to pass to the lessee and the  
2 time of passage is not stated:

3 (a) If a tender or delivery of goods so fails to conform  
4 to the lease contract as to give a right of rejection, the risk  
5 of their loss remains with the lessor, or, in the case of a  
6 finance lease, the supplier, until cure or acceptance.

7 (b) If the lessee rightfully revokes acceptance, he or  
8 she, to the extent of any deficiency in his or her effective  
9 insurance coverage, may treat the risk of loss as having  
10 remained with the lessor from the beginning.

11 (2) Whether or not risk of loss is to pass to the lessee,  
12 if the lessee as to conforming goods already identified to a  
13 lease contract repudiates or is otherwise in default under  
14 the lease contract, the lessor, or, in the case of a finance  
15 lease, the supplier, to the extent of any deficiency in his or  
16 her effective insurance coverage may treat the risk of loss  
17 as resting on the lessee for a commercially reasonable  
18 time.

**§46-2A-221. Casualty to identified goods.**

1 If a lease contract requires goods identified when the  
2 lease contract is made, and the goods suffer casualty with-  
3 out fault of the lessee, the lessor or the supplier before  
4 delivery, or the goods suffer casualty before risk of loss  
5 passes to the lessee pursuant to the lease agreement or  
6 section 2A-219, then:

7 (a) If the loss is total, the lease contract is avoided; and

8 (b) If the loss is partial or the goods have so deterio-  
9 rated as to no longer conform to the lease contract, the  
10 lessee may nevertheless demand inspection and at his or  
11 her option either treat the lease contract as avoided or,  
12 except in a finance lease that is not a consumer lease, ac-  
13 cept the goods with due allowance from the rent payable  
14 for the balance of the lease term for the deterioration or  
15 the deficiency in quantity but without further right against  
16 the lessor.

### PART 3. EFFECT OF LEASE CONTRACT.

#### **§46-2A-301. Enforceability of lease contract.**

1 Except as otherwise provided in this article, a lease  
2 contract is effective and enforceable according to its terms  
3 between the parties, against purchasers of the goods and  
4 against creditors of the parties.

#### **§46-2A-302. Title to and possession of goods.**

1 Except as otherwise provided in this article, each pro-  
2 vision of this article applies whether the lessor or a third  
3 party has title to the goods, and whether the lessor, the  
4 lessee or a third party has possession of the goods, not-  
5 withstanding any statute or rule of law that possession or  
6 the absence of possession is fraudulent.

#### **§46-2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.**

1 (1) As used in this section, "creation of a security in-  
2 terest" includes the sale of a lease contract that is subject to  
3 article nine, secured transactions, by reason of section  
4 9-102(1)(b).

5 (2) Except as provided in subsections (3) and (4), a  
6 provision in a lease agreement which: (i) Prohibits the  
7 voluntary or involuntary transfer, including a transfer by  
8 sale, sublease, creation or enforcement of a security inter-  
9 est, or attachment, levy, or other judicial process, of an  
10 interest of a party under the lease contract or of the les-  
11 sor's residual interest in the goods; or (ii) makes such a  
12 transfer an event of default, gives rise to the rights and  
13 remedies provided in subsection (5), but a transfer that is



14 prohibited or is an event of default under the lease agree-  
15 ment is otherwise effective.

16 (3) A provision in a lease agreement which: (i) Pro-  
17 hibits the creation or enforcement of a security interest in  
18 an interest of a party under the lease contract or in the  
19 lessor's residual interest in the goods; or (ii) makes such a  
20 transfer an event of default, is not enforceable unless, and  
21 then only to the extent that, there is an actual transfer by  
22 the lessee of the lessee's right of possession or use of the  
23 goods in violation of the provision or an actual delegation  
24 of a material performance of either party to the lease con-  
25 tract in violation of the provision. Neither the granting  
26 nor the enforcement of a security interest in: (i) The les-  
27 sor's interest under the lease contract; or (ii) the lessor's  
28 residual interest in the goods is a transfer that materially  
29 impairs the prospect of obtaining return performance by,  
30 materially changes the duty of, or materially increases the  
31 burden or risk imposed on, the lessee within the purview  
32 of subsection (5) unless, and then only to the extent that,  
33 there is an actual delegation of a material performance of  
34 the lessor.

35 (4) A provision in a lease agreement which: (i) Pro-  
36 hibits a transfer of a right to damages for default with  
37 respect to the whole lease contract or of a right to payment  
38 arising out of the transferor's due performance of the  
39 transferor's entire obligation; or (ii) makes such a transfer  
40 an event of default, is not enforceable, and such a transfer  
41 is not a transfer that materially impairs the prospect of  
42 obtaining return performance by, materially changes the  
43 duty of, or materially increases the burden or risk imposed  
44 on, the other party to the lease contract within the purview  
45 of subsection (5).

46 (5) Subject to subsections (3) and (4):

47 (a) If a transfer is made which is made an event of  
48 default under a lease agreement, the party to the lease  
49 contract not making the transfer, unless that party waives  
50 the default or otherwise agrees, has the rights and remedies  
51 described in section 2A-501(2);

52 (b) If paragraph (a) is not applicable and if a transfer  
53 is made that: (i) Is prohibited under a lease agreement; or  
54 (ii) materially impairs the prospect of obtaining return  
55 performance by, materially changes the duty of, or materi-  
56 ally increases the burden or risk imposed on, the other  
57 party to the lease contract, unless the party not making the  
58 transfer agrees at any time to the transfer in the lease con-  
59 tract or otherwise, then, except as limited by contract: (i)  
60 The transferor is liable to the party not making the trans-  
61 fer for damages caused by the transfer to the extent that  
62 the damages could not reasonably be prevented by the  
63 party not making the transfer; and (ii) a court having  
64 jurisdiction may grant other appropriate relief, including  
65 cancellation of the lease contract or an injunction against  
66 the transfer.

67 (6) A transfer of "the lease" or of "all my rights under  
68 the lease," or a transfer in similar general terms, is a trans-  
69 fer of rights and, unless the language or the circumstances,  
70 as in a transfer for security, indicate the contrary, the  
71 transfer is a delegation of duties by the transferor to the  
72 transferee. Acceptance by the transferee constitutes a  
73 promise by the transferee to perform those duties. The  
74 promise is enforceable by either the transferor or the other  
75 party to the lease contract.

76 (7) Unless otherwise agreed by the lessor and the les-  
77 see, a delegation of performance does not relieve the  
78 transferor as against the other party of any duty to per-  
79 form or of any liability for default.

80 (8) In a consumer lease, to prohibit the transfer of an  
81 interest of a party under the lease contract or to make a  
82 transfer an event of default, the language must be specific,  
83 by a writing, and conspicuous.

**§46-2A-304. Subsequent lease of goods by lessor.**

1 (1) Subject to section 2A-303, a subsequent lessee  
2 from a lessor of goods under an existing lease contract  
3 obtains, to the extent of the leasehold interest transferred,  
4 the leasehold interest in the goods that the lessor had or  
5 had power to transfer, and except as provided in subsec-  
6 tion (2) and section 2A-527(4), takes subject to the exist-

7 ing lease contract. A lessor with voidable title has power  
8 to transfer a good leasehold interest to a good faith subse-  
9 quent lessee for value, but only to the extent set forth in  
10 the preceding sentence. If goods have been delivered  
11 under a transaction of purchase, the lessor has that power  
12 even though:

13 (a) The lessor's transferor was deceived as to the iden-  
14 tity of the lessor;

15 (b) The delivery was in exchange for a check which is  
16 later dishonored;

17 (c) It was agreed that the transaction was to be a "cash  
18 sale"; or

19 (d) The delivery was procured through fraud punish-  
20 able as larcenous under the criminal law.

21 (2) A subsequent lessee in the ordinary course of  
22 business from a lessor who is a merchant dealing in goods  
23 of that kind to whom the goods were entrusted by the  
24 existing lessee of that lessor before the interest of the sub-  
25 sequent lessee became enforceable against that lessor ob-  
26 tains, to the extent of the leasehold interest transferred, all  
27 of that lessor's and the existing lessee's rights to the goods,  
28 and takes free of the existing lease contract.

29 (3) A subsequent lessee from the lessor of goods that  
30 are subject to an existing lease contract and are covered by  
31 a certificate of title issued under a statute of this state or of  
32 another jurisdiction takes no greater rights than those  
33 provided both by this section and by the certificate of title  
34 statute.

#### **§46-2A-305. Sale or sublease of goods by lessee.**

1 (1) Subject to the provisions of section 2A-303, a  
2 buyer or sublessee from the lessee of goods under an  
3 existing lease contract obtains, to the extent of the interest  
4 transferred, the leasehold interest in the goods that the  
5 lessee had or had power to transfer, and except as provid-  
6 ed in subsection (2) and section 2A-511(4), takes subject  
7 to the existing lease contract. A lessee with a voidable  
8 leasehold interest has power to transfer a good leasehold  
9 interest to a good faith buyer for value or a good faith

10 sublessee for value, but only to the extent set forth in the  
11 preceding sentence. When goods have been delivered  
12 under a transaction of lease the lessee has that power even  
13 though:

14 (a) The lessor was deceived as to the identity of the  
15 lessee;

16 (b) The delivery was in exchange for a check which is  
17 later dishonored; or

18 (c) The delivery was procured through fraud punish-  
19 able as larcenous under the criminal law.

20 (2) A buyer in the ordinary course of business or a  
21 sublessee in the ordinary course of business from a lessee  
22 who is a merchant dealing in goods of that kind to whom  
23 the goods were entrusted by the lessor obtains, to the ex-  
24 tent of the interest transferred, all of the lessor's and les-  
25 see's rights to the goods, and takes free of the existing  
26 lease contract.

27 (3) A buyer or sublessee from the lessee of goods that  
28 are subject to an existing lease contract and are covered by  
29 a certificate of title issued under a statute of this state or of  
30 another jurisdiction takes no greater rights than those  
31 provided both by this section and by the certificate of title  
32 statute.

**§46-2A-306. Priority of certain liens arising by operation of law.**

1 If a person in the ordinary course of his or her busi-  
2 ness furnishes services or materials with respect to goods  
3 subject to a lease contract, a lien upon those goods in the  
4 possession of that person given by statute or rule of law  
5 for those materials or services takes priority over any in-  
6 terest of the lessor or lessee under the lease contract or this  
7 article unless the lien is created by statute and the statute  
8 provides otherwise or unless the lien is created by rule of  
9 law and the rule of law provides otherwise.

**§46-2A-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.**

1 (1) Except as otherwise provided in section 2A-306, a  
2 creditor of a lessee takes subject to the lease contract.

3 (2) Except as otherwise provided in subsections (3)  
4 and (4) and in sections 2A-306 and 2A-308, a creditor of  
5 a lessor takes subject to the lease contract unless:

6 (a) The creditor holds a lien that attached to the goods  
7 before the lease contract became enforceable;

8 (b) The creditor holds a security interest in the goods  
9 and the lessee did not give value and receive delivery of  
10 the goods without knowledge of the security interest; or

11 (c) The creditor holds a security interest in the goods  
12 which was perfected (section 9-303) before the lease con-  
13 tract became enforceable.

14 (3) A lessee in the ordinary course of business takes  
15 the leasehold interest free of a security interest in the  
16 goods created by the lessor even though the security inter-  
17 est is perfected (section 9-303) and the lessee knows of its  
18 existence.

19 (4) A lessee other than a lessee in the ordinary course  
20 of business takes the leasehold interest free of a security  
21 interest to the extent that it secures future advances made  
22 after the secured party acquires knowledge of the lease or  
23 more than forty-five days after the lease contract becomes  
24 enforceable, whichever first occurs, unless the future ad-  
25 vances are made pursuant to a commitment entered into  
26 without knowledge of the lease and before the expiration  
27 of the forty-five-day period.

#### **§46-2A-308. Special rights of creditors.**

1 (1) A creditor of a lessor in possession of goods sub-  
2 ject to a lease contract may treat the lease contract as void  
3 if as against the creditor retention of possession by the  
4 lessor is fraudulent under any statute or rule of law, but  
5 retention of possession in good faith and current course of  
6 trade by the lessor for a commercially reasonable time  
7 after the lease contract becomes enforceable is not fraudu-  
8 lent.

9 (2) Nothing in this article impairs the rights of credi-  
10 tors of a lessor if the lease contract: (a) Becomes enforce-

11 able, not in current course of trade but in satisfaction of or  
12 as security for a preexisting claim for money, security, or  
13 the like; and (b) is made under circumstances which under  
14 any statute or rule of law apart from this article would  
15 constitute the transaction a fraudulent transfer or voidable  
16 preference.

17 (3) A creditor of a seller may treat a sale or an identi-  
18 fication of goods to a contract for sale as void if as against  
19 the creditor retention of possession by the seller is fraudu-  
20 lent under any statute or rule of law, but retention of pos-  
21 session of the goods pursuant to a lease contract entered  
22 into by the seller as lessee and the buyer as lessor in con-  
23 nection with the sale or identification of the goods is not  
24 fraudulent if the buyer bought for value and in good  
25 faith.

**§46-2A-309. Lessor's and lessee's rights when goods become fixtures.**

1 (1) In this section:

2 (a) Goods are "fixtures" when they become so related  
3 to particular real estate that an interest in them arises under  
4 real estate law;

5 (b) A "fixture filing" is the filing, in the office where a  
6 mortgage on the real estate would be filed or recorded of  
7 a financing statement covering goods that are or are to  
8 become fixtures and conforming to the requirements of  
9 section 9-402(5);

10 (c) A lease is a "purchase money lease" unless the  
11 lessee has possession or use of the goods or the right to  
12 possession or use of the goods before the lease agreement  
13 is enforceable;

14 (d) A mortgage is a "construction mortgage" to the  
15 extent it secures an obligation incurred for the construc-  
16 tion of an improvement on land including the acquisition  
17 cost of the land, if the recorded writing so indicates; and

18 (e) "Encumbrance" includes real estate mortgages and  
19 other liens on real estate and all other rights in real estate  
20 that are not ownership interests.

21 (2) Under this article a lease may be of goods that are  
22 fixtures or may continue in goods that become fixtures,  
23 but no lease exists under this article of ordinary building  
24 materials incorporated into an improvement on land.

25 (3) This article does not prevent creation of a lease of  
26 fixtures pursuant to real estate law.

27 (4) The perfected interest of a lessor of fixtures has  
28 priority over a conflicting interest of an encumbrancer or  
29 owner of the real estate if:

30 (a) The lease is a purchase money lease, the conflict-  
31 ing interest of the encumbrancer or owner arises before  
32 the goods become fixtures, the interest of the lessor is  
33 perfected by a fixture filing before the goods become  
34 fixtures or within ten days thereafter, and the lessee has an  
35 interest of record in the real estate or is in possession of  
36 the real estate; or

37 (b) The interest of the lessor is perfected by a fixture  
38 filing before the interest of the encumbrancer or owner is  
39 of record, the lessor's interest has priority over any con-  
40 flicting interest of a predecessor in title of the encum-  
41 brancer or owner, and the lessee has an interest of record  
42 in the real estate or is in possession of the real estate.

43 (5) The interest of a lessor of fixtures, whether or not  
44 perfected, has priority over the conflicting interest of an  
45 encumbrancer or owner of the real estate if:

46 (a) The fixtures are readily removable factory or of-  
47 fice machines, readily removable equipment that is not  
48 primarily used or leased for use in the operation of the  
49 real estate, or readily removable replacements of domestic  
50 appliances that are goods subject to a consumer lease and  
51 before the goods become fixtures the lease contract is  
52 enforceable; or

53 (b) The conflicting interest is a lien on the real estate  
54 obtained by legal or equitable proceedings after the lease  
55 contract is enforceable; or

56 (c) The encumbrancer or owner has consented in  
57 writing to the lease or has disclaimed an interest in the  
58 goods as fixtures; or

59 (d) The lessee has a right to remove the goods as  
60 against the encumbrancer or owner. If the lessee's right to  
61 remove terminates, the priority of the interest of the lessor  
62 continues for a reasonable time.

63 (6) Notwithstanding subsection (4)(a) but otherwise  
64 subject to subsections (4) and (5), the interest of a lessor  
65 of fixtures, including the lessor's residual interest, is subor-  
66 dinate to the conflicting interest of an encumbrancer of  
67 the real estate under a construction mortgage recorded  
68 before the goods become fixtures if the goods become  
69 fixtures before the completion of the construction. To the  
70 extent given to refinance a construction mortgage, the  
71 conflicting interest of an encumbrancer of the real estate  
72 under a mortgage has this priority to the same extent as  
73 the encumbrancer of the real estate under the construction  
74 mortgage.

75 (7) In cases not within the preceding subsections, pri-  
76 ority between the interest of a lessor of fixtures, including  
77 the lessor's residual interest, and the conflicting interest of  
78 an encumbrancer or owner of the real estate who is not the  
79 lessee is determined by the priority rules governing con-  
80 flicting interests in real estate.

81 (8) If the interest of a lessor of fixtures, including the  
82 lessor's residual interest, has priority over all conflicting  
83 interests of all owners and encumbrancers of the real es-  
84 tate, the lessor or the lessee may: (i) On default, expira-  
85 tion, termination, or cancellation of the lease agreement  
86 but subject to the lease agreement and this article; or (ii) if  
87 necessary to enforce other rights and remedies of the  
88 lessor or lessee under this article, remove the goods from  
89 the real estate, free and clear of all conflicting interests of  
90 all owners and encumbrancers of the real estate, but the  
91 lessor or lessee must reimburse any encumbrancer or  
92 owner of the real estate who is not the lessee and who has  
93 not otherwise agreed for the cost of repair of any physical  
94 injury, but not for any diminution in value of the real  
95 estate caused by the absence of the goods removed or by  
96 any necessity of replacing them. A person entitled to  
97 reimbursement may refuse permission to remove until the



98 party seeking removal gives adequate security for the  
99 performance of this obligation.

100 (9) Even though the lease agreement does not create a  
101 security interest, the interest of a lessor of fixtures, includ-  
102 ing the lessor's residual interest, is perfected by filing a  
103 financing statement as a fixture filing for leased goods  
104 that are or are to become fixtures in accordance with the  
105 relevant provisions of the article on secured transactions  
106 (article nine).

**§46-2A-310. Lessor's and lessee's rights when goods become  
accessions.**

1 (1) Goods are "accessions" when they are installed in  
2 or affixed to other goods.

3 (2) The interest of a lessor or a lessee under a lease  
4 contract entered into before the goods became accessions  
5 is superior to all interests in the whole except as stated in  
6 subsection (4).

7 (3) The interest of a lessor or a lessee under a lease  
8 contract entered into at the time or after the goods became  
9 accessions is superior to all subsequently acquired interests  
10 in the whole except as stated in subsection (4) but is sub-  
11 ordinate to interests in the whole existing at the time the  
12 lease contract was made unless the holders of such inter-  
13 ests in the whole have in writing consented to the lease or  
14 disclaimed an interest in the goods as part of the whole.

15 (4) The interest of a lessor or a lessee under a lease  
16 contract described in subsection (2) or (3) is subordinate  
17 to the interest of:

18 (a) A buyer in the ordinary course of business or a  
19 lessee in the ordinary course of business of any interest in  
20 the whole acquired after the goods became accessions; or

21 (b) A creditor with a security interest in the whole  
22 perfected before the lease contract was made to the extent  
23 that the creditor makes subsequent advances without  
24 knowledge of the lease contract.

25 (5) When under subsections (2) or (3) and (4) a lessor  
26 or a lessee of accessions holds an interest that is superior

27 to all interests in the whole, the lessor or the lessee may:  
28 (a) On default, expiration, termination, or cancellation of  
29 the lease contract by the other party but subject to the  
30 provisions of the lease contract and this article; or (b) if  
31 necessary to enforce his or her other rights and remedies  
32 under this article, remove the goods from the whole, free  
33 and clear of all interests in the whole, but he or she must  
34 reimburse any holder of an interest in the whole who is  
35 not the lessee and who has not otherwise agreed for the  
36 cost of repair of any physical injury but not for any dimi-  
37 nution in value of the whole caused by the absence of the  
38 goods removed or by any necessity for replacing them. A  
39 person entitled to reimbursement may refuse permission  
40 to remove until the party seeking removal gives adequate  
41 security for the performance of this obligation.

**§46-2A-311. Priority subject to subordination.**

1 Nothing in this article prevents subordination by  
2 agreement by any person entitled to priority.

PART 4. PERFORMANCE OF LEASE CONTRACT:  
REPUDIATED, SUBSTITUTED AND EXCUSSED.

**§46-2A-401. Insecurity; adequate assurance of performance.**

1 (1) A lease contract imposes an obligation on each  
2 party that the other's expectation of receiving due perfor-  
3 mance will not be impaired.

4 (2) If reasonable grounds for insecurity arise with  
5 respect to the performance of either party, the insecure  
6 party may demand in writing adequate assurance of due  
7 performance. Until the insecure party receives that assur-  
8 ance, if commercially reasonable the insecure party may  
9 suspend any performance for which he or she has not  
10 already received the agreed return.

11 (3) A repudiation of the lease contract occurs if assur-  
12 ance of due performance adequate under the circumstanc-  
13 es of the particular case is not provided to the insecure  
14 party within a reasonable time, not to exceed thirty days  
15 after receipt of a demand by the other party.

16 (4) Between merchants, the reasonableness of grounds  
17 for insecurity and the adequacy of any assurance offered  
18 must be determined according to commercial standards.

19 (5) Acceptance of any nonconforming delivery or  
20 payment does not prejudice the aggrieved party's right to  
21 demand adequate assurance of future performance.

**§46-2A-402. Anticipatory repudiation.**

1 If either party repudiates a lease contract with respect  
2 to a performance not yet due under the lease contract, the  
3 loss of which performance will substantially impair the  
4 value of the lease contract to the other, the aggrieved party  
5 may:

6 (a) For a commercially reasonable time, await retrac-  
7 tion of repudiation and performance by the repudiating  
8 party;

9 (b) Make demand pursuant to section 2A-401 and  
10 await assurance of future performance adequate under the  
11 circumstances of the particular case; or

12 (c) Resort to any right or remedy upon default under  
13 the lease contract or this article, even though the aggrieved  
14 party has notified the repudiating party that the aggrieved  
15 party would await the repudiating party's performance and  
16 assurance and has urged retraction. In addition, whether  
17 or not the aggrieved party is pursuing one of the forego-  
18 ing remedies, the aggrieved party may suspend perfor-  
19 mance or, if the aggrieved party is the lessor, proceed in  
20 accordance with the provisions of this article on the les-  
21 sor's right to identify goods to the lease contract notwith-  
22 standing default or to salvage unfinished goods (section  
23 2A-524).

**§46-2A-403. Retraction of anticipatory repudiation.**

1 (1) Until the repudiating party's next performance is  
2 due, the repudiating party can retract the repudiation un-  
3 less, since the repudiation, the aggrieved party has can-  
4 celed the lease contract or materially changed the ag-  
5 grieved party's position or otherwise indicated that the  
6 aggrieved party considers the repudiation final.

7 (2) Retraction may be by any method that clearly  
8 indicates to the aggrieved party that the repudiating party  
9 intends to perform under the lease contract and includes  
10 any assurance demanded under section 2A-401.

11 (3) Retraction reinstates a repudiating party's rights  
12 under a lease contract with due excuse and allowance to  
13 the aggrieved party for any delay occasioned by the repu-  
14 diation.

**§46-2A-404. Substituted performance.**

1 (1) If without fault of the lessee, the lessor and the  
2 supplier, the agreed berthing, loading or unloading facili-  
3 ties fail or the agreed type of carrier becomes unavailable  
4 or the agreed manner of delivery otherwise becomes com-  
5 mercially impracticable, but a commercially reasonable  
6 substitute is available, the substitute performance must be  
7 tendered and accepted.

8 (2) If the agreed means or manner of payment fails  
9 because of domestic or foreign governmental regulation:

10 (a) The lessor may withhold or stop delivery or cause  
11 the supplier to withhold or stop delivery unless the lessee  
12 provides a means or manner of payment that is commer-  
13 cially a substantial equivalent; and

14 (b) If delivery has already been taken, payment by the  
15 means or in the manner provided by the regulation dis-  
16 charges the lessee's obligation unless the regulation is  
17 discriminatory, oppressive or predatory.

**§46-2A-405. Excused performance.**

1 Subject to section 2A-404 on substituted performance,  
2 the following rules apply:

3 (a) Delay in delivery or nondelivery, in whole or in  
4 part, by a lessor or a supplier who complies with para-  
5 graphs (b) and (c) is not a default under the lease contract  
6 if performance as agreed has been made impracticable by  
7 the occurrence of a contingency the nonoccurrence of  
8 which was a basic assumption on which the lease contract  
9 was made or by compliance in good faith with any appli-  
10 cable foreign or domestic governmental regulation or

11 order, whether or not the regulation or order later proves  
12 to be invalid.

13 (b) If the causes mentioned in paragraph (a) affect  
14 only part of the lessor's or the supplier's capacity to per-  
15 form, he or she shall allocate production and deliveries  
16 among his or her customers but at his or her option may  
17 include regular customers not then under contract for sale  
18 or lease as well as his or her own requirements for further  
19 manufacture. He or she may so allocate in any manner  
20 that is fair and reasonable.

21 (c) The lessor seasonably shall notify the lessee and in  
22 the case of a finance lease the supplier seasonably shall  
23 notify the lessor and the lessee, if known, that there will be  
24 delay or nondelivery and, if allocation is required under  
25 paragraph (b), of the estimated quota thus made available  
26 for the lessee.

**§46-2A-406. Procedure on excused performance.**

1 (1) If the lessee receives notification of a material or  
2 indefinite delay or an allocation justified under section  
3 2A-405, the lessee may by written notification to the lessor  
4 as to any goods involved, and with respect to all of the  
5 goods if under an installment lease contract the value of  
6 the whole lease contract is substantially impaired (section  
7 2A-510):

8 (a) Terminate the lease contract (section 2A-505(2));  
9 or

10 (b) Except in a finance lease that is not a consumer  
11 lease, modify the lease contract by accepting the available  
12 quota in substitution, with due allowance from the rent  
13 payable for the balance of the lease term for the deficien-  
14 cy but without further right against the lessor.

15 (2) If, after receipt of a notification from the lessor  
16 under section 2A-405, the lessee fails so to modify the  
17 lease agreement within a reasonable time not exceeding 30  
18 days, the lease contract lapses with respect to any deliveries  
19 affected.

**§46-2A-407. Irrevocable promises; finance leases.**

1 (1) In the case of a finance lease that is not a consum-  
2 er lease the lessee's promises under the lease contract be-  
3 come irrevocable and independent upon the lessee's ac-  
4 ceptance of the goods.

5 (2) A promise that has become irrevocable and inde-  
6 pendent under subsection (1):

7 (a) Is effective and enforceable between the parties,  
8 and by or against third parties including assignees of the  
9 parties; and

10 (b) Is not subject to cancellation, termination, modifi-  
11 cation, repudiation, excuse or substitution without the  
12 consent of the party to whom the promise runs.

13 (3) This section does not affect the validity under any  
14 other law of a covenant in any lease contract making the  
15 lessee's promises irrevocable and independent upon the  
16 lessee's acceptance of the goods.

17 (4) In the case of a consumer lease, the promises of  
18 each party are dependent on the promises of the other  
19 party or parties.

#### PART 5. DEFAULT.

##### A. IN GENERAL

##### §46-2A-501. Default; procedure.

1 (1) Whether the lessor or the lessee is in default under  
2 a lease contract is determined by the lease agreement and  
3 this article.

4 (2) If the lessor or the lessee is in default under the  
5 lease contract, the party seeking enforcement has rights  
6 and remedies as provided in this article and, except as  
7 limited by this article, as provided in the lease agreement.

8 (3) If the lessor or the lessee is in default under the  
9 lease contract, the party seeking enforcement may reduce  
10 the party's claim to judgment, or otherwise enforce the  
11 lease contract by self-help or any available judicial proce-  
12 dure or nonjudicial procedure, including administrative  
13 proceeding, arbitration, or the like, in accordance with this  
14 article.

15 (4) Except as otherwise provided in section 1-106(1)  
16 or this article or the lease agreement, the rights and reme-  
17 dies referred to in subsections (2) and (3) are cumulative.

18 (5) If the lease agreement covers both real property  
19 and goods, the party seeking enforcement may proceed  
20 under this part as to the goods, or under other applicable  
21 law as to both the real property and the goods in accor-  
22 dance with that party's rights and remedies in respect of  
23 the real property, in which case this part does not apply.

**§46-2A-502. Notice after default.**

1 Except as otherwise provided in this article or the lease  
2 agreement, the lessor or lessee in default under the lease  
3 contract is not entitled to notice of default or notice of  
4 enforcement from the other party to the lease agreement.

**§46-2A-503. Modification or impairment of rights and remedies.**

1 (1) Except as otherwise provided in this article, the  
2 lease agreement may include rights and remedies for de-  
3 fault in addition to or in substitution for those provided in  
4 this article and may limit or alter the measure of damages  
5 recoverable under this article.

6 (2) Resort to a remedy provided under this article or  
7 in the lease agreement is optional unless the remedy is  
8 expressly agreed to be exclusive. If circumstances cause  
9 an exclusive or limited remedy to fail of its essential pur-  
10 pose, or provision for an exclusive remedy is unconscio-  
11 nable, remedy may be had as provided in this article.

12 (3) Consequential damages may be liquidated under  
13 section 2A-504, or may otherwise be limited, altered or  
14 excluded unless the limitation, alteration or exclusion is  
15 unconscionable. Limitation, alteration, or exclusion of  
16 consequential damages for injury to the person in the case  
17 of consumer goods is prima facie unconscionable but  
18 limitation, alteration or exclusion of damages where the  
19 loss is commercial is not prima facie unconscionable.

20 (4) Rights and remedies on default by the lessor or the  
21 lessee with respect to any obligation or promise collateral

22 or ancillary to the lease contract are not impaired by this  
23 article.

**§46-2A-504. Liquidation of damages.**

1 (1) Damages payable by either party for default, or  
2 any other act or omission, including indemnity for loss or  
3 diminution of anticipated tax benefits or loss or damage to  
4 lessor's residual interest, may be liquidated in the lease  
5 agreement but only at an amount or by a formula that is  
6 reasonable in light of the then anticipated harm caused by  
7 the default or other act or omission.

8 (2) If the lease agreement provides for liquidation of  
9 damages, and such provision does not comply with sub-  
10 section (1), or such provision is an exclusive or limited  
11 remedy that circumstances cause to fail of its essential  
12 purpose, remedy may be had as provided in this article.

13 (3) If the lessor justifiably withholds or stops delivery  
14 of goods because of the lessee's default or insolvency  
15 (section 2A-525 or 2A-526), the lessee is entitled to resti-  
16 tution of any amount by which the sum of his or her pay-  
17 ments exceeds:

18 (a) The amount to which the lessor is entitled by virtue  
19 of terms liquidating the lessor's damages in accordance  
20 with subsection (1); or

21 (b) In the absence of those terms, twenty percent of  
22 the then present value of the total rent the lessee was obli-  
23 gated to pay for the balance of the lease term, or, in the  
24 case of a consumer lease, the lesser of such amount or five  
25 hundred dollars.

26 (4) A lessee's right to restitution under subsection (3)  
27 is subject to offset to the extent the lessor establishes:

28 (a) A right to recover damages under the provisions of  
29 this article other than subsection (1); and

30 (b) The amount or value of any benefits received by  
31 the lessee directly or indirectly by reason of the lease  
32 contract.

**§46-2A-505. Cancellation and termination and effect of can-  
cellation, termination, rescission, or fraud on  
rights and remedies.**



1 (1) On cancellation of the lease contract, all obliga-  
2 tions that are still executory on both sides are discharged,  
3 but any right based on prior default or performance sur-  
4 vives, and the canceling party also retains any remedy for  
5 default of the whole lease contract or any unperformed  
6 balance.

7 (2) On termination of the lease contract, all obligations  
8 that are still executory on both sides are discharged but  
9 any right based on prior default or performance survives.

10 (3) Unless the contrary intention clearly appears, ex-  
11 pressions of "cancellation," "rescission," or the like of the  
12 lease contract may not be construed as a renunciation or  
13 discharge of any claim in damages for an antecedent de-  
14 fault.

15 (4) Rights and remedies for material misrepresentation  
16 or fraud include all rights and remedies available under  
17 this article for default.

18 (5) Neither rescission nor a claim for rescission of the  
19 lease contract nor rejection or return of the goods may bar  
20 or be deemed inconsistent with a claim for damages or  
21 other right or remedy.

**§46-2A-506. Statute of limitations.**

1 (1) An action for default under a lease contract, in-  
2 cluding breach of warranty or indemnity, must be com-  
3 menced within four years after the cause of action ac-  
4 crued. By the original lease contract the parties may re-  
5 duce the period of limitation to not less than one year.

6 (2) A cause of action for default accrues when the act  
7 or omission on which the default or breach of warranty is  
8 based is or should have been discovered by the aggrieved  
9 party, or when the default occurs, whichever is later. A  
10 cause of action for indemnity accrues when the act or  
11 omission on which the claim for indemnity is based is or  
12 should have been discovered by the indemnified party,  
13 whichever is later.

14 (3) If an action commenced within the time limited by  
15 subsection (1) is so terminated as to leave available a rem-  
16 edy by another action for the same default or breach of

17 warranty or indemnity, the other action may be com-  
18 menced after the expiration of the time limited and within  
19 six months after the termination of the first action unless  
20 the termination resulted from voluntary discontinuance or  
21 from dismissal for failure or neglect to prosecute.

22 (4) This section does not alter the law on tolling of the  
23 statute of limitations nor does it apply to causes of action  
24 that have accrued before this article becomes effective.

**§46-2A-507. Proof of market rent; time and place.**

1 (1) Damages based on market rent (section 2A-519 or  
2 2A-528) are determined according to the rent for the use  
3 of the goods concerned for a lease term identical to the  
4 remaining lease term of the original lease agreement and  
5 prevailing at the times specified in sections 2A-519 and  
6 2A-528.

7 (2) If evidence of rent for the use of the goods con-  
8 cerned for a lease term identical to the remaining lease  
9 term of the original lease agreement and prevailing at the  
10 times or places described in this article is not readily avail-  
11 able, the rent prevailing within any reasonable time before  
12 or after the time described or at any other place or for a  
13 different lease term which in commercial judgment or  
14 under usage of trade would serve as a reasonable substitute  
15 for the one described may be used, making any proper  
16 allowance for the difference, including the cost of trans-  
17 porting the goods to or from the other place.

18 (3) Evidence of a relevant rent prevailing at a time or  
19 place or for a lease term other than the one described in  
20 this article offered by one party is not admissible unless  
21 and until he or she has given the other party notice the  
22 court finds sufficient to prevent unfair surprise.

23 (4) If the prevailing rent or value of any goods regu-  
24 larly leased in any established market is in issue, reports in  
25 official publications or trade journals or in newspapers or  
26 periodicals of general circulation published as the reports  
27 of that market are admissible in evidence. The circum-  
28 stances of the preparation of the report may be shown to  
29 affect its weight but not its admissibility.

**B. DEFAULT BY LESSOR**

**§46-2A-508. Lessee's remedies.**

1 (1) If a lessor fails to deliver the goods in conformity  
2 to the lease contract (section 2A-509) or repudiates the  
3 lease contract (section 2A-402), or a lessee rightfully re-  
4 jects the goods (section 2A-509) or justifiably revokes  
5 acceptance of the goods (section 2A-517), then with re-  
6 spect to any goods involved, and with respect to all of the  
7 goods if under an installment lease contract the value of  
8 the whole lease contract is substantially impaired (section  
9 2A-510), the lessor is in default under the lease contract  
10 and the lessee may:

11 (a) Cancel the lease contract (section 2A-505(1));

12 (b) Recover so much of the rent and security as has  
13 been paid and is just under the circumstances;

14 (c) Cover and recover damages as to all goods affected  
15 whether or not they have been identified to the lease con-  
16 tract (sections 2A-518 and 2A-520), or recover damages  
17 for nondelivery (sections 2A-519 and 2A-520);

18 (d) Exercise any other rights or pursue any other  
19 remedies provided in the lease contract.

20 (2) If a lessor fails to deliver the goods in conformity  
21 to the lease contract or repudiates the lease contract, the  
22 lessee may also:

23 (a) If the goods have been identified, recover them  
24 (section 2A-522); or

25 (b) In a proper case, obtain specific performance or  
26 replevy the goods (section 2A-521).

27 (3) If a lessor is otherwise in default under a lease  
28 contract, the lessee may exercise the rights and pursue the  
29 remedies provided in the lease contract, which may in-  
30 clude a right to cancel the lease, and in section 2A-519(3).

31 (4) If a lessor has breached a warranty, whether ex-  
32 press or implied, the lessee may recover damages (section  
33 2A-519(4)).

34 (5) On rightful rejection or justifiable revocation of  
35 acceptance, a lessee has a security interest in goods in the

36 lessee's possession or control for any rent and security that  
37 has been paid and any expenses reasonably incurred in  
38 their inspection, receipt, transportation, and care and cus-  
39 tody and may hold those goods and dispose of them in  
40 good faith and in a commercially reasonable manner,  
41 subject to section 2A-527(5).

42 (6) Subject to the provisions of section 2A-407, a  
43 lessee, on notifying the lessor of the lessee's intention to  
44 do so, may deduct all or any part of the damages resulting  
45 from any default under the lease contract from any part of  
46 the rent still due under the same lease contract.

**§46-2A-509. Lessee's rights on improper delivery; rightful rejection.**

1 (1) Subject to the provisions of section 2A-510 on  
2 default in installment lease contracts, if the goods or the  
3 tender or delivery fail in any respect to conform to the  
4 lease contract, the lessee may reject or accept the goods or  
5 accept any commercial unit or units and reject the rest of  
6 the goods.

7 (2) Rejection of goods is ineffective unless it is within  
8 a reasonable time after tender or delivery of the goods and  
9 the lessee seasonably notifies the lessor.

**§46-2A-510. Installment lease contracts; rejection and default.**

1 (1) Under an installment lease contract a lessee may  
2 reject any delivery that is nonconforming if the noncon-  
3 formity substantially impairs the value of that delivery and  
4 cannot be cured or the nonconformity is a defect in the  
5 required documents; but if the nonconformity does not  
6 fall within subsection (2) and the lessor or the supplier  
7 gives adequate assurance of its cure, the lessee must accept  
8 that delivery.

9 (2) Whenever nonconformity or default with respect to  
10 one or more deliveries substantially impairs the value of  
11 the installment lease contract as a whole there is a default  
12 with respect to the whole. But, the aggrieved party rein-  
13 states the installment lease contract as a whole if the ag-  
14 grieved party accepts a nonconforming delivery without  
15 seasonably notifying of cancellation or brings an action

16 with respect only to past deliveries or demands perfor-  
17 mance as to future deliveries.

**§46-2A-511. Merchant lessee's duties as to rightfully rejected goods.**

1 (1) Subject to any security interest of a lessee (section  
2 2A-508(5)), if a lessor or a supplier has no agent or place  
3 of business at the market of rejection, a merchant lessee,  
4 after rejection of goods in his or her possession or control,  
5 shall follow any reasonable instructions received from the  
6 lessor or the supplier with respect to the goods. In the  
7 absence of those instructions, a merchant lessee shall make  
8 reasonable efforts to sell, lease, or otherwise dispose of the  
9 goods for the lessor's account if they threaten to decline in  
10 value speedily. Instructions are not reasonable if on de-  
11 mand indemnity for expenses is not forthcoming.

12 (2) If a merchant lessee (subsection (1)) or any other  
13 lessee (section 2A-512) disposes of goods, he or she is  
14 entitled to reimbursement either from the lessor or the  
15 supplier or out of the proceeds for reasonable expenses of  
16 caring for and disposing of the goods and, if the expenses  
17 include no disposition commission, to such commission as  
18 is usual in the trade, or if there is none, to a reasonable  
19 sum not exceeding ten percent of the gross proceeds.

20 (3) In complying with this section or section 2A-512,  
21 the lessee is held only to good faith. Good faith conduct  
22 hereunder is neither acceptance or conversion nor the  
23 basis of an action for damages.

24 (4) A purchaser who purchases in good faith from a  
25 lessee pursuant to this section or section 2A-512 takes the  
26 goods free of any rights of the lessor and the supplier  
27 even though the lessee fails to comply with one or more of  
28 the requirements of this article.

**§46-2A-512. Lessee's duties as to rightfully rejected goods.**

1 (1) Except as otherwise provided with respect to goods  
2 that threaten to decline in value speedily (section 2A-511)  
3 and subject to any security interest of a lessee (section  
4 2A-508(5)):

5 (a) The lessee, after rejection of goods in the lessee's  
6 possession, shall hold them with reasonable care at the  
7 lessor's or the supplier's disposition for a reasonable time  
8 after the lessee's seasonable notification of rejection;

9 (b) If the lessor or the supplier gives no instructions  
10 within a reasonable time after notification of rejection, the  
11 lessee may store the rejected goods for the lessor's or the  
12 supplier's account or ship them to the lessor or the suppli-  
13 er or dispose of them for the lessor's or the supplier's ac-  
14 count with reimbursement in the manner provided in sec-  
15 tion 2A-511; but

16 (c) The lessee has no further obligations with regard to  
17 goods rightfully rejected.

18 (2) Action by the lessee pursuant to subsection (1) is  
19 not acceptance or conversion.

**§46-2A-513. Cure by lessor of improper tender or delivery;  
replacement.**

1 (1) If any tender or delivery by the lessor or the sup-  
2 plier is rejected because nonconforming and the time for  
3 performance has not yet expired, the lessor or the supplier  
4 may seasonably notify the lessee of the lessor's or the  
5 supplier's intention to cure and may then make a con-  
6 forming delivery within the time provided in the lease  
7 contract.

8 (2) If the lessee rejects a nonconforming tender that  
9 the lessor or the supplier had reasonable grounds to be-  
10 lieve would be acceptable with or without money allow-  
11 ance, the lessor or the supplier may have a further reason-  
12 able time to substitute a conforming tender if he or she  
13 seasonably notifies the lessee.

**§46-2A-514. Waiver of lessee's objections.**

1 (1) In rejecting goods, a lessee's failure to state a par-  
2 ticular defect that is ascertainable by reasonable inspection  
3 precludes the lessee from relying on the defect to justify  
4 rejection or to establish default:

5 (a) If, stated seasonably, the lessor or the supplier  
6 could have cured it (section 2A-513); or

7 (b) Between merchants if the lessor or the supplier  
8 after rejection has made a request in writing for a full and  
9 final written statement of all defects on which the lessee  
10 proposes to rely.

11 (2) A lessee's failure to reserve rights when paying rent  
12 or other consideration against documents precludes recov-  
13 ery of the payment for defects apparent on the face of the  
14 documents.

**§46-2A-515. Acceptance of goods.**

1 (1) Acceptance of goods occurs after the lessee has  
2 had a reasonable opportunity to inspect the goods and:

3 (a) The lessee signifies or acts with respect to the  
4 goods in a manner that signifies to the lessor or the suppli-  
5 er that the goods are conforming or that the lessee will  
6 take or retain them in spite of their nonconformity; or

7 (b) The lessee fails to make an effective rejection of  
8 the goods (section 2A-509(2)).

9 (2) Acceptance of a part of any commercial unit is  
10 acceptance of that entire unit.

**§46-2A-516. Effect of acceptance of goods; notice of default;  
burden of establishing default after accep-  
tance; notice of claim or litigation to person  
answerable over.**

1 (1) A lessee must pay rent for any goods accepted in  
2 accordance with the lease contract, with due allowance for  
3 goods rightfully rejected or not delivered.

4 (2) A lessee's acceptance of goods precludes rejection  
5 of the goods accepted. In the case of a finance lease, if  
6 made with knowledge of a nonconformity, acceptance  
7 cannot be revoked because of it. In any other case, if  
8 made with knowledge of a nonconformity, acceptance  
9 cannot be revoked because of it unless the acceptance was  
10 on the reasonable assumption that the nonconformity  
11 would be seasonably cured. Acceptance does not of itself  
12 impair any other remedy provided by this article or the  
13 lease agreement for nonconformity.

14 (3) If a tender has been accepted:

15 (a) Within a reasonable time after the lessee discovers  
16 or should have discovered any default, the lessee shall  
17 notify the lessor and the supplier, if any, or be barred  
18 from any remedy against the party not notified;

19 (b) Except in the case of a consumer lease, within a  
20 reasonable time after the lessee receives notice of litigation  
21 for infringement or the like (section 2A-211) the lessee  
22 shall notify the lessor or be barred from any remedy over  
23 for liability established by the litigation; and

24 (c) The burden is on the lessee to establish any de-  
25 fault.

26 (4) If a lessee is sued for breach of a warranty or other  
27 obligation for which a lessor or a supplier is answerable  
28 over the following apply:

29 (a) The lessee may give the lessor or the supplier, or  
30 both, written notice of the litigation. If the notice states  
31 that the person notified may come in and defend, and that  
32 if the person notified does not do so, that person will be  
33 bound in any action against that person by the lessee by  
34 any determination of fact common to the two litigations,  
35 then unless the person notified after seasonable receipt of  
36 the notice does come in and defend, that person is so  
37 bound;

38 (b) The lessor or the supplier may demand in writing  
39 that the lessee turn over control of the litigation including  
40 settlement if the claim is one for infringement or the like  
41 (section 2A-211) or else be barred from any remedy over.  
42 If the demand states that the lessor or the supplier agrees  
43 to bear all expense and to satisfy any adverse judgment,  
44 then unless the lessee after seasonable receipt of the de-  
45 mand does turn over control, the lessee is so barred.

46 (5) Subsections (3) and (4) apply to any obligation of  
47 a lessee to hold the lessor or the supplier harmless against  
48 infringement or the like (section 2A-211).

**§46-2A-517. Revocation of acceptance of goods.**

1 (1) A lessee may revoke acceptance of a lot or com-  
2 mercial unit whose nonconformity substantially impairs its  
3 value to the lessee if the lessee has accepted it:



4 (a) Except in the case of a finance lease, on the rea-  
5 sonable assumption that its nonconformity would be cured  
6 and it has not been seasonably cured; or

7 (b) Without discovery of the nonconformity if the  
8 lessee's acceptance was reasonably induced either by the  
9 lessor's assurances or, except in the case of a finance lease,  
10 by the difficulty of discovery before acceptance.

11 (2) Except in the case of a finance lease that is not a  
12 consumer lease, a lessee may revoke acceptance of a lot or  
13 commercial unit if the lessor defaults under the lease con-  
14 tract and the default substantially impairs the value of that  
15 lot or commercial unit to the lessee.

16 (3) If the lease agreement so provides, the lessee may  
17 revoke acceptance of a lot or commercial unit because of  
18 other defaults by the lessor.

19 (4) Revocation of acceptance must occur within a  
20 reasonable time after the lessee discovers or should have  
21 discovered the ground for it and before any substantial  
22 change in condition of the goods which is not caused by  
23 the nonconformity. Revocation is not effective until the  
24 lessee notifies the lessor.

25 (5) A lessee who so revokes has the same rights and  
26 duties with regard to the goods involved as if the lessee  
27 had rejected them.

**§46-2A-518. Cover; substitute goods.**

1 (1) After a default by a lessor under the lease contract  
2 of the type described in section 2A-508(1), or, if agreed,  
3 after other default by the lessor, the lessee may cover by  
4 making any purchase or lease of or contract to purchase  
5 or lease goods in substitution for those due from the les-  
6 sor.

7 (2) Except as otherwise provided with respect to dam-  
8 ages liquidated in the lease agreement (section 2A-504) or  
9 otherwise determined pursuant to agreement of the parties  
10 (sections 1-102(3) and 2A-503), if a lessee's cover is by a  
11 lease agreement substantially similar to the original lease  
12 agreement and the new lease agreement is made in good  
13 faith and in a commercially reasonable manner, the lessee

14 may recover from the lessor as damages: (i) The present  
15 value, as of the date of the commencement of the term of  
16 the new lease agreement, of the rent under the new lease  
17 agreement applicable to that period of the new lease term  
18 which is comparable to the then remaining term of the  
19 original lease agreement minus the present value as of the  
20 same date of the total rent for the then remaining lease  
21 term of the original lease agreement; and (ii) any incidental  
22 or consequential damages, less expenses saved in consequence  
23 of the lessor's default.

24 (3) If a lessee's cover is by lease agreement that for  
25 any reason does not qualify for treatment under subsection  
26 (2), or is by purchase or otherwise, the lessee may  
27 recover from the lessor as if the lessee had elected not to  
28 cover and section 2A-519 governs.

**§46-2A-519. Lessee's damages for nondelivery, repudiation,  
default, and breach of warranty in regard to  
accepted goods.**

1 (1) Except as otherwise provided with respect to dam-  
2 ages liquidated in the lease agreement (section 2A-504) or  
3 otherwise determined pursuant to agreement of the parties  
4 (sections 1-102(3) and 2A-503), if a lessee elects not to  
5 cover or a lessee elects to cover and the cover is by lease  
6 agreement that for any reason does not qualify for treat-  
7 ment under section 2A-518(2), or is by purchase or other-  
8 wise, the measure of damages for nondelivery or repudia-  
9 tion by the lessor or for rejection or revocation of accep-  
10 tance by the lessee is the present value, as of the date of  
11 the default, of the then market rent minus the present  
12 value as of the same date of the original rent, computed  
13 for the remaining lease term of the original lease agree-  
14 ment, together with incidental and consequential damages,  
15 less expenses saved in consequence of the lessor's default.

16 (2) Market rent is to be determined as of the place for  
17 tender or, in cases of rejection after arrival or revocation  
18 of acceptance, as of the place of arrival.

19 (3) Except as otherwise agreed, if the lessee has ac-  
20 cepted goods and given notification (section 2A-516(3)),  
21 the measure of damages for nonconforming tender or

22 delivery or other default by a lessor is the loss resulting in  
23 the ordinary course of events from the lessor's default as  
24 determined in any manner that is reasonable together with  
25 incidental and consequential damages, less expenses saved  
26 in consequence of the lessor's default.

27 (4) Except as otherwise agreed, the measure of damag-  
28 es for breach of warranty is the present value at the time  
29 and place of acceptance of the difference between the  
30 value of the use of the goods accepted and the value if  
31 they had been as warranted for the lease term, unless spe-  
32 cial circumstances show proximate damages of a different  
33 amount, together with incidental and consequential dam-  
34 ages, less expenses saved in consequence of the lessor's  
35 default or breach of warranty.

**§46-2A-520. Lessee's incidental and consequential damages.**

1 (1) Incidental damages resulting from a lessor's de-  
2 fault include expenses reasonably incurred in inspection,  
3 receipt, transportation and care and custody of goods  
4 rightfully rejected or goods the acceptance of which is  
5 justifiably revoked, any commercially reasonable charges,  
6 expenses or commissions in connection with effecting  
7 cover, and any other reasonable expense incident to the  
8 default.

9 (2) Consequential damages resulting from a lessor's  
10 default include:

11 (a) Any loss resulting from general or particular re-  
12 quirements and needs of which the lessor at the time of  
13 contracting had reason to know and which could not rea-  
14 sonably be prevented by cover or otherwise; and

15 (b) Injury to person or property proximately resulting  
16 from any breach of warranty.

**§46-2A-521. Lessee's right to specific performance or replev-  
in.**

1 (1) Specific performance may be decreed if the goods  
2 are unique or in other proper circumstances.

3       (2) A decree for specific performance may include  
4 any terms and conditions as to payment of the rent, dam-  
5 ages or other relief that the court deems just.

6       (3) A lessee has a right of replevin, detinue, sequestra-  
7 tion, claim and delivery, or the like for goods identified to  
8 the lease contract if after reasonable effort the lessee is  
9 unable to effect cover for those goods or the circumstanc-  
10 es reasonably indicate that the effort will be unavailing.

**§46-2A-522. Lessee's right to goods on lessor's insolvency.**

1       (1) Subject to subsection (2) and even though the  
2 goods have not been shipped, a lessee who has paid a part  
3 or all of the rent and security for goods identified to a  
4 lease contract (section 2A-217) on making and keeping  
5 good a tender of any unpaid portion of the rent and secu-  
6 rity due under the lease contract may recover the goods  
7 identified from the lessor if the lessor becomes insolvent  
8 within ten days after receipt of the first installment of rent  
9 and security.

10       (2) A lessee acquires the right to recover goods identi-  
11 fied to a lease contract only if they conform to the lease  
12 contract.

**C. DEFAULT BY LESSEE**

**§46-2A-523. Lessor's remedies.**

1       (1) If a lessee wrongfully rejects or revokes acceptance  
2 of goods or fails to make a payment when due or repudi-  
3 ates with respect to a part or the whole, then, with respect  
4 to any goods involved, and with respect to all of the goods  
5 if under an installment lease contract the value of the  
6 whole lease contract is substantially impaired (section  
7 2A-510), the lessee is in default under the lease contract  
8 and the lessor may:

9       (a) Cancel the lease contract (section 2A-505(1));

10       (b) Proceed respecting goods not identified to the  
11 lease contract (section 2A-524);

12       (c) Withhold delivery of the goods and take possession  
13 of goods previously delivered (section 2A-525);

14 (d) Stop delivery of the goods by any bailee (section  
15 2A-526);

16 (e) Dispose of the goods and recover damages (section  
17 2A-527), or retain the goods and recover damages (sec-  
18 tion 2A-528), or in a proper case recover rent (section  
19 2A-529);

20 (f) Exercise any other rights or pursue any other rem-  
21 edies provided in the lease contract.

22 (2) If a lessor does not fully exercise a right or obtain  
23 a remedy to which the lessor is entitled under subsection  
24 (1), the lessor may recover the loss resulting in the ordi-  
25 nary course of events from the lessee's default as deter-  
26 mined in any reasonable manner, together with incidental  
27 damages, less expenses saved in consequence of the les-  
28 see's default.

29 (3) If a lessee is otherwise in default under a lease  
30 contract, the lessor may exercise the rights and pursue the  
31 remedies provided in the lease contract which may include  
32 a right to cancel the lease. In addition, unless otherwise  
33 provided in the lease contract:

34 (a) If the default substantially impairs the value of the  
35 lease contract to the lessor, the lessor may exercise the  
36 rights and pursue the remedies provided in subsection (1)  
37 or (2); or

38 (b) If the default does not substantially impair the  
39 value of the lease contract to the lessor, the lessor may  
40 recover as provided in subsection (2).

**§46-2A-524. Lessor's right to identify goods to lease contract.**

1 (1) After default by the lessee under the lease contract  
2 of the type described in section 2A-523(1) or section  
3 2A-523(3)(a) or, if agreed, after other default by the les-  
4 see, the lessor may:

5 (a) Identify to the lease contract conforming goods  
6 not already identified if at the time the lessor learned of  
7 the default they were in the lessor's or the supplier's pos-  
8 session or control; and

9 (b) Dispose of goods (section 2A-527(1)) that demon-  
10 strably have been intended for the particular lease contract  
11 even though those goods are unfinished.

12 (2) If the goods are unfinished, in the exercise of  
13 reasonable commercial judgment for the purposes of  
14 avoiding loss and of effective realization, an aggrieved  
15 lessor or the supplier may either complete manufacture  
16 and wholly identify the goods to the lease contract or  
17 cease manufacture and lease, sell or otherwise dispose of  
18 the goods for scrap or salvage value or proceed in any  
19 other reasonable manner.

**§46-2A-525. Lessor's right to possession of goods.**

1 (1) If a lessor discovers the lessee to be insolvent, the  
2 lessor may refuse to deliver the goods.

3 (2) After a default by the lessee under the lease con-  
4 tract of the type described in section 2A-523(1) or  
5 2A-523(3)(a) or, if agreed, after other default by the les-  
6 see, the lessor has the right to take possession of the  
7 goods. If the lease contract so provides, the lessor may  
8 require the lessee to assemble the goods and make them  
9 available to the lessor at a place to be designated by the  
10 lessor which is reasonably convenient to both parties.  
11 Without removal, the lessor may render unusable any  
12 goods employed in trade or business, and may dispose of  
13 goods on the lessee's premises (section 2A-527).

14 (3) The lessor may proceed under subsection (2) with-  
15 out judicial process if it can be done without breach of the  
16 peace or the lessor may proceed by action.

**§46-2A-526. Lessor's stoppage of delivery in transit or other-  
wise.**

1 (1) A lessor may stop delivery of goods in the posses-  
2 sion of a carrier or other bailee if the lessor discovers the  
3 lessee to be insolvent and may stop delivery of carload,  
4 truckload, planeload or larger shipments of express or  
5 freight if the lessee repudiates or fails to make a payment  
6 due before delivery, whether for rent, security or otherwise  
7 under the lease contract, or for any other reason the lessor  
8 has a right to withhold or take possession of the goods.

9 (2) In pursuing its remedies under subsection (1), the  
10 lessor may stop delivery until:

11 (a) Receipt of the goods by the lessee;

12 (b) Acknowledgment to the lessee by any bailee of the  
13 goods, except a carrier, that the bailee holds the goods for  
14 the lessee; or

15 (c) Such an acknowledgment to the lessee by a carrier  
16 via reshipment or as warehouseman.

17 (3)(a) To stop delivery, a lessor shall so notify as to  
18 enable the bailee by reasonable diligence to prevent deliv-  
19 ery of the goods.

20 (b) After notification, the bailee shall hold and deliver  
21 the goods according to the directions of the lessor, but the  
22 lessor is liable to the bailee for any ensuing charges or  
23 damages.

24 (c) A carrier who has issued a nonnegotiable bill of  
25 lading is not obliged to obey a notification to stop re-  
26 ceived from a person other than the consignor.

**§46-2A-527. Lessor's rights to dispose of goods.**

1 (1) After a default by a lessee under the lease contract  
2 of the type described in section 2A-523(1) or 2A-523  
3 (3)(a) or after the lessor refuses to deliver or takes posses-  
4 sion of goods (section 2A-525 or 2A-526), or, if agreed,  
5 after other default by a lessee, the lessor may dispose of  
6 the goods concerned or the undelivered balance thereof  
7 by lease, sale or otherwise.

8 (2) Except as otherwise provided with respect to dam-  
9 ages liquidated in the lease agreement (section 2A-504) or  
10 otherwise determined pursuant to agreement of the parties  
11 (sections 1-102(3) and 2A-503), if the disposition is by  
12 lease agreement substantially similar to the original lease  
13 agreement and the new lease agreement is made in good  
14 faith and in a commercially reasonable manner, the lessor  
15 may recover from the lessee as damages: (i) Accrued and  
16 unpaid rent as of the date of the commencement of the  
17 term of the new lease agreement; (ii) the present value, as  
18 of the same date, of the total rent for the then remaining

19 lease term of the original lease agreement minus the pres-  
20 ent value, as of the same date, of the rent under the new  
21 lease agreement applicable to that period of the new lease  
22 term which is comparable to the then remaining term of  
23 the original lease agreement; and (iii) any incidental dam-  
24 ages allowed under section 2A-530, less expenses saved in  
25 consequence of the lessee's default.

26 (3) If the lessor's disposition is by lease agreement that  
27 for any reason does not qualify for treatment under sub-  
28 section (2), or is by sale or otherwise, the lessor may re-  
29 cover from the lessee as if the lessor had elected not to  
30 dispose of the goods and section 2A-528 governs.

31 (4) A subsequent buyer or lessee who buys or leases  
32 from the lessor in good faith for value as a result of a  
33 disposition under this section takes the goods free of the  
34 original lease contract and any rights of the original lessee  
35 even though the lessor fails to comply with one or more of  
36 the requirements of this article.

37 (5) The lessor is not accountable to the lessee for any  
38 profit made on any disposition. A lessee who has rightfull-  
39 ly rejected or justifiably revoked acceptance shall account  
40 to the lessor for any excess over the amount of the lessee's  
41 security interest (section 2A-508(5)).

**§46-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.**

1 (1) Except as otherwise provided with respect to dam-  
2 ages liquidated in the lease agreement (section 2A-504) or  
3 otherwise determined pursuant to agreement of the parties  
4 (sections 1-102(3) and 2A-503), if a lessor elects to retain  
5 the goods or a lessor elects to dispose of the goods and the  
6 disposition is by lease agreement that for any reason does  
7 not qualify for treatment under section 2A-527(2), or is  
8 by sale or otherwise, the lessor may recover from the les-  
9 see as damages for a default of the type described in sec-  
10 tion 2A-523(1) or 2A-523(3)(a), or, if agreed, for other  
11 default of the lessee; (i) Accrued and unpaid rent as of  
12 the date of default if the lessee has never taken possession  
13 of the goods, or, if the lessee has taken possession of the  
14 goods, as of the date the lessor repossesses the goods or an



15 earlier date on which the lessee makes a tender of the  
16 goods to the lessor; (ii) the present value as of the date  
17 determined under clause (i) of the total rent for the then  
18 remaining lease term of the original lease agreement mi-  
19 nus the present value as of the same date of the market  
20 rent at the place where the goods are located computed for  
21 the same lease term; and (iii) any incidental damages al-  
22 lowed under section 2A-530, less expenses saved in conse-  
23 quence of the lessee's default.

24 (2) If the measure of damages provided in subsection  
25 (1) is inadequate to put a lessor in as good a position as  
26 performance would have, the measure of damages is the  
27 present value of the profit, including reasonable overhead,  
28 the lessor would have made from full performance by the  
29 lessee, together with any incidental damages allowed under  
30 section 2A-530, due allowance for costs reasonably in-  
31 curred and due credit for payments or proceeds of dispo-  
32 sition.

**§46-2A-529. Lessor's action for the rent.**

1 (1) After default by the lessee under the lease contract  
2 of the type described in section 2A-523(1) or 2A-523  
3 (3)(a) or, if agreed, after other default by the lessee, if the  
4 lessor complies with subsection (2), the lessor may recover  
5 from the lessee as damages:

6 (a) For goods accepted by the lessee and not repos-  
7 sessed by or tendered to the lessor, and for conforming  
8 goods lost or damaged within a commercially reasonable  
9 time after risk of loss passes to the lessee (section  
10 2A-219): (i) Accrued and unpaid rent as of the date of  
11 entry of judgment in favor of the lessor; (ii) the present  
12 value as of the same date of the rent for the then remain-  
13 ing lease term of the lease agreement; and (iii) any inci-  
14 dental damages allowed under section 2A-530, less ex-  
15 penses saved in consequence of the lessee's default; and

16 (b) For goods identified to the lease contract if the  
17 lessor is unable after reasonable effort to dispose of them  
18 at a reasonable price or the circumstances reasonably  
19 indicate that effort will be unavailing: (i) Accrued and  
20 unpaid rent as of the date of entry of judgment in favor of

21 the lessor; (ii) the present value as of the same date of the  
22 rent for the then remaining lease term of the lease agree-  
23 ment; and (iii) any incidental damages allowed under  
24 section 2A-530, less expenses saved in consequence of the  
25 lessee's default.

26 (2) Except as provided in subsection (3), the lessor  
27 shall hold for the lessee for the remaining lease term of  
28 the lease agreement any goods that have been identified to  
29 the lease contract and are in the lessor's control.

30 (3) The lessor may dispose of the goods at any time  
31 before collection of the judgment for damages obtained  
32 pursuant to subsection (1). If the disposition is before the  
33 end of the remaining lease term of the lease agreement,  
34 the lessor's recovery against the lessee for damages is gov-  
35 erned by section 2A-527 or section 2A-528, and the lessor  
36 will cause an appropriate credit to be provided against a  
37 judgment for damages to the extent that the amount of the  
38 judgment exceeds the recovery available pursuant to sec-  
39 tion 2A-527 or 2A-528.

40 (4) Payment of the judgment for damages obtained  
41 pursuant to subsection (1) entitles the lessee to the use and  
42 possession of the goods not then disposed of for the re-  
43 maining lease term of and in accordance with the lease  
44 agreement.

45 (5) After default by the lessee under the lease contract  
46 of the type described in section 2A-523(1) or section  
47 2A-523(3)(a) or, if agreed, after other default by the les-  
48 see, a lessor who is held not entitled to rent under this  
49 section must nevertheless be awarded damages for nonac-  
50 ceptance under section 2A-527 or section 2A-528.

**§46-2A-530. Lessor's incidental damages.**

1 Incidental damages to an aggrieved lessor include any  
2 commercially reasonable charges, expenses or commis-  
3 sions incurred in stopping delivery, in the transportation,  
4 care and custody of goods after the lessee's default, in  
5 connection with return or disposition of the goods, or  
6 otherwise resulting from the default.

**§46-2A-531. Standing to sue third parties for injury to goods.**

1 (1) If a third party so deals with goods that have been  
2 identified to a lease contract as to cause actionable injury  
3 to a party to the lease contract: (a) The lessor has a right  
4 of action against the third party; and (b) the lessee also has  
5 a right of action against the third party if the lessee:

6 (i) Has a security interest in the goods;

7 (ii) Has an insurable interest in the goods; or

8 (iii) Bears the risk of loss under the lease contract or  
9 has since the injury assumed that risk as against the lessor  
10 and the goods have been converted or destroyed.

11 (2) If at the time of the injury the party plaintiff did  
12 not bear the risk of loss as against the other party to the  
13 lease contract and there is no arrangement between them  
14 for disposition of the recovery, his or her suit or settle-  
15 ment, subject to his or her own interest, is as a fiduciary  
16 for the other party to the lease contract.

17 (3) Either party with the consent of the other may sue  
18 for the benefit of whom it may concern.

**§46-2A-532. Lessor's rights to residual interest.**

1 In addition to any other recovery permitted by this  
2 article or other law, the lessor may recover from the lessee  
3 an amount that will fully compensate the lessor for any  
4 loss of or damage to the lessor's residual interest in the  
5 goods caused by the default of the lessee.

**ARTICLE 9. SECURED TRANSACTIONS; SALES OF ACCOUNTS  
AND CHATTEL PAPER.**

**§46-9-113. Security interests arising under article on sales or  
under article on leases.**

1 A security interest arising solely under the article on  
2 sales (article two) or the article on leases (article two-a) is  
3 subject to the provisions of this article except that to the  
4 extent that and so long as the debtor does not have or does  
5 not lawfully obtain possession of the goods;

6 (a) No security agreement is necessary to make the  
7 security interest enforceable; and

8 (b) No filing is required to perfect the security inter-  
9 est; and

10 (c) The rights of the secured party on default by the  
 11 debtor are governed: (i) By the article on sales (article  
 12 two) in the case of a security interest arising solely under  
 13 such article; or (ii) by the article on leases (article two-a)  
 14 in the case of a security interest arising solely under such  
 15 article.

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

### Article

1. Short Title, Definitions and General Provisions.
2. Consumer Credit Protection.
6. General Consumer Protection.
7. Administration.

### ARTICLE 1. SHORT TITLE, DEFINITIONS AND GENERAL PROVISIONS.

§46A-1-102. General definitions.

§46A-1-104. Application.

§46A-1-106. Sales, leases or loans subject to chapter by agreement of parties.

§46A-1-107. Waiver.

#### \*§46A-1-102. General definitions.

1 In addition to definitions appearing in subsequent  
 2 articles, in this chapter: (1) "Actuarial method" means the  
 3 method, defined by rules adopted by the commissioner, of  
 4 allocating payments made on a debt between principal or  
 5 amount financed and loan finance charge or sales finance  
 6 charge pursuant to which a payment is applied first to the  
 7 accumulated loan finance charge or sales finance charge  
 8 and the balance is applied to the unpaid principal or un-  
 9 paid amount financed.

10 (2) "Agreement" means the bargain of the parties in  
 11 fact as found in their language or by implication from  
 12 other circumstances including course of dealing or usage  
 13 of trade or course of performance. A "consumer credit  
 14 agreement" is an agreement where credit is granted.

15 (3) "Agricultural purpose" means a purpose related to  
 16 the production, harvest, exhibition, marketing, transporta-  
 17 tion, processing or manufacture of agricultural products

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\*Clerk's Note: This section was also amended by S. B. 366 (Chapter 73), which passed subsequent to this act.

18 by a natural person who cultivates, plants, propagates or  
19 nurtures the agricultural products. "Agricultural products"  
20 includes agricultural, horticultural, viticultural and dairy  
21 products, livestock, wildlife, poultry, bees, forest products,  
22 fish and shellfish, and any products thereof, including  
23 processed and manufactured products, and any and all  
24 products raised or produced on farms and any processed  
25 or manufactured products thereof.

26 (4) "Amount financed" means the total of the follow-  
27 ing items to the extent that payment is deferred:

28 (a) The cash price of the goods, services or interest in  
29 land, less the amount of any down payment whether made  
30 in cash or in property traded in;

31 (b) The amount actually paid or to be paid by the  
32 seller pursuant to an agreement with the buyer to dis-  
33 charge a security interest in or a lien on property traded  
34 in; and

35 (c) If not included in the cash price:

36 (i) Any applicable sales, use, privilege, excise or docu-  
37 mentary stamp taxes;

38 (ii) Amounts actually paid or to be paid by the seller  
39 for registration, certificate of title or license fees; and

40 (iii) Additional charges permitted by this chapter.

41 (5) "Average daily balance" in a billing cycle for  
42 which a sales finance charge or loan finance charge is  
43 made is the sum of the amount unpaid each day during  
44 that cycle divided by the number of days in that cycle.  
45 The amount unpaid on a day is determined by adding to  
46 the balance, if any, unpaid as of the beginning of that day  
47 all purchases and other debits and deducting all payments  
48 and other credits made or received as of that day.

49 (6) The "cash price" of goods, services or an interest in  
50 land means the price at which the goods, services or inter-  
51 est in land are offered for sale by the seller to cash buyers  
52 in the ordinary course of business, and may include (a)  
53 applicable sales, use, privilege, and excise and documenta-  
54 ry stamp taxes, (b) the cash price of accessories or related

55 services such as delivery, installation, servicing, repairs,  
56 alterations and improvements, and (c) amounts actually  
57 paid or to be paid by the seller for registration, certificate  
58 of title, or license fees.

59 (7) "Closing costs" with respect to a debt secured by an  
60 interest in land include:

61 (a) Fees or premiums for title examination, title insur-  
62 ance or similar purposes including surveys;

63 (b) Fees for preparation of a deed, deed of trust, mort-  
64 gage, settlement statement or other documents;

65 (c) Escrows for future payments of taxes and insur-  
66 ance;

67 (d) Official fees and fees for notarizing deeds and  
68 other documents;

69 (e) Appraisal fees; and

70 (f) Credit reports.

71 (8) "Code" means the official code of West Virginia,  
72 one thousand nine hundred thirty-one, as amended.

73 (9) "Commercial facsimile transmission" means the  
74 electronic or telephonic transmission in the state to a fac-  
75 simile device to encourage a person to purchase goods,  
76 realty or services.

77 (10) "Commissioner" means the commissioner of  
78 banking of West Virginia.

79 (11) "Conspicuous": A term or clause is conspicuous  
80 when it is so written that a reasonable person against whom  
81 it is to operate ought to have noticed it. Whether a term or  
82 clause is conspicuous or not is for decision by the court.

83 (12) "Consumer" means a natural person who incurs  
84 debt pursuant to a consumer credit sale or a consumer  
85 loan, or debt or other obligations pursuant to a consumer  
86 lease.

87 (13) (a) Except as provided in paragraph (b), "con-  
88 sumer credit sale" is a sale of goods, services or an interest  
89 in land in which:

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

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

94 (iii) The goods, services or interest in land are pur-  
95 chased primarily for a personal, family, household or  
96 agricultural purpose;

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

99 (v) With respect to a sale of goods or services, the  
100 amount financed does not exceed forty-five thousand  
101 dollars or the sale is of a factory-built home as defined in  
102 section two, article fifteen, chapter thirty-seven of this  
103 code.

104 (b) "Consumer credit sale" does not include a sale in  
105 which the seller allows the buyer to purchase goods or  
106 services pursuant to a lender credit card or similar ar-  
107 rangement.

108 (14) (a) "Consumer lease" means a lease of goods:

109 (i) Which a lessor regularly engaged in the business of  
110 leasing makes to a person, other than an organization, who  
111 takes under the lease primarily for a personal, family,  
112 household or agricultural purpose;

113 (ii) In which the total of payments under the lease,  
114 excluding payments for options to renew or buy, do not  
115 exceed forty-five thousand dollars or in which the lease is  
116 of a factory-built home as defined in section two, article  
117 fifteen, chapter thirty-seven of this code; and

118 (iii) Which is for a term exceeding four months.

119 (b) "Consumer lease" does not include a lease made  
120 pursuant to a lender credit card or similar arrangement.

121 (15) "Consumer loan" is a loan made by a person  
122 regularly engaged in the business of making loans in  
123 which:

124 (a) The debtor is a person other than an organization;

125 (b) The debt is incurred primarily for a personal, fam-  
126 ily, household or agricultural purpose;

127 (c) Either the debt is payable in installments or a loan  
128 finance charge is made; and

129 (d) Either the principal does not exceed forty-five  
130 thousand dollars or the debt is secured by an interest in  
131 land or a factory-built home as defined in section two,  
132 article fifteen, chapter thirty-seven of this code.

133 (16) "Cosigner" means a natural person who assumes  
134 liability for the obligation on a consumer credit sale or  
135 consumer loan without receiving goods, services or money  
136 in return for the obligation or, in the case of a revolving  
137 charge account or revolving loan account of a consumer,  
138 without receiving the contractual right to obtain extensions  
139 of credit under the account. The term cosigner includes  
140 any person whose signature is requested as a condition to  
141 granting credit to a consumer or as a condition for for-  
142 bearance on collection of a consumer's obligation that is  
143 in default. The term cosigner does not include a spouse  
144 whose signature is required to perfect a security interest.  
145 A person who meets the definition in this paragraph is a  
146 "cosigner" whether or not the person is designated as such  
147 on the credit obligation.

148 (17) "Credit" means the privilege granted by a creditor  
149 to a debtor to defer payment of debt or to incur debt and  
150 defer its payment.

151 (18) "Earnings" means compensation paid or payable  
152 to an individual or for his account for personal services  
153 rendered or to be rendered by him, whether denominated  
154 as wages, salary, commission, bonus or otherwise, and  
155 includes periodic payments pursuant to a pension, retire-  
156 ment or disability program.

157 (19) "Facsimile device" means a machine that receives  
158 and copies reproductions or facsimiles of documents or  
159 photographs that have been transmitted electronically or  
160 telephonically over telecommunications lines.

161 (20) "Federal Consumer Credit Protection Act" means  
162 the "Consumer Credit Protection Act" (Public Law 90-321;



163 82 Stat. 146), as amended, and includes regulations issued  
164 pursuant to that act.

165 (21) "Goods" includes goods not in existence at the  
166 time the transaction is entered into and gift and merchan-  
167 dise certificates, but excludes money, chattel paper, docu-  
168 ments of title and instruments.

169 (22) "Home solicitation sale" means a consumer credit  
170 sale in excess of twenty-five dollars in which the buyer  
171 receives a solicitation of the sale at a place other than the  
172 seller's business establishment at a fixed location and the  
173 buyer's agreement or offer to purchase is there given to  
174 the seller or a person acting for the seller. The term does  
175 not include a sale made pursuant to a preexisting  
176 open-end credit account with the seller in existence for at  
177 least three months prior to the transaction, a sale made  
178 pursuant to prior negotiations between the parties at the  
179 seller's business establishment at a fixed location, a sale of  
180 motor vehicles, mobile homes or farm equipment or a sale  
181 which may be rescinded under the Federal Truth in Lend-  
182 ing Act (being Title I of the Federal Consumer Credit  
183 Protection Act). A sale which would be a home sollicita-  
184 tion sale if credit were extended by the seller is a home  
185 solicitation sale although the goods or services are paid  
186 for, in whole or in part, by a consumer loan in which the  
187 creditor is subject to claims and defenses arising from the  
188 sale.

189 (23) Except as otherwise provided, "lender" includes  
190 an assignee of the lender's right to payment but use of the  
191 term does not in itself impose on an assignee any obliga-  
192 tion of the lender.

193 (24) "Lender credit card or similar arrangement"  
194 means an arrangement or loan agreement, other than a  
195 seller credit card, pursuant to which a lender gives a debtor  
196 the privilege of using a credit card, letter of credit, or other  
197 credit confirmation or identification in transactions out of  
198 which debt arises:

199 (a) By the lender's honoring a draft or similar order  
200 for the payment of money drawn or accepted by the con-  
201 sumer;

202 (b) By the lender's payment or agreement to pay the  
203 consumer's obligations; or

204 (c) By the lender's purchase from the obligee of the  
205 consumer's obligations.

206 (25) "Loan" includes:

207 (a) The creation of debt by the lender's payment of or  
208 agreement to pay money to the consumer or to a third  
209 party for the account of the consumer other than debts  
210 created pursuant to a seller credit card;

211 (b) The creation of debt by a credit to an account with  
212 the lender upon which the consumer is entitled to draw  
213 immediately;

214 (c) The creation of debt pursuant to a lender credit  
215 card or similar arrangement; and

216 (d) The forbearance of debt arising from a loan.

217 (26) (a) "Loan finance charge" means the sum of (i)  
218 All charges payable directly or indirectly by the debtor  
219 and imposed directly or indirectly by the lender as an  
220 incident to the extension of credit, including any of the  
221 following types of charges which are applicable: Interest  
222 or any amount payable under a point, discount, or other  
223 system of charges, however denominated, premium or  
224 other charge for any guarantee or insurance protecting the  
225 lender against the consumer's default or other credit loss;  
226 and (ii) charges incurred for investigating the collateral or  
227 credit worthiness of the consumer or for commissions or  
228 brokerage for obtaining the credit, irrespective of the  
229 person to whom the charges are paid or payable, unless  
230 the lender had no notice of the charges when the loan was  
231 made. The term does not include charges as a result of  
232 default, additional charges, delinquency charges or deferral  
233 charges.

234 (b) If a lender makes a loan to a consumer by pur-  
235 chasing or satisfying obligations of the consumer pursuant  
236 to a lender credit card or similar arrangement, and the  
237 purchase or satisfaction is made at less than the face  
238 amount of the obligation, the discount is not part of the  
239 loan finance charge.

240 (27) "Merchandise certificate" or "gift certificate"  
241 means a writing issued by a seller or issuer of a seller cred-  
242 it card, not redeemable in cash and usable in its face  
243 amount in lieu of cash in exchange for goods or services.

244 (28) "Official fees" means:

245 (a) Fees and charges prescribed by law which actually  
246 are or will be paid to public officials for determining the  
247 existence of or for perfecting, releasing, terminating or  
248 satisfying a security interest related to a consumer credit  
249 sale or consumer loan; or

250 (b) Premiums payable for insurance or fees escrowed  
251 in a special account for the purpose of funding  
252 self-insurance or its equivalent in lieu of perfecting a secu-  
253 rity interest otherwise required by the creditor in connec-  
254 tion with the sale, lease or loan, if such premium or fee  
255 does not exceed the fees and charges described in para-  
256 graph (a) which would otherwise be payable.

257 (29) "Organization" means a corporation, government  
258 or governmental subdivision or agency, trust, estate, part-  
259 nership, cooperative or association.

260 (30) "Payable in installments" means that payment is  
261 required or permitted by agreement to be made in (a) Two  
262 or more periodic payments, excluding a down payment,  
263 with respect to a debt arising from a consumer credit sale  
264 pursuant to which a sales finance charge is made, (b) four  
265 or more periodic payments, excluding a down payment,  
266 with respect to a debt arising from a consumer credit sale  
267 pursuant to which no sales finance charge is made, or (c)  
268 two or more periodic payments with respect to a debt  
269 arising from a consumer loan. If any periodic payment  
270 other than the down payment under an agreement requir-  
271 ing or permitting two or more periodic payments is more  
272 than twice the amount of any other periodic payment,  
273 excluding the down payment, the consumer credit sale or  
274 consumer loan is "payable in installments."

275 (31) "Person" or "party" includes a natural person or  
276 an individual, and an organization.

277       (32) "Person related to" with respect to an individual  
278 means (a) The spouse of the individual, (b) a brother,  
279 brother-in-law, sister or sister-in-law of the individual, (c)  
280 an ancestor or lineal descendant of the individual or his  
281 spouse, and (d) any other relative, by blood or marriage,  
282 of the individual or his spouse who shares the same home  
283 with the individual. "Person related to" with respect to an  
284 organization means (a) a person directly or indirectly  
285 controlling, controlled by or under common control with  
286 the organization, (b) an officer or director of the organi-  
287 zation or a person performing similar functions with re-  
288 spect to the organization or to a person related to the or-  
289 ganization, (c) the spouse of a person related to the orga-  
290 nization, and (d) a relative by blood or marriage of a per-  
291 son related to the organization who shares the same home  
292 with him.

293       (33) "Precomputed loan." A loan, refinancing or  
294 consolidation is "precomputed" if:

295       (A) The debt is expressed as a sum comprising the  
296 principal and the amount of the loan finance charge com-  
297 puted in advance; or

298       (B) The loan is expressed in terms of the principal  
299 amount; the loan installment payments are a scheduled,  
300 fixed amount including principal and interest and assume  
301 payment on the installment due date; and interest pay-  
302 ments will not vary or result in an adjustment during the  
303 term of the loan or at its final payment as a result of the  
304 actual installment payment dates.

305       (34) "Precomputed sale." A sale, refinancing or con-  
306 solidation is "precomputed" if:

307       (A) The debt is expressed as a sum comprising the  
308 amount financed and the amount of the sales finance  
309 charge computed in advance; or

310       (B) The debt is expressed in terms of the principal  
311 amount; the debt installment payments are a scheduled,  
312 fixed amount including principal and interest and assume  
313 payment on the installment due date; and interest pay-  
314 ments will not vary or result in an adjustment during the

315 term of the debt or at its final payment as a result of the  
316 actual installment payment dates.

317 (35) "Presumed" or "presumption" means that the trier  
318 of fact must find the existence of the fact presumed unless  
319 and until evidence is introduced which would support a  
320 finding of its nonexistence.

321 (36) "Principal" of a loan means the total of:

322 (a) The net amount paid to, receivable by or paid or  
323 payable for the account of the debtor;

324 (b) The amount of any discount excluded from the  
325 loan finance charge; and

326 (c) To the extent that payment is deferred:

327 (i) Amounts actually paid or to be paid by the lender  
328 for registration, certificate of title, or license fees if not  
329 included in (a); and

330 (ii) Additional charges permitted by this chapter.

331 (37) "Revolving charge account" means an agreement  
332 between a seller and a buyer by which (a) The buyer may  
333 purchase goods or services on credit or a seller credit card,  
334 (b) the balances of amounts financed and the sales finance  
335 and other appropriate charges are debited to an account,  
336 (c) a sales finance charge if made is not precomputed but  
337 is computed periodically on the balances of the account  
338 from time to time, and (d) there is the privilege of paying  
339 the balances in installments.

340 (38) "Revolving loan account" means an arrangement  
341 between a lender and a consumer including, but not limit-  
342 ed to, a lender credit card or similar arrangement, pursuant  
343 to which (a) the lender may permit the consumer to obtain  
344 loans from time to time, (b) the unpaid balances of princi-  
345 pal and the loan finance and other appropriate charges are  
346 debited to an account, (c) a loan finance charge if made is  
347 not precomputed but is computed periodically on the  
348 outstanding unpaid balances of the principal of the con-  
349 sumer's account from time to time, and (d) there is the  
350 privilege of paying the balances in installments.

351 (39) "Sale of goods" includes any agreement in the  
352 form of a bailment or lease of goods if the bailee or lessee  
353 agrees to pay as compensation for use a sum substantially  
354 equivalent to or in excess of the aggregate value of the  
355 goods involved and it is agreed that the bailee or lessee  
356 will become, or for no other or a nominal consideration  
357 has the option to become, the owner of the goods upon  
358 full compliance with his obligations under the agreement.

359 (40) "Sale of an interest in land" includes a lease in  
360 which the lessee has an option to purchase the interest and  
361 all or a substantial part of the rental or other payments  
362 previously made by him are applied to the purchase price.

363 (41) "Sale of services" means furnishing or agreeing to  
364 furnish services and includes making arrangements to  
365 have services furnished by another.

366 (42) "Sales finance charge" means the sum of (a) All  
367 charges payable directly or indirectly by the buyer and  
368 imposed directly or indirectly by the seller or issuer of a  
369 seller credit card as an incident to the extension of credit,  
370 including any of the following types of charges which are  
371 applicable: Time-price differential, however denominated,  
372 including service, carrying or other charge, premium or  
373 other charge for any guarantee or insurance protecting the  
374 seller against the buyer's default or other credit loss, and  
375 (b) charges incurred for investigating the collateral or  
376 credit worthiness of the buyer or for commissions or bro-  
377 kerage for obtaining the credit, irrespective of the person  
378 to whom the charges are paid or payable; unless the seller  
379 had no notice of the charges when the credit was granted.  
380 The term does not include charges as a result of default,  
381 additional charges, delinquency charges or deferral charg-  
382 es. If the seller or issuer of a seller credit card purchases  
383 or satisfies obligations of the consumer and the purchase  
384 or satisfaction is made at less than the face amount of the  
385 obligation, the discount is not part of the sales finance  
386 charge.

387 (43) Except as otherwise provided, "seller" includes an  
388 assignee of the seller's right to payment but use of the  
389 term does not in itself impose on an assignee any obliga-  
390 tion of the seller.

391 (44) "Seller credit card" means an arrangement pursu-  
392 ant to which a person gives to a buyer or lessee the privi-  
393 lege of using a credit card, letter of credit, or other credit  
394 confirmation or identification primarily for the purpose of  
395 purchasing or leasing goods or services from that person,  
396 that person and any other person or persons, a person  
397 related to that person, or others licensed or franchised or  
398 permitted to do business under his business name or trade  
399 name or designation or on his behalf.

400 (45) "Services" includes (a) Work, labor and other  
401 personal services, (b) privileges with respect to transporta-  
402 tion, use of vehicles, hotel and restaurant accommodations,  
403 education, entertainment, recreation, physical culture,  
404 hospital accommodations, funerals, cemetery accommoda-  
405 tions, and the like, and (c) insurance.

406 (46) "Supervised financial organization" means a per-  
407 son, other than a supervised lender or an insurance com-  
408 pany or other organization primarily engaged in an insur-  
409 ance business:

410 (a) Organized, chartered or holding an authorization  
411 certificate under the laws of this state or of the United  
412 States which authorizes the person to make consumer  
413 loans; and

414 (b) Subject to supervision and examination with re-  
415 spect to such loans by an official or agency of this state or  
416 of the United States.

417 (47) "Supervised lender" means a person authorized to  
418 make or take assignments of supervised loans.

419 (48) "Supervised loan" means a consumer loan made  
420 by other than a supervised financial organization, includ-  
421 ing a loan made pursuant to a revolving loan account,  
422 where the principal does not exceed two thousand dollars,  
423 and in which the rate of the loan finance charge exceeds  
424 eight percent per year as determined according to the  
425 actuarial method.

**§46A-1-104. Application.**

1 (1) This chapter applies if a consumer, who is a resi-  
2 dent of this state, is induced to enter into a consumer cred-  
3 it sale made pursuant to a revolving charge account, to  
4 enter into a revolving charge account, to enter into a con-  
5 sumer loan made pursuant to a revolving loan account, or  
6 to enter into a consumer lease, by personal or mail solici-  
7 tation, and the goods, services or proceeds are delivered to  
8 the consumer in this state, and payment on such account is  
9 to be made from this state.

10 (2) With respect to consumer credit sales or consumer  
11 loans consummated in another state, a creditor may not  
12 collect in an action brought in this state a sales finance  
13 charge or loan finance charge in excess of that permitted  
14 by this chapter.

**§46A-1-106. Sales, leases or loans subject to chapter by agreement of parties.**

1 The parties to any sale, lease or loan, other than a  
2 consumer credit sale, consumer lease or consumer loan,  
3 may agree in writing signed by the parties that the sale,  
4 lease or loan is subject to the provisions of this chapter  
5 applying to consumer credit sales, consumer leases or  
6 consumer loans. If the parties so agree, the sale, lease or  
7 loan is subject to this chapter.

**§46A-1-107. Waiver.**

1 Except as otherwise provided in this chapter, a con-  
2 sumer may not waive or agree to forego rights or benefits  
3 under this chapter or under article two-a, chapter forty-six  
4 of this code.

**ARTICLE 2. CONSUMER CREDIT PROTECTION.**

- §46A-2-103a. Lessor subject to claims and defenses arising from leases.
- §46A-2-104. Notice to consigners.
- §46A-2-106. Notice of consumer's right to cure default; cure; acceleration.
- §46A-2-113. Notice of assignment.
- §46A-2-114. Receipts; statements of account; evidence of payment.
- §46A-2-116. Assignment of earnings.
- §46A-2-117. Authorization to confess judgment prohibited.
- §46A-2-118. No garnishment before judgment.
- §46A-2-121. Unconscionability; inducement by unconscionable conduct.
- §46A-2-122. Definitions.



§46A-2-130. Limitation on garnishment.

§46A-2-131. No discharge or reprisal because of garnishment.

§46A-2-136. Personal property exemptions.

**§46A-2-103a. Lessor subject to claims and defenses arising from leases.**

1 (a) The following provisions shall be applicable to  
2 claims and defenses of lessees arising from finance leases  
3 which are consumer leases or arising from sale and lease  
4 back agreements which include consumer leases:

5 (1) A lessor, other than the issuer of a credit card who,  
6 with respect to a particular transaction, makes a consumer  
7 lease for the purpose of enabling a lessee to lease goods or  
8 services, other than primarily for an agricultural purpose,  
9 is subject to all claims and defenses of the lessee against  
10 the supplier arising from that specific lease of goods or  
11 services if the lessor participates in or is connected with the  
12 lease transaction. A lessor is considered to be connected  
13 with the lease transaction if:

14 (A) The lessor and the supplier have arranged for a  
15 commission or brokerage or referral fee for the agreement  
16 to lease by the lessor;

17 (B) The lessor is a person related to the supplier unless  
18 the relationship is remote or is not a factor in the transac-  
19 tion;

20 (C) The supplier guarantees the payments or otherwise  
21 assumes the risk of loss by the lessor upon the lease other  
22 than a risk of loss arising solely from the lessor's failure to  
23 perfect a lien if necessary;

24 (D) The lessor directly supplies the supplier with doc-  
25 uments used by the lessee to evidence the transaction, or  
26 the supplier directly supplies the lessor with documents  
27 used by the lessee to evidence the transaction;

28 (E) The lease is conditioned upon the lessee's lease of  
29 the goods or services from the particular supplier, but the  
30 lessor's payment of proceeds of the lease to the supplier  
31 does not in itself establish that the lease was so condi-  
32 tioned;

33 (F) The supplier in such sale has specifically recom-  
34 mended such lessor by name to the lessee, and the lessor  
35 has made ten or more leases to lessees within a period of  
36 twelve months, within which period the lease in question  
37 was made, for goods or services supplied by the supplier  
38 or a person related to the supplier, if in connection with  
39 such other ten or more leases, the supplier also specifically  
40 recommended such lessor by name to the lessees involved;  
41 or

42 (G) The supplier was the issuer of a credit card other  
43 than a lender credit card which may be used by the lessee  
44 in the transaction as a result of a prior agreement between  
45 the issuer and the supplier.

46 (b) The total of all claims and defenses which a lessee  
47 is permitted to assert against a lessor under the provisions  
48 of this section shall not exceed the sums due to the lessor  
49 for that lease, except (1) As to any claim or defense  
50 founded in fraud: *Provided*, That as to any claim or de-  
51 fense founded in fraud, the total sought shall not exceed  
52 the total sum due or payable under the lease, and (2) for  
53 any excess charges and penalties recoverable under sec-  
54 tion one hundred one, article five of this chapter.

55 (c) An agreement may not limit or waive the claims  
56 and defenses of a lessee under this section.

57 (d) "Lender credit card" as used in this section means  
58 an arrangement or loan agreement, other than a seller  
59 credit card, pursuant to which a lender gives a debtor the  
60 privilege of using the credit card in transactions which  
61 entitle the user thereof to purchase goods or services from  
62 at least one hundred persons not related to the issuer of  
63 the lender credit card, out of which debt arises:

64 (1) By the lender's honoring a draft or similar order  
65 for the payment of money drawn or accepted by the con-  
66 sumer;

67 (2) By the lender's payment or agreement to pay the  
68 consumer's obligation; or

69 (3) By the lender's purchase from the obligee of the  
70 consumer's obligations.

71 (e) A claim or defense which a lessee may assert  
72 against a lessor under the provisions of this section may be  
73 asserted only as a defense to or setoff against a claim by  
74 the lessor: *Provided*, That if a lessee shall have a claim or  
75 defense which could be asserted under the provisions of  
76 this section as a matter of defense to or set off against a  
77 claim which is asserted by the lessor, then the lessee shall  
78 have the right to institute and maintain an action or pro-  
79 ceeding seeking to obtain the cancellation, in whole or in  
80 part, of the obligation evidenced by the lease agreement or  
81 the release, in whole or in part, of any lien upon real or  
82 personal property securing the payment thereof: *Provid-*  
83 *ed, however*, That any claim or defense founded in fraud,  
84 lack or failure of consideration, or in a violation of the  
85 provisions of this chapter as specified in section one hun-  
86 dred one, article five of this chapter, may be asserted by a  
87 lessee at any time, subject to the provisions of this code  
88 relating to limitation of actions.

89 (f) Nothing contained in this section shall be con-  
90 strued in any manner as affecting any transaction entered  
91 into prior to the operative date of this chapter.

92 (g) Notwithstanding any provisions of this section, a  
93 lessor shall not be subject to any claim or defense arising  
94 from or growing out of personal injury or death resulting  
95 therefrom, or damage to property.

96 (h) Nothing contained in this section shall be con-  
97 strued as affecting any lessee's right of action, claim or  
98 defense which is otherwise provided in this code or at  
99 common law.

#### §46A-2-104. Notice to cosigners.

1 (a) No person shall be held liable as cosigner, or be  
2 charged with personal liability for payment in a consumer  
3 credit sale, consumer lease or consumer loan unless that  
4 person, in addition to and before signing any instrument  
5 evidencing the transaction, signs and receives a separate  
6 notice which clearly explains his liability in the event of  
7 default by the consumer and also receives a copy of any  
8 disclosure required by the "Federal Consumer Credit Pro-  
9 tection Act."

10 (b) Such notice shall be sufficient in a consumer credit  
11 sale or consumer loan if it appears under the conspicuous  
12 caption "NOTICE TO COSIGNER" and contains substan-  
13 tially the following language:

14 "You are being asked to guarantee this debt. Think  
15 carefully before you do. If the borrower doesn't pay the  
16 debt, you will have to. Be sure you can afford to pay it if  
17 you have to, and that you want to accept this responsibili-  
18 ty."

19 "You may have to pay up to the full amount of the  
20 debt if the borrower does not pay. You may also have to  
21 pay late fees or collection costs, which increase this  
22 amount."

23 "The creditor can collect this debt from you without  
24 first trying to collect from the borrower. The creditor can  
25 use the same collection methods against you that can be  
26 used against the borrower, such as suing you, garnishing  
27 your wages, etc. If this debt is ever in default, that fact may  
28 become a part of your credit record."

29 "This notice is not the contract that makes you liable  
30 for the debt."

31 The caption shall be typewritten or printed in at least  
32 twelve point bold upper case type. The body of the notice  
33 shall be typewritten or printed in at least eight point regu-  
34 lar type, in upper or lower case, where appropriate.

35 (c) Such notice shall be sufficient in a consumer lease  
36 transaction if it appears under the conspicuous caption  
37 "NOTICE TO COSIGNER" and contains substantially the  
38 following language:

39 "You are being asked to guarantee this lease. Think  
40 carefully before you do. If the lessee doesn't pay, you will  
41 have to. Be sure you can afford to pay it if you have to,  
42 and that you want to accept this responsibility."

43 "You may have to pay up to the full amount if the  
44 lessee does not pay. You may also have to pay late fees or  
45 collection costs, which increase this amount."

46 "The creditor can collect this debt from you without  
47 first trying to collect from the lessee. The creditor can use  
48 the same collection methods against you that can be used  
49 against the lessee, such as suing you, garnishing your  
50 wages, etc. If this debt is ever in default, that fact may  
51 become a part of your credit record."

52 "This notice is not the contract which makes you liable  
53 for the debt."

54 The caption shall be typewritten or printed in at least  
55 twelve point bold upper case type. The body of the notice  
56 shall be typewritten or printed in at least eight point regu-  
57 lar type, in upper or lower case, where appropriate.

**§46A-2-106. Notice of consumer's right to cure default; cure;  
acceleration.**

1 After a consumer has been in default on any install-  
2 ment obligation or any other secured obligation for five  
3 days for failure to make a scheduled payment or otherwise  
4 perform pursuant to such a consumer credit sale, consum-  
5 er lease or consumer loan other than with respect to a  
6 covenant to provide insurance for or otherwise to protect  
7 and preserve the property covered by a security interest,  
8 the creditor may give him notice of such fact in the man-  
9 ner provided for herein. Actual delivery of such notice to  
10 a consumer or delivery or mailing of same to the last  
11 known address of the consumer is sufficient for the pur-  
12 pose of this section. If given by mail, notice is given when  
13 it is deposited in a mailbox properly addressed and post-  
14 age prepaid. Notice shall be in writing and shall conspicu-  
15 ously state the name, address and telephone number of the  
16 creditor to whom payment or other performance is owed,  
17 a brief description of the transaction, the consumer's right  
18 to cure such default and the amount of payment and other  
19 required performance and date by which it must be paid  
20 or accomplished in order to cure the default. A copy of  
21 the notice required by this section shall be (i) Retained by  
22 the creditor, (ii) certified in the manner prescribed by this  
23 section by an officer or other authorized representative of  
24 such creditor, and (iii) notarized by a person licensed as a  
25 notary under the laws of the state of West Virginia or any  
26 other state or territory of the United States. The certifica-

27 tion required by this section shall substantially conform to  
28 the following language:

29 "I, \_\_\_\_\_ (name of  
30 person certifying),

31 the \_\_\_\_\_ (title of per-  
32 son certifying)

33 of \_\_\_\_\_ (creditor's name),  
34 hereby certify that the notice of the consumer's right to  
35 cure default on which this certification appears (or to  
36 which this certification is attached) was on this \_\_\_\_\_  
37 day of \_\_\_\_\_, 19\_\_\_\_\_, mailed to the per-  
38 son(s) whose name(s) appear herein (therein) at the ad-  
39 dress(es) set forth herein (therein).

40 \_\_\_\_\_ "

41 (Signature)

42 Except as hereinafter provided in this section, after a  
43 default on any installment obligation or any other secured  
44 obligation other than with respect to a covenant to provide  
45 insurance for or otherwise to protect and preserve the  
46 property covered by a security interest or lease, a creditor  
47 may not accelerate maturity of the unpaid balance of any  
48 such installment obligation or any other such secured  
49 obligation, commence any action or demand or take pos-  
50 session of collateral on account of default until ten days  
51 after notice has been given to the consumer of his right to  
52 cure such default. Until such period expires, the consum-  
53 er shall have the right to cure any default by tendering the  
54 amount of all unpaid sums due at the time of the tender,  
55 without acceleration, plus any unpaid delinquency or  
56 deferral charges and by tendering any other performance  
57 necessary to cure such default. Any such cure shall re-  
58 store a consumer to all his rights under the agreement the  
59 same as if there had been no default. A consumer who  
60 has been in default three or more times on the same obli-  
61 gation and who has been given notice of such fact three or  
62 more times shall not have the right to cure a default under  
63 this section even though previous defaults have been cured  
64 and his creditor's right to proceed against him and his  
65 collateral shall not be impaired or limited in any way by

66 this section. There shall be no acceleration of the maturi-  
67 ty of all or part of any amount owing in such a consumer  
68 credit sale, consumer lease or consumer loan, except where  
69 nonperformance specified in the agreement as constituting  
70 default has occurred.

**§46A-2-113. Notice of assignment.**

1 A consumer is authorized to pay the original creditor  
2 until he receives notification of assignment of rights to  
3 payment pursuant to a consumer credit sale, consumer  
4 lease or a consumer loan and that payment is to be made  
5 to the assignee. A notification which does not reasonably  
6 identify the rights assigned is ineffective. If requested by  
7 the consumer, the assignee must seasonably furnish rea-  
8 sonable proof that the assignment has been made and  
9 unless he does so the consumer may pay the original cred-  
10 itor.

**§46A-2-114. Receipts; statements of account; evidence of pay-  
ment.**

1 (1) The creditor shall deliver or mail to the consumer,  
2 without request, a written receipt for each payment by coin  
3 or currency on an obligation pursuant to a consumer  
4 credit sale, consumer lease or consumer loan. A periodic  
5 statement showing a payment received complies with this  
6 subsection.

7 (2) Upon written request of a consumer, the person to  
8 whom an obligation is owed pursuant to a consumer credit  
9 sale, consumer lease or consumer loan, other than one  
10 pursuant to a revolving charge account or revolving loan  
11 account, shall provide a written statement of the dates and  
12 amounts of payments made within the past twelve months  
13 and the total amount unpaid. The requested statement  
14 shall be provided without charge once during each year of  
15 the term of the sale, lease or loan. If additional statements  
16 are requested the creditor may charge not in excess of  
17 three dollars for each additional statement.

18 (3) After a consumer has fulfilled all obligations with  
19 respect to a consumer credit sale, consumer lease or con-  
20 sumer loan, other than one pursuant to a revolving charge  
21 account or revolving loan account, the person to whom the

22 obligation was owed shall, upon the request of the con-  
23 sumer, deliver or mail to the consumer written evidence  
24 acknowledging payment in full of all obligations with  
25 respect to the transaction.

**§46A-2-116. Assignment of earnings.**

1 (1) The maximum part of the aggregate disposable  
2 earnings of an individual for any workweek which may be  
3 subjected to any one or more assignments of earnings for  
4 the payment of a debt or debts arising from one or more  
5 consumer credit sales, consumer leases or consumer loans,  
6 or one or more sales as defined in section one hundred  
7 two, article six of this chapter, may not exceed twenty-five  
8 percent of his disposable earnings for that week.

9 (2) As used in this section:

10 (a) "Disposable earnings" means that part of the earn-  
11 ings of an individual remaining after the deduction from  
12 those earnings of amounts required by law to be withheld;  
13 and

14 (b) "Assignment of earnings" includes all forms of  
15 assignments, deductions, transfers, or sales of earnings to  
16 another, either as payment or as security, and whether  
17 stated to be revocable or nonrevocable, and includes any  
18 deductions authorized under the provisions of section  
19 three, article five, chapter twenty-one of this code, except  
20 deductions for union or club dues, pension plans, payroll  
21 savings plans, charities, stock purchase plans and hospital-  
22 ization and medical insurance.

23 (3) Any assignment of earnings and any deduction  
24 under said section three, article five, chapter twenty-one of  
25 this code shall be revocable by the employee at will at any  
26 time, notwithstanding any provision to the contrary.

27 (4) The priority of multiple assignments of earnings  
28 shall be according to the date and time of each such as-  
29 signment.

**§46A-2-117. Authorization to confess judgment prohibited.**

1 A consumer may not authorize any person to confess  
2 judgment on a claim arising out of a consumer credit sale,



3 consumer lease or a consumer loan. An authorization in  
4 violation of this section is void. The provisions of this  
5 section shall not be construed as in any way impliedly  
6 authorizing a confession of judgment in any other type of  
7 transaction.

**§46A-2-118. No garnishment before judgment.**

1 Prior to entry of judgment in an action against the  
2 debtor for debt arising from a consumer credit sale, con-  
3 sumer lease or a consumer loan, the creditor may not  
4 attach unpaid earnings of the debtor by garnishment or  
5 like proceedings. The provisions of this section shall not  
6 be construed as in any way impliedly authorizing garnish-  
7 ment before judgment in any other type of transaction.

**§46A-2-121. Unconscionability; inducement by unconscionable conduct.**

1 (1) With respect to a transaction which is or gives rise  
2 to a consumer credit sale, consumer lease or consumer  
3 loan, if the court as a matter of law finds:

4 (a) The agreement or transaction to have been uncon-  
5 scionable at the time it was made, or to have been induced  
6 by unconscionable conduct, the court may refuse to en-  
7 force the agreement, or

8 (b) Any term or part of the agreement or transaction  
9 to have been unconscionable at the time it was made, the  
10 court may refuse to enforce the agreement, or may en-  
11 force the remainder of the agreement without the uncon-  
12 scionable term or part, or may so limit the application of  
13 any unconscionable term or part as to avoid any uncon-  
14 scionable result.

15 (2) If it is claimed or appears to the court that the  
16 agreement or transaction or any term or part thereof may  
17 be unconscionable, the parties shall be afforded a reason-  
18 able opportunity to present evidence as to its setting, pur-  
19 pose and effect to aid the court in making the determina-  
20 tion.

21 (3) For the purpose of this section, a charge or prac-  
22 tice expressly permitted by this chapter is not unconscio-  
23 nable.

**§46A-2-122. Definitions.**

1 For the purposes of this section and sections one hun-  
2 dred twenty-three, one hundred twenty-four, one hundred  
3 twenty-five, one hundred twenty-six, one hundred  
4 twenty-seven, one hundred twenty-eight, one hundred  
5 twenty-nine, and one hundred twenty-nine-a of this article,  
6 the following terms shall have the following meanings:

7 (a) "Consumer" means any natural person obligated or  
8 allegedly obligated to pay any debt.

9 (b) "Claim" means any obligation or alleged obliga-  
10 tion of a consumer to pay money arising out of a transac-  
11 tion in which the money, property, insurance or service  
12 which is the subject of the transaction is primarily for  
13 personal, family or household purposes, whether or not  
14 such obligation has been reduced to judgment.

15 (c) "Debt collection" means any action, conduct or  
16 practice of soliciting claims for collection or in the collec-  
17 tion of claims owed or due or alleged to be owed or due  
18 by a consumer.

19 (d) "Debt collector" means any person or organization  
20 engaging directly or indirectly in debt collection. The  
21 term includes any person or organization who sells or  
22 offers to sell forms which are, or are represented to be, a  
23 collection system, device or scheme, and are intended or  
24 calculated to be used to collect claims.

**§46A-2-130. Limitation on garnishment.**

1 (1) For the purposes of the provisions in this chapter  
2 relating to garnishment:

3 (a) "Disposable earnings" means that part of the earn-  
4 ings of an individual remaining after the deduction from  
5 those earnings of amounts required by law to be withheld;  
6 and

7 (b) "Garnishment" means any legal or equitable proce-  
8 dure through which the earnings of an individual are re-  
9 quired to be withheld for payment of a debt.

10 (2) The maximum part of the aggregate disposable  
11 earnings of an individual for any workweek which is sub-

12 jected to garnishment to enforce payment of a judgment  
13 arising from a consumer credit sale or consumer loan may  
14 not exceed the lesser of:

15 (a) Twenty percent of his disposable earnings for that  
16 week, or

17 (b) The amount by which his disposable earnings for  
18 that week exceed thirty times the federal minimum hourly  
19 wage prescribed by section 6(a) (1) of the "Fair Labor  
20 Standards Act of 1938," U.S.C. Title 19, Sec. 206(a)(1), in  
21 effect at the time the earnings are payable.

22 (c) In the case of earnings for a pay period other than  
23 a week, the commissioner shall prescribe by rule a multi-  
24 ple of the federal minimum hourly wage equivalent in  
25 effect to that set forth in subdivision (b), subsection (2) of  
26 this section.

27 (3) No court may make, execute or enforce an order  
28 or process in violation of this section. Any time after a  
29 consumer's earnings have been executed upon pursuant to  
30 article five-a or article five-b, chapter thirty-eight of this  
31 code by a creditor resulting from a consumer credit sale,  
32 consumer lease or consumer loan, such consumer may  
33 petition any court having jurisdiction of such matter or the  
34 circuit court of the county wherein he resides to reduce or  
35 temporarily or permanently remove such execution upon  
36 his earnings on the grounds that such execution causes or  
37 will cause undue hardship to him or his family. When such  
38 fact is proved to the satisfaction of such court, it may re-  
39 duce or temporarily or permanently remove such execu-  
40 tion.

41 (4) No garnishment governed by the provisions of this  
42 section will be given priority over a voluntary assignment  
43 of wages to fulfill a support obligation, a garnishment to  
44 collect arrearages in support payments, or a notice of  
45 withholding from wages of amounts payable as support,  
46 notwithstanding the fact that the garnishment in question  
47 or the judgment upon which it is based may have preced-  
48 ed the support-related assignment, garnishment, or notice  
49 of withholding in point of time or filing.

**§46A-2-131. No discharge or reprisal because of garnishment.**

1 No employer shall discharge or take any other form  
2 of reprisal against an employee for the reason that a credi-  
3 tor of the employee has subjected or attempted to subject  
4 unpaid earnings of the employee to garnishment or like  
5 proceedings directed to the employer for the purpose of  
6 paying a judgment arising from a consumer credit sale,  
7 consumer lease or consumer loan.

**§46A-2-136. Personal property exemptions.**

1 Any consumer residing in this state may set apart and  
2 hold personal property to be exempt from execution or  
3 other judicial process resulting from consumer credit  
4 transactions or consumer leases, except for the purchase  
5 money due on such property, in such amounts as follows:  
6 Clothing and other wearing apparel of the consumer, his  
7 spouse and any dependents of such consumer, not to ex-  
8 ceed the fair market value of two hundred dollars; furni-  
9 ture, appliances, furnishings and fixtures regularly used  
10 for family purposes in the consumer's residence, to the  
11 extent of the fair market value of one thousand dollars;  
12 children's books, pictures, toys and other such personal  
13 property of children; all medical health equipment used  
14 for health purposes by the consumer, his spouse and any  
15 dependent of such consumer; tools of trade, including any  
16 income-producing property used in the consumer's princi-  
17 pal occupation, to the extent of the fair market value of  
18 one thousand dollars; and any policy of life or endow-  
19 ment insurance which is payable to the spouse or children  
20 of the insured consumer or to a trustee for their benefit,  
21 except the cash value of any accrued dividends thereon.  
22 When a consumer claims personal property as exempt  
23 under the provisions of this section, he shall deliver a list  
24 containing all the personal property owned or claimed by  
25 him and all items of such property he claims as exempt  
26 hereunder, with the value of each separate item listed ac-  
27 cording to his best knowledge, to the officer holding the  
28 execution or other such process. Such list shall be sworn  
29 to by affidavit. If the value of the property named in such  
30 list exceeds the amounts specified in this section, the con-

31 sumer shall state at the foot thereof what part of such  
32 property he claims as exempt. If such value does not  
33 exceed the amounts specified in this section, the claim of  
34 exemption shall be held to extend to the whole thereof  
35 without stating more and, if no appraisal is demanded,  
36 the property so claimed shall be set aside as exempt.  
37 Where the consumer owning exempt property is absent or  
38 incapable of acting or neglects or declines to act hereun-  
39 der, the claim of exemption may be made, the list deliv-  
40 ered and the affidavit made by his spouse with the same  
41 effect as if the owner had done so. Upon receipt of such a  
42 list, the officer to whom it is given shall immediately ex-  
43 hibit such list to the creditor or his agent or attorney. The  
44 rights granted and procedures provided for in article eight,  
45 chapter thirty-eight of this code shall apply to any pro-  
46 ceeding under this section, except that the provisions of  
47 sections one and three of such article shall not apply.

#### ARTICLE 6. GENERAL CONSUMER PROTECTION.

##### §46A-6-102. Definitions.

1 When used in this article the following words, terms  
2 and phrases, and any variations thereof required by the  
3 context, shall have the meaning ascribed to them in this  
4 article, except where the context indicates a different  
5 meaning:

6 (a) "Advertisement" means the publication, dissemina-  
7 tion or circulation of any matter, oral or written, including  
8 labeling, which tends to induce, directly or indirectly, any  
9 person to enter into any obligation, sign any contract, or  
10 acquire any title or interest in any goods or services and  
11 includes every word device to disguise any form of busi-  
12 ness solicitation by using such terms as "renewal," "in-  
13 voice," "bill," "statement" or "reminder," to create an im-  
14 pression of existing obligation when there is none, or  
15 other language to mislead any person in relation to any  
16 sought-after commercial transaction.

17 (b) "Consumer" means a natural person to whom a sale  
18 or lease is made in a consumer transaction, and a "con-  
19 sumer transaction" means a sale or lease to a natural per-

20 son or persons for a personal, family, household or agri-  
21 cultural purpose.

22 (c) "Merchantable" means, in addition to the qualities  
23 prescribed in section three hundred fourteen, article two,  
24 chapter forty-six of this code, that the goods conform in  
25 all material respects to applicable state and federal statutes  
26 and regulations establishing standards of quality and safe-  
27 ty of goods and, in the case of goods with mechanical,  
28 electrical or thermal components, that the goods are in  
29 good working order and will operate properly in normal  
30 usage for a reasonable period of time.

31 (d) "Sale" includes any sale, offer for sale or attempt to  
32 sell any goods for cash or credit or any services or offer  
33 for services for cash or credit.

34 (e) "Trade" or "commerce" means the advertising,  
35 offering for sale, sale or distribution of any goods or ser-  
36 vices and shall include any trade or commerce, directly or  
37 indirectly, affecting the people of this state.

38 (f) "Unfair methods of competition and unfair or  
39 deceptive acts or practices" means and includes, but is not  
40 limited to, any one or more of the following:

41 (1) Passing off goods or services as those of another;

42 (2) Causing likelihood of confusion or of misunder-  
43 standing as to the source, sponsorship, approval or certifi-  
44 cation of goods or services;

45 (3) Causing likelihood of confusion or of misunder-  
46 standing as to affiliation, connection or association with, or  
47 certification by another;

48 (4) Using deceptive representations or designations of  
49 geographic origin in connection with goods or services;

50 (5) Representing that goods or services have sponsor-  
51 ship, approval, characteristics, ingredients, uses, benefits or  
52 quantities that they do not have, or that a person has a  
53 sponsorship, approval, status, affiliation or connection that  
54 he does not have;

55 (6) Representing that goods are original or new if they  
56 are deteriorated, altered, reconditioned, reclaimed, used or  
57 secondhand;

58 (7) Representing that goods or services are of a partic-  
59 ular standard, quality or grade, or that goods are of a par-  
60 ticular style or model, if they are of another;

61 (8) Disparaging the goods, services or business of  
62 another by false or misleading representation of fact;

63 (9) Advertising goods or services with intent not to sell  
64 them as advertised;

65 (10) Advertising goods or services with intent not to  
66 supply reasonably expectable public demand, unless the  
67 advertisement discloses a limitation of quantity;

68 (11) Making false or misleading statements of fact  
69 concerning the reasons for, existence of or amounts of  
70 price reductions;

71 (12) Engaging in any other conduct which similarly  
72 creates a likelihood of confusion or of misunderstanding;

73 (13) The act, use or employment by any person of  
74 any deception, fraud, false pretense, false promise or mis-  
75 representation, or the concealment, suppression or omis-  
76 sion of any material fact with intent that others rely upon  
77 such concealment, suppression or omission, in connection  
78 with the sale or advertisement of any goods or services,  
79 whether or not any person has in fact been misled, de-  
80 ceived or damaged thereby;

81 (14) Advertising, printing, displaying, publishing,  
82 distributing or broadcasting, or causing to be advertised,  
83 printed, displayed, published, distributed or broadcast in  
84 any manner, any statement or representation with regard  
85 to the sale of goods or the extension of consumer credit  
86 including the rates, terms or conditions for the sale of such  
87 goods or the extension of such credit, which is false, mis-  
88 leading, or deceptive, or which omits to state material in-  
89 formation which is necessary to make the statements there-  
90 in not false, misleading or deceptive;

91 (15) Representing that any person has won a prize,  
92 one of a group of prizes or any other thing of value, if  
93 receipt of the prize or thing of value is contingent upon  
94 any payment of a service charge, mailing charge, handling  
95 charge or any other similar charge by the person or upon  
96 mandatory attendance by the person at a promotion or

97 sales presentation at the seller's place of business or any  
98 other location: *Provided*, That a person may be offered  
99 one item or the choice of several items conditioned on the  
100 person listening to a sales promotion or entering a con-  
101 sumer transaction if the true retail value and an accurate  
102 description of the item or items are clearly and conspicu-  
103 ously disclosed along with the person's obligations upon  
104 accepting the item or items; such description and disclo-  
105 sure shall be typewritten or printed in at least eight point  
106 regular type, in upper or lower case, where appropriate; or

107 (16) Violating any provision or requirement of article  
108 six-b of this chapter.

109 (g) "Warranty" means express and implied warranties  
110 described and defined in sections three hundred thirteen,  
111 three hundred fourteen and three hundred fifteen, article  
112 two, chapter forty-six of this code and expressions or  
113 actions of a merchant which assure the consumer that the  
114 goods have described qualities or will perform in a de-  
115 scribed manner.

#### ARTICLE 7. ADMINISTRATION.

§46A-7-102. Power of attorney general; reliance on rules of attorney general or commissioner of banking; duty to report.

§46A-7-109. Injunctions against unconscionable agreements and fraudulent or unconscionable conduct.

#### **§46A-7-102. Power of attorney general; reliance on rules of attorney general or commissioner of banking; duty to report.**

1 (1) In addition to other powers granted by this chap-  
2 ter, the attorney general within the limitations provided by  
3 law may:

4 (a) Receive and act on complaints, take action de-  
5 signed to obtain voluntary compliance with this chapter or  
6 commence proceedings on his own initiative;

7 (b) Counsel persons and groups on their rights and  
8 duties under this chapter;

9 (c) Establish programs for the education of consumers  
10 with respect to credit and leasing practices and problems;



11 (d) Make studies appropriate to effectuate the purpos-  
12 es and policies of this chapter and make the results avail-  
13 able to the public;

14 (e) Adopt, amend and repeal such reasonable rules  
15 and regulations, in accordance with the provisions of  
16 chapter twenty-nine-a of this code, as are necessary and  
17 proper to effectuate the purposes of this chapter and to  
18 prevent circumvention or evasion thereof; and

19 (f) Delegate his powers and duties under this chapter  
20 to qualified personnel in his office, who shall act under the  
21 direction and supervision of the attorney general and for  
22 whose acts he shall be responsible.

23 (2) Except for refund of an excess charge, no liability  
24 is imposed under this chapter for an act done or omitted  
25 in conformity with a rule of the attorney general or com-  
26 missioner, notwithstanding that after the act or omission  
27 the rule may be amended or repealed or be determined by  
28 judicial or other authority to be invalid for any reason.  
29 Any form or procedure which has been submitted to the  
30 commissioner and the attorney general in writing and  
31 approved in writing by them shall not be deemed a viola-  
32 tion of the penalty provisions of this chapter notwithstand-  
33 ing that such approval may be subsequently amended or  
34 rescinded or be determined by judicial or other authority  
35 to be invalid for any reason.

36 (3) Except for refund of an excess charge, in any  
37 action brought pursuant to the provisions of this chapter, it  
38 shall be a defense that the act or omission complained of  
39 was in conformity with a published opinion of the attor-  
40 ney general issued in compliance with section one, article  
41 three, chapter five of this code or in conformity with an  
42 examination report issued by the commissioner to the  
43 person against whom the action is brought pursuant to  
44 section six, article two, chapter thirty-one-a of this code, or  
45 a declaratory ruling issued to the person against whom the  
46 action is brought pursuant to subdivision (9), subsection  
47 (c), section four of said article.

48 (4) On or before the first day of December of each  
49 year, the attorney general and commissioner shall jointly

50 or separately submit a report or reports to the governor  
51 and to the Legislature on the operation of their offices, on  
52 the use of consumer credit and on consumer protection  
53 problems in the state, and on the problems of persons of  
54 small means obtaining credit from persons regularly en-  
55 gaged in extending sales or loan credit. For the purpose  
56 of making such report or reports, the attorney general and  
57 commissioner are authorized to conduct research and  
58 make appropriate studies. The report or reports shall  
59 include a description of the examination and investigation  
60 procedures and policies of their offices, a statement of  
61 policies followed in deciding whether to investigate or  
62 examine the offices of credit suppliers subject to this  
63 chapter, a statement of the number and percentages of  
64 offices which are periodically investigated or examined, a  
65 statement of the types of consumer credit and consumer  
66 protection problems of both creditors and consumers  
67 which have come to their attention through their examina-  
68 tions and investigations and the disposition of them under  
69 existing law, and a general statement of the activities of  
70 their offices and of others to promote the purposes of this  
71 chapter.

**§46A-7-109. Injunctions against unconscionable agreements  
and fraudulent or unconscionable conduct.**

1 (1) The attorney general may bring a civil action to  
2 restrain a creditor or a person acting in his behalf from  
3 engaging in a course of:

4 (a) Making or enforcing unconscionable terms or  
5 provisions of consumer credit sales, consumer leases or  
6 consumer loans;

7 (b) Fraudulent or unconscionable conduct in induc-  
8 ing consumers to enter into consumer credit sales, con-  
9 sumer leases or consumer loans; or

10 (c) Fraudulent or unconscionable conduct in the  
11 collection of debts arising from consumer credit sales,  
12 consumer leases or consumer loans.

13 (2) In an action brought pursuant to this section the  
14 court may grant relief only if it finds:

15 (a) That the respondent has made unconscionable  
16 agreements or has engaged or is likely to engage in a  
17 course of fraudulent or unconscionable conduct;

18 (b) That the agreements or conduct of the respondent  
19 have caused or are likely to cause injury to consumers;  
20 and

21 (c) That the respondent has been able to cause or will  
22 be able to cause the injury primarily because the transac-  
23 tions involved are credit or lease transactions.

24 (3) In applying this section, consideration shall be  
25 given to each of the following factors, among others:

26 (a) Belief by the creditor at the time consumer credit  
27 sales, consumer leases or consumer loans are made that  
28 there was no reasonable probability of payment in full of  
29 the obligation by the debtor;

30 (b) In the case of consumer credit sales, knowledge  
31 by the seller at the time of the sale of the inability of the  
32 buyer to receive substantial benefits from the property or  
33 services sold;

34 (c) In the case of consumer credit sales, gross dispari-  
35 ty between the price of the property or services sold and  
36 the value of the property or services measured by the price  
37 at which similar property or services are readily obtainable  
38 in credit transactions by like buyers;

39 (d) The fact that the creditor contracted for or re-  
40 ceived separate charges for insurance with respect to con-  
41 sumer credit sales, consumer leases or consumer loans with  
42 the effect of making the sales or loans, considered as a  
43 whole, unconscionable; and

44 (e) The fact that the respondent has knowingly taken  
45 advantage of the inability of the debtor reasonably to  
46 protect his interests by reason of physical or mental infir-  
47 mities, ignorance, illiteracy or inability to understand the  
48 language of the agreement, or similar factors.

49 (4) In an action brought pursuant to this chapter, a  
50 charge or practice expressly permitted by this chapter is  
51 not unconscionable.

## CHAPTER 161

(H. B. 4746—By Delegates Prezioso, Ball, Ennis, Proudfoot, Yeager,  
Anderson and Leggett)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections two and three, article seventeen, chapter eighteen-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to legislative rules; authorizing specific regulations relating to higher education, including higher education report cards and contracts and consortium agreements with public schools, private schools or private industry.

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

That sections two and three, article seventeen, chapter eighteen-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

### ARTICLE 17. LEGISLATIVE RULES.

§18B-17-2. Board of trustees.

§18B-17-3. Board of directors.

#### §18B-17-2. Board of trustees.

1 (a) The legislative rules filed in the state register on the  
2 third day of December, one thousand nine hundred  
3 ninety-one, modified by the board of trustees to meet the  
4 objections of the legislative oversight commission on  
5 education accountability and refiled in the state register on  
6 the twenty-first day of January, one thousand nine  
7 hundred ninety-two, relating to the board of trustees  
8 (report card), are authorized.

9 (b) The legislative rules filed in the state register on the  
10 thirteenth day of July, one thousand nine hundred  
11 ninety-one, relating to the board of trustees (equal  
12 opportunity and affirmative action), are authorized.

13 (c) The legislative rules filed in the state register on the  
14 eighth day of September, one thousand nine hundred  
15 ninety-two, relating to the board of trustees (holidays), are  
16 authorized.

17 (d) The legislative rules filed in the state register on the  
18 third day of April, one thousand nine hundred ninety-two,  
19 relating to the board of trustees (alcoholic beverages on  
20 campuses), are authorized.

21 (e) The legislative rules filed in the state register on the  
22 fifteenth day of November, one thousand nine hundred  
23 ninety-three, relating to the board of trustees (acceptance  
24 of advanced placement credit), are authorized.

25 (f) The legislative rules filed in the state register on the  
26 thirteenth day of December, one thousand nine hundred  
27 ninety-three, modified by the board of trustees to meet the  
28 objections of the legislative oversight commission on  
29 education accountability and refiled in the state register on  
30 the twenty-first day of January, one thousand nine  
31 hundred ninety-four, relating to the board of trustees  
32 (assessment, payment and refund of fees), are authorized.

33 (g) The legislative rules filed in the state register on the  
34 first day of November, one thousand nine hundred  
35 ninety-three, modified by the board of trustees to meet the  
36 objections of the legislative oversight commission on  
37 education accountability and refiled in the state register on  
38 the twenty-first day of December, one thousand nine  
39 hundred ninety-three, relating to the board of trustees  
40 (personnel administration), are authorized.

41 (h) The legislative rules filed in the state register on the  
42 twenty-seventh day of January, one thousand nine  
43 hundred ninety-four, relating to the board of trustees  
44 (resource allocation policy), are authorized.

45 (i) The legislative rules filed in the state register on the  
46 fourth day of December, one thousand nine hundred  
47 ninety-five, modified by the board of trustees to meet the  
48 objections of the legislative oversight commission on  
49 education accountability and refiled in the state register on  
50 the fifteenth day of February, one thousand nine hundred

51 ninety-six, relating to the board of trustees (higher  
52 education report card), are authorized.

**§18B-17-3. Board of directors.**

1 (a) The legislative rules filed in the state register on the  
2 sixteenth day of December, one thousand nine hundred  
3 ninety-one, modified by the board of directors to meet the  
4 objections of the legislative oversight commission on  
5 education accountability and refiled in the state register on  
6 the twenty-first day of January, one thousand nine  
7 hundred ninety-two, relating to the board of directors  
8 (report card), are authorized.

9 (b) The legislative rules filed in the state register on the  
10 twenty-seventh day of September, one thousand nine  
11 hundred ninety-one, relating to the board of directors  
12 (equal opportunity and affirmative action), are authorized.

13 (c) The legislative rules filed in the state register on the  
14 fourth day of December, one thousand nine hundred  
15 ninety-one, relating to the board of directors (holiday  
16 policy), are authorized.

17 (d) The legislative rules filed in the state register on the  
18 nineteenth day of March, one thousand nine hundred  
19 ninety-two, as modified and refiled in the state register on  
20 the tenth day of July, one thousand nine hundred  
21 ninety-two, relating to the board of directors (presidential  
22 appointments, responsibilities and evaluations), are  
23 authorized.

24 (e) The legislative rules filed in the state register on the  
25 twentieth day of September, one thousand nine hundred  
26 ninety-three, relating to the board of directors (acceptance  
27 of advanced placement credit), are authorized.

28 (f) The legislative rules filed in the state register on the  
29 tenth day of December, one thousand nine hundred  
30 ninety-three, relating to the board of directors (resource  
31 allocation policy), are authorized.

32 (g) The legislative rules filed in the state register on the  
33 eighth day of December, one thousand nine hundred

35 ninety-three, modified by the board of directors to meet  
36 the objections of the legislative oversight commission on  
37 education accountability and refiled in the state register on  
38 the eleventh day of January, one thousand nine hundred  
39 ninety-four, relating to the board of directors (assessment,  
40 payment and refund of fees), are authorized.

41 (h) The legislative rules filed in the state register on  
42 the first day of November, one thousand nine hundred  
43 ninety-three, modified by the board of directors to meet  
44 the objections of the legislative oversight commission on  
45 education accountability and refiled in the state register on  
46 the twenty-first day of December, one thousand nine  
47 hundred ninety-three, relating to the board of directors  
48 (personnel administration), are authorized.

49 (i) The legislative rules filed in the state register on  
50 the twenty-seventh day of October, one thousand nine  
51 hundred ninety-four, modified by the board of directors  
52 to meet the objections of the legislative oversight  
53 commission on education accountability and refiled in the  
54 state register on the nineteenth day of December, one  
55 thousand nine hundred ninety-four, relating to the board  
56 of directors (proprietary, correspondence, business,  
57 occupational and trade schools), are authorized.

58 (j) The legislative rules filed in the state register on the  
59 eighteenth day of April, one thousand nine hundred  
60 ninety-five, relating to the board of directors (contracts  
61 and consortium agreements with public schools, private  
62 schools or private industry), are authorized.

63 (k) The legislative rules filed in the state register on  
64 the seventeenth day of November, one thousand nine  
65 hundred ninety-five, modified by the board of directors to  
66 meet the objections of the legislative oversight commission  
67 on education accountability and refiled in the state register  
68 on the fourth day of January, one thousand nine hundred  
69 ninety-six, relating to the board of directors (higher  
70 education report cards), are authorized.

## CHAPTER 162

(H. B. 4152—By Delegates Pino, Douglas, Linch, Faircloth,  
Staton, Ryan and Riggs)

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[Passed February 1, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section twelve, article three, chapter twenty-nine-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the disapproval of proposed legislative rules by the Legislature.

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

That section twelve, article three, chapter twenty-nine-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 3. RULE MAKING.

#### §29A-3-12. Submission of legislative rules to Legislature.

1           (a) No later than forty days before the sixtieth day of  
2 each regular session of the Legislature, the cochairmen of  
3 the legislative rule-making review committee shall submit  
4 to the clerk of the respective houses of the Legislature  
5 copies of all proposed legislative rules which have been  
6 submitted to and considered by the committee pursuant to  
7 the provisions of section eleven of this article and which  
8 have not been previously submitted to the Legislature for  
9 study, together with the recommendations of the  
10 committee with respect to such rules, a statement of the  
11 reasons for any recommendation that a rule be amended  
12 or withdrawn and a statement that a bill authorizing the  
13 legislative rule has been drafted by the staff of the  
14 committee or by legislative services pursuant to section  
15 eleven of this article. The cochairman of the committee  
16 may also submit such rules at the direction of the  
17 committee at any time before or during a special session  
18 in which consideration thereof may be appropriate. The  
19 committee may withhold from its report any proposed



20 legislative rule which was submitted to the committee  
21 fewer than two hundred twenty-five days before the end of  
22 the regular session. The clerk of each house shall submit  
23 the report to his or her house at the commencement of the  
24 next session.

25 All bills introduced authorizing the promulgation of a  
26 rule may be referred by the speaker of the House of  
27 Delegates and by the president of the Senate to  
28 appropriate standing committees of the respective houses  
29 for further consideration or the matters may be otherwise  
30 dealt with as each house or its rules provide. The  
31 Legislature may by act authorize the agency to adopt a  
32 legislative rule incorporating the entire rule or may  
33 authorize the agency to adopt a rule with any amendments  
34 which the Legislature shall designate. The clerk of the  
35 house originating such act shall forthwith file a copy of  
36 any bill of authorization enacted with the secretary of state  
37 and with the agency proposing such rule and the clerk of  
38 each house may prepare and file a synopsis of legislative  
39 action during any session on any proposed rule submitted  
40 to the house during such session for which authority to  
41 promulgate was not by law provided during such session.  
42 In acting upon the separate bills authorizing the  
43 promulgation of rules, the Legislature may, by  
44 amendment or substitution, combine the separate bills of  
45 authorization insofar as the various rules authorized  
46 therein are proposed by agencies which are placed under  
47 the administration of one of the single separate executive  
48 departments identified under the provisions of section two,  
49 article one, chapter five-f of this code or the Legislature  
50 may combine the separate bills of authorization by agency  
51 or agencies within an executive department. In the case of  
52 rules proposed for promulgation by an agency which is  
53 not administered by an executive department pursuant to  
54 the provisions of article two of said chapter, the separate  
55 bills of authorization for the proposed rules of that agency  
56 may, by amendment or substitution, be combined. The  
57 foregoing provisions relating to combining separate bills  
58 of authorization according to department or agency are  
59 not intended to restrict the permissible breadth of bills of  
60 authorization and do not preclude the Legislature from

61 otherwise combining various bills of authorization which  
62 have a unity of subject matter. Any number of provisions  
63 may be included in a bill of authorization, but the single  
64 object of the bill shall be to authorize the promulgation of  
65 proposed legislative rules.

66 (b) If the Legislature during its regular session  
67 disapproves all or part of any legislative rule which was  
68 submitted to it by the legislative rule-making review  
69 committee during such session, no agency may thereafter  
70 issue any rule or directive or take other action to  
71 implement such rule or part thereof unless and until  
72 otherwise authorized to do so, except that the agency may  
73 resubmit the same or similar proposed rule to the  
74 legislative rule-making review committee in accordance  
75 with the provisions of section eleven of this article.

76 (c) Nothing herein shall be construed to prevent the  
77 Legislature by law from authorizing, or authorizing and  
78 directing, an agency to promulgate legislative rules not  
79 proposed by the agency or upon which some procedure  
80 specified in this chapter is not yet complete.

81 (d) Whenever the Legislature is convened by  
82 proclamation of the governor, upon his or her own  
83 initiative or upon application of the members of the  
84 Legislature, or whenever a regular session of the  
85 Legislature is extended or convened by the vote or  
86 petition of its members, the Legislature may by act  
87 enacted during such extraordinary or extended session  
88 authorize, in whole or in part, any legislative rule,  
89 whether submitted to the legislative rule-making review  
90 committee or not, if legislative action on such rule during  
91 such session is a lawful order of business.

92 (e) As a part of any act that amends chapter sixty-four  
93 of this code, authorizing the promulgation of a proposed  
94 legislative rule or rules, the Legislature may also provide,  
95 by general language or with specificity, for the  
96 disapproval of rules not approved or acted upon by the  
97 Legislature.

98 (f) Whenever a date is required by this section to be  
99 computed in relation to the end of a regular session of the

100 Legislature, such date shall be computed without regard to  
101 any extensions of such session occasioned solely by the  
102 proclamation of the governor.

103 (g) Whenever a date is required to be computed from  
104 or is fixed by the first day of a regular session of the  
105 Legislature, it shall be computed or fixed in the year one  
106 thousand nine hundred eighty-four, and each fourth year  
107 thereafter without regard to the second Wednesday of  
108 January of such years.

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## CHAPTER 163

(Com. Sub. for H. B. 4224—By Delegates Douglas, Gallagher, Faircloth,  
Compton, Linch and Riggs)

[Passed March 9, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section one, article one, and sections one and two, article three, all of chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; providing that any rules proposed by an executive or administrative agency, and introduced in a bill of authorization by the Legislature, but not authorized by the Legislature are disapproved; the legislative mandate or authorization for the promulgation of certain legislative rules by various executive and administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate legislative rules as amended by the Legislature; authorizing certain of the agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing the division of environmental protection to promulgate legislative rules relating to

emission standards for hazardous air pollutants, as filed; authorizing the division of environmental protection to promulgate legislative rules relating to prevention and control air pollution from hazardous waste treatment, storage or disposal facilities, as modified; authorizing the division of environmental protection to promulgate legislative rules relating to acid rain provisions and permits, as filed; authorizing the division of environmental protection to promulgate legislative rules relating to underground storage tanks, as modified; authorizing division of environmental protection to promulgate legislative rules relating to hazardous waste management regulations, as modified; authorizing the division of environmental protection to promulgate legislative rules relating to surface mining and reclamation regulations, as modified and amended; authorizing the division of environmental protection to promulgate legislative rules relating to coalbed methane wells, as modified; authorizing the division of environmental protection to promulgate legislative rules relating to waste tire management, as modified; authorizing the division of environmental protection to promulgate legislative rules relating to sewage sludge management, as modified; authorizing the division of environmental protection to promulgate legislative rules relating to prevention and control of air pollution from the emission of volatile organic compounds, as amended; authorizing the division of environmental protection to promulgate legislative rules relating to monitoring well design standards, as modified; authorizing the division of environmental protection to promulgate legislative rules relating to solid waste management, as modified and amended; authorizing the environmental quality board to promulgate legislative rules relating to requirements governing water quality standards as modified and amended; authorizing the solid waste management board to promulgate legislative rules relating to development of comprehensive litter and solid waste control plans, as modified.

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

That section one, article one, and sections one and two, article three, all of chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 1. GENERAL LEGISLATIVE AUTHORIZATION.****§64-1-1. Legislative authorization.**

1 Under the provisions of article three, chapter  
2 twenty-nine-a of the code of West Virginia, the Legislature  
3 expressly authorizes the promulgation of the rules de-  
4 scribed in articles two through eleven of this chapter, sub-  
5 ject only to the limitations set forth with respect to each  
6 such rule in the section or sections of this chapter autho-  
7 rizing its promulgation. The Legislature declares that all  
8 rules now or hereafter authorized under articles two  
9 through eleven of this chapter are within the legislative  
10 intent of the statute which the rule is intended to imple-  
11 ment, extend, apply or interpret. Legislative rules promul-  
12 gated pursuant to the provisions of articles one through  
13 eleven of this chapter in effect at the effective date of this  
14 section shall continue in full force and effect until  
15 reauthorized in this chapter by legislative enactment, or  
16 until amended by emergency rule pursuant to the provi-  
17 sions of article three, chapter twenty-nine-a of this code.  
18 All proposed legislative rules for which bills of authoriza-  
19 tion have been introduced in the Legislature not specifi-  
20 cally authorized under articles two through eleven of this  
21 chapter are disapproved by the Legislature.

**ARTICLE 3. AUTHORIZATION FOR BUREAU OF ENVIRON-  
MENT TO PROMULGATE LEGISLATIVE  
RULES.**

§64-3-1. Division of environmental protection.

§64-3-2. Environmental boards.

**§64-3-1. Division of environmental protection.**

1 (a) The legislative rules filed in the state register on the  
2 twenty-eighth day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section four,  
4 article five, chapter twenty-two of this code, relating to the  
5 division of environmental protection (emission standards  
6 for hazardous air pollutants pursuant to 40 CFR Part 63,  
7 45CSR34), are authorized.

8 (b) The legislative rules filed in the state register on  
9 the twenty-eighth day of July, one thousand nine hundred

10 ninety-five, authorized under the authority of section four,  
11 article five, chapter twenty-two of this code, modified by  
12 the division of environmental protection to meet the ob-  
13 jections of the legislative rule-making review committee  
14 and refiled in the state register on the twenty-seventh day  
15 of October, one thousand nine hundred ninety-five, relat-  
16 ing to the division of environmental protection (to prevent  
17 and control air pollution from hazardous waste treatment,  
18 storage or disposal facilities, 45CSR25), are authorized.

19 (c) The legislative rules filed in the state register on the  
20 twenty-eighth day of July, one thousand nine hundred  
21 ninety-five, authorized under the authority of section four,  
22 article five, chapter twenty-two of this code, relating to the  
23 division of environmental protection (acid rain provisions  
24 and permits, 45CSR33), are authorized.

25 (d) The legislative rules filed in the state register on  
26 the thirty-first day of July, one thousand nine hundred  
27 ninety-five, authorized under the authority of section six,  
28 article seventeen, chapter twenty-two of this code, modi-  
29 fied by the division of environmental protection to meet  
30 the objections of the legislative rule-making review com-  
31 mittee and refiled in the state register on the eighteenth  
32 day of January, one thousand nine hundred ninety-six,  
33 relating to the division of environmental protection (un-  
34 derground storage tanks, 47CSR36), are authorized.

35 (e) The legislative rules filed in the state register on the  
36 thirty-first day of July, one thousand nine hundred  
37 ninety-five, authorized under the authority of section six,  
38 article eighteen, chapter twenty-two of this code, modified  
39 by the division of environmental protection to meet the  
40 objections of the legislative rule-making review committee  
41 and refiled in the state register on the eighteenth day of  
42 January, one thousand nine hundred ninety-six, relating to  
43 the division of environmental protection (hazardous waste  
44 management regulations, 47CSR35), are authorized.

45 (f) The legislative rules filed in the state register on the  
46 thirty-first day of July, one thousand nine hundred  
47 ninety-five, authorized under the authority of section four,  
48 article three, chapter twenty-two of this code, modified by  
49 the division of environmental protection to meet the ob-

50 jections of the legislative rule-making review committee  
51 and refiled in the state register on the twenty-third day of  
52 January, one thousand nine hundred ninety-six, relating to  
53 the division of environmental protection (surface mining  
54 and reclamation regulations, 38CSR2), are authorized with  
55 the following amendments:

56 "On page 64, section 3.27, after the word 'Director' by  
57 striking out the word 'may' and inserting in lieu thereof  
58 the word 'shall';

59 On page 64, section 3.27, after the word 'completed'  
60 by striking out the remainder of the first paragraph and  
61 inserting in lieu thereof the following words:

62 'and reclamation activities are ongoing.'

63 On page 156, section 11.6(c)(6)(A) after the word  
64 'operations' by striking out the words 'within five (5) years  
65 of the date of SMA approval,';

66 On page 156, section 11.6(c)(6)(B) after the word  
67 '(95-87)' by striking out the words 'within five (5) years of  
68 the date of SMA approval,';

69 On page 157, section 11.6(c)(6)(C) after the word  
70 'State' by striking out the words 'within five (5) years of  
71 the date of SMA approval,';

72 On page 163, section 11.6(d)(6)(A), after the word  
73 'applicant' by striking out the words 'within five (5) years  
74 of the date of SMA approval,';

75 On page 164, section 11.6(d)(6)(B), after the word  
76 '95-87' by striking out the words 'within five (5) years of  
77 the date of SMA approval,';

78 On page 164, section 11.6(d)(6)(C), after the word  
79 'wetlands' by striking out the words 'within five (5) years  
80 of the date of SMA approval,';

81 On page 169, section 11.6(e)(5)(A), after the word  
82 '95-87' by striking out the words 'within five (5) years of  
83 the date of SMA approval,';

84 On page 169, section 11.6(e)(5)(B), after the word  
85 'wetlands' by striking out the words 'within five (5) years  
86 of the date of SMA approval,';

87 On page 175, section 11.6(f)(5)(A), after the word  
88 '95-87', by striking out the words 'within five (5) years of  
89 the date of SMA approval,';

90 On page 175, section 11.6(f)(5)(B), after the word  
91 'enhancement' by striking out the words 'of wetlands with-  
92 in five (5) years of the date of SMA approval,'.

93 On page 178, section 12.2 subsection (e) by striking  
94 12.2.e in its entirety and inserting in lieu thereof the fol-  
95 lowing:

96 'Notwithstanding any other provisions of this rule, no  
97 bond release or reduction will be granted if, at the time,  
98 water discharged from or affected by the operation re-  
99 quires chemical treatment in order to comply with applica-  
100 ble effluent limitations or water quality standards: *Provided*,  
101 *That the Director may approve a request for Phase I*  
102 *but not Phase II or III, release if the applicant demon-*  
103 *strates to the satisfaction of the Director that either:*

104 (A) The remaining bond is adequate to assure long  
105 term treatment of the drainage; or

106 (B) The operator has irrevocably committed other  
107 financial resources which are adequate to assure long term  
108 treatment of the drainage: *Provided*, *That the alternate*  
109 *financial resources must be in acceptable form, and meet*  
110 *the standards set forth in Section 11 of the Act and Sec-*  
111 *tion 11 of this rule: Provided, however, That the alternate*  
112 *financial arrangements shall provide a mechanism where-*  
113 *by the Director can assume management of the resources*  
114 *and treatment work in the event that the operator defaults*  
115 *for any reason: And provided further, That default on a*  
116 *treatment obligation under this paragraph shall be consid-*  
117 *ered equivalent to a bond forfeiture, and the operator will*  
118 *be subject to penalties and sanctions, including permit*  
119 *blocking, as if a bond forfeiture had occurred.*



120       In order to make such demonstration as referenced  
121 above, the applicant shall address, at a minimum, the cur-  
122 rent and projected quantity and quality of drainage to be  
123 treated, the anticipated duration of treatment, the estimated  
124 capital and operating cost of the treatment facility, and the  
125 calculations which demonstrate the adequacy of the re-  
126 maining bond or of the alternate financial resources.'

127       On page sixteen, section 38-2-2.106, after the words  
128 'sum of the loading' by inserting the words 'or driving';  
129 and by striking out the words 'in a constructed valley fill,  
130 backfill, dam, or refuse pile' and inserting in lieu thereof  
131 the words 'as determined by acceptable engineering prac-  
132 tices';

133       On page twenty-eight, section 38-2-3.2(e), after the  
134 words 'limited number of minor changes' by inserting the  
135 words 'that do not significantly affect the health, safety or  
136 welfare of the public and';

137       On page thirty-six, section 38-2-3.6(h)(5), after the  
138 words 'as defined in' by striking out the words 'Article 5D  
139 of Chapter 20' and inserting in lieu thereof the words  
140 'Article 14 of Chapter 22';

141       On page thirty-nine, section 38-2-3.8(c), at the end  
142 after the words 'reasonable time for compliance.', by in-  
143 serting a new sentence to read as follows: '*Provided*, That  
144 those structures and facilities, where it can be demonstrat-  
145 ed that reconstruction or revision would result in greater  
146 environmental harm and the performance standards set  
147 forth in the Act and these regulations can otherwise be  
148 met, may be exempt from revision or reconstruction.';

149       On page one hundred seventy-eight, section  
150 38-2-12.2(d), after the words 'until all coal extraction  
151 operations' by inserting the words 'for the permit or incre-  
152 ment thereof', and after the words 'the entire disturbed  
153 area' by inserting the words 'for the permit or increment  
154 thereof';

155       On page one hundred ninety-seven, section  
156 38-2-14.3(c)(2), after the words 'medium is the best' by  
157 inserting the word 'reasonably';

158       And,

159       On page two hundred fifteen, section 38-2-14.14(e)  
160 (4), by striking the sentence 'Runoff from areas above and  
161 adjacent to the fill shall not be allowed to flow onto the fill  
162 surface, and shall be diverted into stabilized diversion  
163 channels, designed and constructed to safely pass the peak  
164 runoff from a 100 year, 24 hour precipitation event.' and  
165 inserting in lieu thereof the sentences 'Surface water run-  
166 off from areas above and adjacent to the fill shall be di-  
167 verted into properly designed and constructed stabilized  
168 diversion channels which have been designed using best  
169 current technology to safely pass the peak runoff from a  
170 100 year, 24 hour precipitation event. The channel shall  
171 be designed and constructed to ensure stability of the fill,  
172 control erosion, and minimize water infiltration into the  
173 fill.' "

174       (g) The legislative rules filed in the state register on  
175 the twenty-sixth day of July, one thousand nine hundred  
176 ninety-five, authorized under the authority of section four,  
177 article twenty-one, chapter twenty-two of this code, modi-  
178 fied by the division of environmental protection to meet  
179 the objections of the legislative rule-making review com-  
180 mittee and refiled in the state register on the fourteenth  
181 day of December, one thousand nine hundred ninety-five,  
182 relating to the division of environmental protection  
183 (coalbed methane wells, 38CSR23), are authorized.

184       (h) The legislative rules filed in the state register on  
185 the twenty-third day of November, one thousand nine  
186 hundred ninety-four, authorized under the authority of  
187 section eight, article eleven, chapter twenty of this code,  
188 modified by the division of environmental protection to  
189 meet the objections of the legislative rule-making review  
190 committee and refiled in the state register on the twentieth  
191 day of December, one thousand nine hundred ninety-five,  
192 relating to the division of environmental protection (waste  
193 tire management, 47CSR38G), are authorized.

194       (i) The legislative rules filed in the state register on the  
195 twenty-second day of June, one thousand nine hundred  
196 ninety-five, authorized under the authority of section  
197 twenty, article fifteen, chapter twenty-two of this code,

198 modified by the division of environmental protection to  
199 meet the objections of the legislative rule-making review  
200 committee and refiled in the state register on the  
201 twenty-second day of December, one thousand nine hun-  
202 dred ninety-five, relating to the division of environmental  
203 protection (sewage sludge management, 47CSR38D), are  
204 authorized with the amendments set forth below:

205       On page seven, section 3.2.2, by striking out the words  
206 "Table 3 of this rule will automatically be repealed and  
207 replaced with Table 3A of this rule on December 31,  
208 1997, unless this provision is modified prior to that date.";

209       And,

210       On page seven, section 3.2.2, after the word "rule." by  
211 inserting the following: The director is authorized until  
212 Dec. 31, 1999, to issue variances to this section to allow  
213 land application to soils which exceed the maximum soil  
214 concentrations of metals listed in Table 3 where soil analy-  
215 ses demonstrate that other soil factors, including, but not  
216 limited to, soil pH, cation exchange capacity, organic mat-  
217 ter content, or clay content, will limit mobility and avail-  
218 ability of the metals. No later than June 30, 1999, the  
219 director shall propose revisions to Table 3 to adequately  
220 protect soil quality, human health and the environment',

221       And,

222       On page 20, by striking the following from Table 3:  
223 "NOTE: Table 3 of this rule will automatically be re-  
224 pealed and replaced with Table 3A of this rule on Decem-  
225 ber 31, 1997, unless the provision of paragraph 3.2.2 of  
226 this rule is modified prior to that date.",

227       And,

228       On page 21, by striking out all of Table 3A.

229       (j) The legislative rules filed in the state register on the  
230 thirty-first day of July, one thousand nine hundred  
231 ninety-five, authorized under the authority of section four,  
232 article five, chapter twenty-two of this code, relating to the  
233 division of environmental protection (to prevent and con-  
234 trol of air pollution from the emission of volatile organic

235 compounds, 45CSR21), are authorized with the following  
236 amendment:

237 "On pages 170 and 171, by striking out section 40 in  
238 its entirety and inserting in lieu thereof a new section 40,  
239 to read as follows:

240 §45-21-40. Other Facilities that Emit Volatile Organic  
241 Compound (VOC).

242 40.1. Applicability.

243 a. This section 40. applies to any facility that has ag-  
244 gregate maximum theoretical emissions of 90.7 mega-  
245 grams (mg) (100 tons) or more of volatile organic com-  
246 pounds (VOCs) per calendar year in the absence of con-  
247 trol devices; provided that this section 40. applies to any  
248 source or sources within such facility other than those  
249 sources subject to regulation under sections 11. through  
250 39. VOC emissions from sources regulated under sections  
251 11. through 39., but which fall below the applicability  
252 thresholds of these sections, and thus are not subject to the  
253 emissions control standards of these sections, shall be  
254 included in the determination of maximum theoretical  
255 emissions for a facility but shall not be subject to the re-  
256 quirements of this section 40. Emissions from sources  
257 listed in section 40.1.d. shall not be included in the deter-  
258 mination of maximum theoretical emissions for a facility.

259 b. The owner or operator of a coating line or opera-  
260 tion, whose emissions are below this applicability thresh-  
261 hold, shall comply with the certification, recordkeeping,  
262 and reporting requirements of section 40.6.a.

263 c. The owner or operator of a non-coating source,  
264 whose emissions are below this applicability threshold,  
265 shall comply with the certification, recordkeeping, and  
266 reporting requirements of section 40.6.b.

267 d. The requirements of this section 40. shall not apply  
268 to coke ovens (including by-product recovery plants), fuel  
269 combustion sources, barge loading facilities, jet engine test  
270 cells, vegetable oil processing facilities, wastewater treat-  
271 ment facilities, iron and steel production, surface im-  
272 poundments, pits; and boilers, industrial furnaces, and

273 incinerators having a destruction efficiency of 95 percent  
274 or greater.

275 e. The requirements of this section 40. shall not apply  
276 to any facility bound by an order or permit, enforceable  
277 by the Director, which limits the facility's emissions to less  
278 than 100 tons of VOC per calendar year without the appli-  
279 cation of control devices.

280 40.2. Definitions. — As used in this section 40., all  
281 terms not defined herein shall have the meaning given  
282 them in section 2.

283 a. 'Reasonably available control measures' (also denot-  
284 ed as RACM) means an emission limit or limits that reflect  
285 the application of control technology and/or abatement  
286 techniques or measures that are reasonably available, con-  
287 sidering technological and economic feasibility. Such  
288 emission limits may be considered on a plant-wide basis to  
289 achieve emission reduction requirements in the most cost  
290 effective manner.

291 b. "Fugitive emissions" means those emissions which  
292 could not reasonably pass through a stack, chimney, vent,  
293 or other functionally equivalent opening.

294 40.3. Standards. — The owner or operator of a facility  
295 subject to this section 40. shall:

296 a. Except as provided in section 40.3.b.,

297 1. With respect to any existing non-fugitive emission  
298 source which has maximum theoretical emissions of 6  
299 pounds per hour or more, comply with an emission con-  
300 trol plan established on a case-by-case basis approved by  
301 the Director that meets the definition of reasonably avail-  
302 able control measures (RACM) and achieves at least a 90  
303 percent reduction in emissions below the total (aggregate)  
304 maximum theoretical emissions from all such non-fugitive  
305 emission sources subject to RACM requirements; and

306 2. With respect to each process unit producing a prod-  
307 uct or products, intermediate or final, in excess of 1000  
308 megagrams (Mg) (1,100 tons) per year, regardless of  
309 whether such product or products are listed in 40 CFR

310 60.489, comply with an emission control plan for fugitive  
311 sources using the methods and criteria of section 37., or  
312 alternative methods and criteria approved by the Director.  
313 The Director may exempt a process unit from fugitive  
314 emission control requirements upon satisfactory demon-  
315 stration that emissions are of minor significance.

316 b. With respect to such sources as described in sections  
317 40.3.a.1. and 40.3.a.2., comply with emission limits and  
318 measures based upon an alternative emissions reduction  
319 plan approved by the Director considering technical, eco-  
320 nomic and air quality benefit considerations that, at a  
321 minimum, maintains emission control measures incorpo-  
322 rated as part of any federally approved maintenance plan  
323 for the county or area in which the source is located.

324 c. With respect to any source at a facility subject to this  
325 section 40., which source has maximum theoretical emis-  
326 sions of 6 pounds per hour or more and is constructed,  
327 modified or begins operating after the effective date of  
328 this rule, comply with a control plan developed on a  
329 case-by-case basis approved by the Director that meets the  
330 definition of reasonably available control technology  
331 (RACT) in section 2.60. for both fugitive and non-fugitive  
332 emission sources.

#### 333 40.4. Submissions and Approval of Control Plans

334 a. Within 90 days after the effective date of this rule,  
335 the owner or operator of a facility subject to this section  
336 40. shall submit any required amendments to the  
337 case-by-case RACT control plans previously submitted to  
338 the Director, that revise such control plans to meet the  
339 definition of reasonably available control measures  
340 (RACM).

341 b. Notwithstanding the provisions of section 9.2., the  
342 owner or operator of a facility subject to this rule solely  
343 due to this section 40., that requires a major process  
344 change and/or major capital investment to comply with  
345 RACM requirements, may petition the Director for an  
346 additional extension beyond December 31, 1996, for  
347 compliance certification, and the Director may grant such  
348 extension when warranted. Provided however, such com-

349 pliance certification date shall be no later than July 31,  
350 1997.

351 c. The Director shall not approve a RACM plan or an  
352 alternative emissions reduction plan under this section 40.  
353 unless such plan includes:

354 1. A commitment to develop and submit a complete  
355 RACT plan to the Director within 180 days of a finding  
356 by the Director that a violation of the National Ambient  
357 Air Quality Standard for ozone has occurred within the  
358 county or maintenance area in which the source is located;  
359 and

360 2. A commitment to achieving full implementation of  
361 RACT within 2 years of approval of the RACT plan by the  
362 Director.

363 d. A finding by the Director that a violation of the  
364 National Ambient Air Quality Standard for ozone has  
365 occurred shall be made based upon verification of a moni-  
366 tored ozone standard violation in the county or mainte-  
367 nance area in which the source is located. The three main-  
368 tenance areas (the Huntington area, comprising Cabell and  
369 Wayne counties; the Charleston area, comprising Kanawha  
370 and Putnam counties; and the Parkersburg area, compris-  
371 ing Wood county) shall be treated separately and independ-  
372 dently for any such finding(s).

373 e. All RACM control plans, RACT control plans, and  
374 alternative emissions reduction plans approved by the  
375 Director pursuant to this section 40. shall be embodied in  
376 a consent order or permit in accordance with 45CSR13 or  
377 45CSR30, as required. A facility owner or operator may  
378 at any time petition the Director to approve revisions to  
379 these plans. The decision concerning said petition shall be  
380 issued by the Director in accordance with 45CSR13 or  
381 45CSR30, as required, or a consent order. Any such revi-  
382 sions shall be subject to the public participation require-  
383 ments of 45CSR13 or 45CSR30.

384 f. The owner or operator of a facility subject to this  
385 section 40. may submit for approval by the Director an

386 emission control plan that meets the definition of reason-  
387 ably available control technology (RACT) in section 2.60.

388 40.5. Test methods and procedures. — The owner or  
389 operator of any source subject to this section 40. shall  
390 demonstrate compliance with section 40.3. by using the  
391 applicable test methods specified in sections 41. through  
392 46 or by other means approved by the Director. Notwith-  
393 standing the requirements of section 41.1., EPA approval  
394 for alternate test methods to demonstrate compliance shall  
395 not be required for sources which are subject solely to  
396 emission control requirements specified in section 40.3.

397 40.6. Reporting and Recordkeeping Requirements for  
398 Exempt Non-Control Technique Guideline (CTG) Sourc-  
399 es.

400 a. An owner or operator of a coating line or operation  
401 that is exempt from the emission limitations in section  
402 40.3. shall comply with the certification, recordkeeping,  
403 and reporting requirements in section 4.2.

404 b. An owner or operator of a non-coating source that  
405 is exempt from the emission limitations in section 40.3.  
406 shall submit, upon request by the Director, records that  
407 document that the source is exempt from these require-  
408 ments.

409 1. These records shall be submitted to the Director  
410 within 30 days from the date of request.

411 2. If such records are not made available, the source  
412 will be considered subject to the limits in section 40.3.

413 40.7. Reporting and Recordkeeping Requirements for  
414 Subject Non-CTG Coating Sources. — An owner or oper-  
415 ator of a coating line or operation subject to this section  
416 40. and complying with section 40.3. shall comply with  
417 the certification, recordkeeping, and reporting require-  
418 ments in section 4.

419 40.8. Reporting and Recordkeeping Requirements for  
420 Subject Non-CTG, Non-Coating Sources.

421 a. The owner or operator of the subject VOC sources  
422 shall perform all testing and maintain the results of all tests



423 and calculations required under sections 40.3. and 40.5.  
424 to demonstrate that the subject source is in compliance.

425       b. The owner or operator of the subject VOC source  
426 shall maintain these records in a readily accessible location  
427 for a minimum of 3 years, and shall make these records  
428 available to the Director upon verbal or written request.

429       c. The owner or operator of any facility containing  
430 sources subject to this section 40. shall comply with the  
431 requirements in section 5. except that such requirements,  
432 as they apply to sources solely subject to this section 40.,  
433 may be modified by the Director upon petition by the  
434 owner or operator. Any such modified requirements shall  
435 be embodied in the facility's control plan (RACM, RACT  
436 or alternative plan) and reflected in the associated consent  
437 order or permit issued pursuant to 45CSR13 or  
438 45CSR30.' "

439       (k) The legislative rules filed in the state register on  
440 the twenty-seventh day of July, one thousand nine hun-  
441 dred ninety-five, authorized under the authority of section  
442 five, article twelve, chapter twenty-two of this code, modi-  
443 fied by the division of environmental protection to meet  
444 the objections of the legislative rule-making review com-  
445 mittee and refiled in the state register on the seventeenth  
446 day of January, one thousand nine hundred ninety-six,  
447 relating to the division of environmental protection (moni-  
448 toring well design standards, 47CSR60), are authorized.

449       (l) The legislative rules filed in the state register on the  
450 thirty-first day of July, one thousand nine hundred  
451 ninety-five, authorized under the authority of section five,  
452 article fifteen, chapter twenty-two of this code, modified  
453 by the division of environmental protection to meet the  
454 objections of the legislative rule-making review committee  
455 and refiled in the state register on the twenty-fourth day of  
456 January, one thousand nine hundred ninety-six, relating to  
457 the division of environmental protection (solid waste man-  
458 agement, 47CSR38), are authorized with the following  
459 amendments:

460       "On page 37, subdivision 3.8.4, after the words 'from  
461 the uppermost' by striking the word 'significant.'

462 On page 142, by striking the existing subdivision  
463 4.11.2.c.A and inserting in lieu thereof the following:

464 **'4.11.2.c.A**

465 The monitoring frequency for all constituents listed in  
466 Appendix I of this rule, must be at least twice a year dur-  
467 ing the active life of the facility, including closure and the  
468 post-closure periods. The director may require more fre-  
469 quent monitoring on a site-specific basis by considering  
470 aquifer flow rate and existing quality of the groundwater.'

471 On page 148, by striking the existing subdivision  
472 4.11.3.i.A. and inserting in lieu thereof the following:

473 **'4.11.3.i.A.**

474 The director may consider an alternative groundwater  
475 protection standard in consultation with the environmental  
476 quality board pursuant to 47CSR57 for constituents for  
477 which water quality standards have not been established.'

478 On page 151, subdivision 4.11.5., by following the  
479 words 'any applicable groundwater quality protection  
480 standards' by inserting the words 'and/or background  
481 groundwater quality, pursuant to the requirements of the  
482 Groundwater Protection Act, WVC §22-12-1 et seq.'

483 On page 152, subdivision 4.11.6.b.A., by following  
484 the words 'Be protective of human health and the environ-  
485 ment' inserting the words 'and maintain existing ground-  
486 water quality, pursuant to the requirements of the Ground-  
487 water Protection Act, WVC §22-12-1 et seq.'

488 On page 154, subdivision 4.11.6.d.B.(f), by striking  
489 the words 'Resource value of the aquifer' and inserting in  
490 lieu thereof the words 'The hydrogeologic characteristics  
491 of the facility and the surrounding land,'

492 On page 154, subdivision 4.11.6.d.B(f).(e) by striking  
493 out the words "The hydrogeologic characteristics of the  
494 facility and surrounding land;

495 And, by renumbering and relettering the remaining  
496 subdivisions of the rule.

497 On page 156, subdivision 4.11.7.a.A., by following  
498 the words 'Demonstrate compliance with' inserting the  
499 words 'the Groundwater Protection Act, WVC §22-12-1 et  
500 seq., and/or the"

501 And,

502 On page 173, subdivision 5.4.3, by adding the follow-  
503 ing sentence to the end of the subdivision: 'A class D facil-  
504 ity other than a class D-1 solid waste facility shall not  
505 exceed two (2) acres in size.' "

### §64-3-2. Environmental boards.

1 (a) The legislative rules filed by the environmental  
2 quality board in the state register on the thirty-first day of  
3 July, one thousand nine hundred ninety-five, under the  
4 authority of section four, article three, chapter twenty-  
5 two-b of this code, modified by the environmental quality  
6 board to meet the objections of the legislative rule-making  
7 review committee and refiled in the state register on the  
8 nineteenth day of January, one thousand nine hundred  
9 ninety-six, relating to the environmental quality board  
10 (requirements governing water quality standards,  
11 46CSR1), are authorized with the following amendments:

12 "On page one, section two, by deleting all of subsec-  
13 tion 2.1;

14 On page one by renumbering the following subsec-  
15 tion:

16 On page two, after subsection 2.1, by adding a new  
17 subsection 2.2 to read as follows:

18 '2.2. 'Cumulative' means a pollutant which increases in  
19 concentration in an organism by successive additions at  
20 different times or in different ways';

21 And,

22 On page eight, section five, after the words 'No mixing  
23 zones for human health criteria shall be' by striking out  
24 the remainder of subdivision c. and inserting in lieu there-  
25 of the following:

26 'established on a stream which has a seven (7) day, ten  
27 (10) year return frequency of 5 cfs or less.' "

28 (b) The legislative rules filed in the state register on  
29 the twenty-sixth day of July, one thousand nine hundred  
30 ninety-five, authorized under the authority of section six,  
31 article three, chapter twenty-two-c of this code, modified  
32 by the solid waste management board to meet the  
33 objections of the legislative rule-making review committee  
34 and refiled in the state register on the twenty-sixth day of  
35 October, one thousand nine hundred ninety-five, relating  
36 to the solid waste management board (development of  
37 comprehensive litter and solid waste control plans,  
38 54CSR3), are authorized.

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## CHAPTER 164

(Com. Sub. for H. B. 4229—By Delegates Douglas, Gallagher,  
Faircloth, Compton, Linch and Riggs)

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[Passed March 9, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact article two, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; the legislative mandate or authorization for the promulgation of certain legislative rules by various executive and administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate legislative rules as amended by the Legislature; authorizing certain of the agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing certain of the agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee, as amended by the Legislature; authorizing department

of administration to promulgate legislative rules relating to purchasing as modified and amended; authorizing department of administration to promulgate legislative rules relating to parking, as modified; authorizing division of personnel to promulgate legislative rules relating to leave donation program, as modified and amended.

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

That article two, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 2. AUTHORIZATION FOR DEPARTMENT OF ADMINISTRATION TO PROMULGATE LEGISLATIVE RULES.**

§64-2-1. Department of administration.

§64-2-2. Division of personnel.

**§64-2-1. Department of administration.**

1 (a) The legislative rules filed in the state register on the  
2 twenty-fourth day of July, one thousand nine hundred  
3 ninety-five, under the authority of section four, article  
4 three, chapter five-a, of this code, modified by the  
5 department of administration to meet the objections of the  
6 legislative rule-making review committee and refiled in the  
7 state register on the twenty-first day of September, one  
8 thousand nine hundred ninety-five, relating to the  
9 department of administration (purchasing, 148 CSR1), are  
10 authorized with the following amendment:

11 "On page 11, section 7.1, subsection (a), line one, after  
12 the word 'five (5)' by inserting the word 'working' "

13 (b) The legislative rules filed in the state register on  
14 the thirty-first day of July, one thousand nine hundred  
15 ninety-five, under the authority of section five, article four,  
16 chapter five-a, of this code, modified by the department of  
17 administration to meet the objections of the legislative  
18 rule-making review committee and refiled in the state  
19 register on the twenty-first day of September, one  
20 thousand nine hundred ninety-five, relating to the  
21 department of administration (parking, 148 CSR6), are  
22 authorized.

**§64-2-2. Division of personnel.**

1 The legislative rules filed in the state register on the  
 2 thirty-first day of July, one thousand nine hundred  
 3 ninety-five, authorized under the authority of section  
 4 twenty-seven, article six, chapter twenty-nine, of this code,  
 5 modified by the division of personnel to meet the objec-  
 6 tions of the legislative rule-making review committee and  
 7 refiled in the state register on the thirty-first day of Octo-  
 8 ber, one thousand nine hundred ninety-five, relating to the  
 9 division of personnel (leave donation program, 143  
 10 CSR2), are authorized, with the following amendments:

11 "On page two, section 3.1, subsection (d), following  
 12 the words 'one half a month' by inserting the word 'contin-  
 13 uously';

14 On page four, section 5.2, subsection (d), subdivision  
 15 C, following the word 'verification' by striking out the  
 16 semicolon and the word 'or,' and inserting in lieu thereof  
 17 the words 'or otherwise fails or ceases to meet eligibility  
 18 requirements;'

19 On page four, section 5.2, subsection (d), subdivision  
 20 D, following the word 'recipient' by striking out the period  
 21 and inserting a semicolon and the word 'or'

22 And,

23 On page four, section 5.2, subsection (d), by creating a  
 24 new subdivision E to read as follows: 'E. upon the recipi-  
 25 ent's return to work.' "

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## CHAPTER 165

(Com. Sub. for H. B. 4225—By Delegates Douglas, Gallagher, Faircloth,  
 Compton, Linch and Riggs)

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[Passed March 8, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact article five, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating generally to the promulgation of administrative rules by the various executive or ad-

ministrative agencies and the procedures relating thereto; the legislative mandate or authorization for the promulgation of certain legislative rules by various executive and administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate legislative rules as amended by the Legislature; authorizing certain of the agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing the division of health to promulgate legislative rules relating to the cancer registry, as filed; authorizing the division of health to promulgate legislative rules relating to standards for local boards of health, as modified; authorizing the division of health to promulgate legislative rules relating to AIDS-related medical testing and confidentiality, as modified; authorizing the division of health to promulgate legislative rules relating to personal care home licensure, as modified and amended.

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

That article five, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 5. AUTHORIZATION FOR DEPARTMENT OF HEALTH  
AND HUMAN RESOURCES TO PROMULGATE  
LEGISLATIVE RULES.**

**§64-5-1. State board of health; division of health.**

1           (a) The legislative rules filed in the state register on the  
2 thirty-first day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section  
4 two-a, article five-a, chapter sixteen of this code, relating to  
5 the division of health (cancer registry, 64 CSR 68), are  
6 authorized.

7           (b) The legislative rules filed in the state register on  
8 the thirty-first day of July, one thousand nine hundred  
9 ninety-five, authorized under the authority of section  
10 seven, article one, chapter sixteen of this code, modified  
11 by the division of health to meet the objections of the  
12 legislative rule-making review committee and refiled in the

13 state register on the sixth day of December, one thousand  
14 nine hundred ninety-five, relating to the division of health  
15 (standards for local boards of health, 64 CSR 73), are  
16 authorized.

17 (c) The legislative rules filed in the state register on the  
18 fourth day of August, one thousand nine hundred  
19 ninety-five, authorized under the authority of section  
20 eight, article three-c, chapter sixteen of this code, modified  
21 by the division of health to meet the objections of the  
22 legislative rule-making review committee and refiled in the  
23 state register on the twenty-third day of January, one thou-  
24 sand nine hundred ninety-six, relating to the division of  
25 health (AIDS-related medical testing and confidentiality,  
26 64 CSR 64), are authorized.

27 (d) The legislative rules filed in the state register on  
28 the fourth day of January, one thousand nine hundred  
29 ninety-six, authorized under the authority of section five,  
30 article five-c, chapter sixteen of this code, modified by the  
31 division of health to meet the objections of the legislative  
32 rule-making review committee and refiled in the state  
33 register on the twenty-third day of January, one thousand  
34 nine hundred ninety-six, relating to the division of health  
35 (personal care home licensure, 64 CSR 14), are authorized  
36 with the amendments set forth below:

37 "On page nine, section 4.3.1.d, after the word 'provi-  
38 sions' by inserting the words 'in policy';

39 On page nine, section 4.3.1.d, by striking out the fol-  
40 lowing: 'The provisions may be in the form of a bond, a  
41 property lien, or other form of guaranty acceptable to the  
42 secretary. The guaranty shall be in the amount of three  
43 hundred dollars (\$300) per resident or ten thousand dol-  
44 lars (\$10,000), whichever is greater.' and inserting in lieu  
45 thereof the following: 'If the owner does not provide  
46 continuing care to all residents during this thirty (30) day  
47 period, any expenses incurred by the Department to pro-  
48 vide continuing resident care (i.e., food, staff, etc.) during  
49 this thirty (30) day period, is the responsibility of the  
50 owner.';

51 On page seventeen, section 4.10.4, by striking out the



52 word 'State' and inserting in lieu thereof the word 'Secre-  
53 tary';

54 On page seventeen, section 4.10.4, after the words 'for  
55 each of the residents' by inserting the words 'affected by  
56 the waiver request,';

57 On page twenty-four, section 5.8.2, after the words 'an  
58 additional' by striking out the words 'direct care' and  
59 inserting in lieu thereof the words 'personal care';

60 On page twenty-four, section 5.8.2, after the word  
61 'day' by striking out the words 'and evening shifts' and  
62 inserting in lieu thereof the word 'shift';

63 On page twenty-four in section 5.8.2, after the words  
64 'to have' by striking out the words 'no more than';

65 On page twenty-four in section 5.8.2, after the words  
66 'two (2)' by inserting the words 'or more';

67 On page twenty-four, line sixty-seven, by striking out  
68 the words 'no more than';

69 On page twenty-four, section 5.8.2, after 'residents.'  
70 by inserting the following sentence: 'At a minimum, an  
71 additional personal care staff will be available on the eve-  
72 ning shift for each fifteen (15) residents identified on their  
73 functional needs assessment to have no more than two (2)  
74 or more of the above care needs.';

75 On page twenty-four, section 5.8.2, after the words 'An  
76 additional' by striking out the word 'employee' and insert-  
77 ing in lieu thereof the words 'personal care staff';

78 On page twenty-four, section 5.8.2, after the word  
79 'with' by striking out the words 'one (1)' and inserting in  
80 lieu thereof the words 'two (2)';

81 On page twenty-seven, section 6.1.7, after the words  
82 'valid for' by striking out the words 'six (6) months' and  
83 inserting in lieu thereof the words 'one (1) year';

84 On page thirty-five, section 7.3.9, after the words 'per-  
85 sonal care home' by striking out the words 'in need of  
86 nursing services as specified in this rule' and inserting the

87 following: 'The frequency with which a registered profes-  
88 sional nurse shall provide services to the personal care  
89 home not providing limited and intermittent nursing ser-  
90 vices shall be based upon the needs of the residents, but  
91 not less than weekly.';

92 On page thirty-five, subsection 7.3.9, after the word  
93 'Section' by striking out the number '13' and inserting in  
94 lieu thereof the number '12';

95 On page thirty-five, section 7.3.9, after the words  
96 'professional registered nurse.' by striking out the follow-  
97 ing: 'The frequency with which a registered professional  
98 nurse shall provide services to the personal care home not  
99 providing limited and intermittent nursing services shall be  
100 based upon the needs of the residents.'

101 On page fifty-four, section 11.3.1, by striking out the  
102 sentence 'Existing and newly constructed buildings to be  
103 offered, maintained, and operated as personal care homes  
104 shall provide for accessibility in their entirety to individu-  
105 als with a physical disability.' and inserting in lieu thereof  
106 the sentence 'Those personal care homes housing any  
107 resident with a physical disability shall provide access to  
108 areas used in common by all residents as well as to the  
109 resident's personal area.';

110 On page fifty-five, section 11.3.8, in the second sen-  
111 tence, after the word 'widths' by inserting the words 'for  
112 new construction';

113 On page fifty-five, section 11.3.10, after the words  
114 'shall have a' by striking out the word 'central';

115 On page fifty-five, section 11.3.10, after the word  
116 'weather' by striking out the following: 'Individual room  
117 units known as 'through the wall heating and cooling units'  
118 are acceptable.';

119 On page fifty-five, section 11.3.17, after the word  
120 'residents.' by adding the following: 'However, if existing  
121 facilities cannot comply with the janitor closet requirement  
122 on each floor, the facility must demonstrate a sanitary  
123 means of disposal of wastewater in an area that is not a  
124 resident sleeping area.';

125 On page fifty-seven, section 11.4.10, at the beginning  
126 of the first sentence, by striking out the word 'The' and  
127 inserting in lieu thereof the words 'In new facilities the';

128 On page fifty-seven, section 11.4.10, after the word  
129 'area.' at the end of subsection ten by adding the following  
130 sentence: 'In existing facilities residents' rooms shall have  
131 an outside exposure through a vertical transparent win-  
132 dow. In existing facilities rooms extending below ground  
133 level shall be allowed only if approved by the Secretary.';

134 On page fifty-eight, section 11.5.2, after the word  
135 'every' by striking out the words 'four (4)' and inserting in  
136 lieu thereof the words 'five (5)';

137 On page fifty-eight, section 11.5.3, after the word 'per'  
138 by striking out the words 'five (5)' and inserting in lieu  
139 thereof the words 'ten (10)';

140 On page fifty-eight, section 11.5.3, after the word  
141 'residents.' by striking out the following sentence: 'If the  
142 facility can show a process that functions well for resi-  
143 dents, upon application, the secretary will grant a waiver of  
144 this requirement.'

145 On page sixty-one, section 11.13.3.a, at the beginning  
146 of the first sentence, by striking out the word 'Outlets' and  
147 inserting in lieu thereof the words 'In new facilities electri-  
148 cal outlets';

149 On page sixty-one, section 11.13.3.a, after the word  
150 'walls;' by inserting a period and the words 'In existing  
151 facilities electrical outlets to meet the needs of the resi-  
152 dents shall be provided.';

153 On page sixty-six, section 12.2.5.a, after the word  
154 'services' by striking out the words 'through daily contact  
155 with the home and visits to the residents at least eight (8)  
156 hours a week'; and inserting in lieu thereof the words 'to  
157 residents';

158 On page sixty-six, by striking out section 12.2.5.d;

159 And,

160 By relettering the remaining subdivisions."

## CHAPTER 166

(Com. Sub. for S. B. 196—By Senators Ross, Anderson, Boley,  
Buckalew, Grubb and Macnaughtan)

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[Passed March 9, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact article six, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; legislative mandate or authorization for the promulgation of certain legislative rules by various executive and administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate legislative rules as amended by the Legislature; authorizing certain of the agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing the jail and correctional facility standards commission to promulgate legislative rules relating to the minimum standards for construction, operation and maintenance of jails, as modified; authorizing the jail and correctional facility standards commission to promulgate legislative rules relating to the minimum standards for the construction, operation and maintenance of correctional facilities, as modified; authorizing the state police to promulgate legislative rules relating to the West Virginia DNA databank, as modified; authorizing the state police to promulgate legislative rules relating to state police grievance procedures, as modified and amended; authorizing the state police to promulgate legislative rules relating to cadet physical qualifications, as modified; authorizing the state police to promulgate legislative rules relating to West Virginia state police professional standards investigations, as modified; authorizing the division of veterans affairs to promulgate legislative rules relating to the state home for veterans-fiscal,

as modified; and authorizing the fire commission to promulgate legislative rules relating to the state building code, as modified and amended.

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

That article six, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 6. AUTHORIZATION FOR DEPARTMENT OF MILITARY AFFAIRS AND PUBLIC SAFETY TO PROMULGATE LEGISLATIVE RULES.**

§64-6-1. Jail and correctional facility standards commission.

§64-6-2. State police.

§64-6-3. Division of veterans affairs.

§64-6-4. Fire commission.

**§64-6-1. Jail and correctional facility standards commission.**

1 (a) The legislative rules filed in the state register on the  
2 thirty-first day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section nine,  
4 article twenty, chapter thirty-one of this code, modified by  
5 the jail and correctional facility standards commission to  
6 meet the objections of the legislative rule-making review  
7 committee and refiled in the state register on the  
8 twenty-second day of November, one thousand nine hun-  
9 dred ninety-five, relating to the jail and correctional facili-  
10 ty standards commission (West Virginia minimum stan-  
11 dards for construction, operation and maintenance of jails,  
12 95CSR1), are authorized.

13 (b) The legislative rules filed in the state register on  
14 the thirty-first day of July, one thousand nine hundred  
15 ninety-five, authorized under the authority of section nine,  
16 article twenty, chapter thirty-one of this code, modified by  
17 the jail and correctional facility standards commission to  
18 meet the objections of the legislative rule-making review  
19 committee and refiled in the state register on the eleventh  
20 day of January, one thousand nine hundred ninety-six,  
21 relating to the jail and correctional facility standards com-  
22 mission (minimum standards for construction, operation

23 and maintenance of correctional facilities, 95CSR2), are  
24 authorized.

**§64-6-2. State police.**

1 (a) The legislative rules filed in the state register on the  
2 ninth day of May, one thousand nine hundred ninety-five,  
3 authorized under the authority of section twenty-four-a,  
4 article two, chapter fifteen of this code, modified by the  
5 state police to meet the objections of the legislative  
6 rule-making review committee and refiled in the state  
7 register on the thirteenth day of June, one thousand nine  
8 hundred ninety-five, relating to the state police (West Vir-  
9 ginia DNA databank, 81CSR9), are authorized.

10 (b) The legislative rules filed in the state register on  
11 the twenty-third day of June, one thousand nine hundred  
12 ninety-five, authorized under the authority of section six,  
13 article two, chapter fifteen of this code, modified by the  
14 state police to meet the objections of the legislative  
15 rule-making review committee and refiled in the state  
16 register on the twenty-second day of September, one thou-  
17 sand nine hundred ninety-five, relating to the state police  
18 (state police grievance procedures, 81CSR8), are autho-  
19 rized, with the following amendment:

20 "On page four, section 4.6, after the words 'a grievant  
21 may', by striking out the words 'have no', and inserting in  
22 lieu thereof the words 'not have'".

23 (c) The legislative rules filed in the state register on the  
24 twenty-third day of June, one thousand nine hundred  
25 ninety-five, authorized under the authority of section  
26 twenty-five, article two, chapter fifteen of this code, modi-  
27 fied by the state police to meet the objections of the legis-  
28 lative rule-making review committee and refiled in the  
29 state register on the twenty-second day of September, one  
30 thousand nine hundred ninety-five, relating to the state  
31 police (cadet physical qualifications, 81CSR2), are autho-  
32 rized.

33 (d) The legislative rules filed in the state register on  
34 the thirty-first day of July, one thousand nine hundred  
35 ninety-five, authorized under the authority of section

36 twenty-five, article two, chapter fifteen of this code, modi-  
37 fied by the state police to meet the objections of the legis-  
38 lative rule-making review committee and refiled in the  
39 state register on the twenty-second day of December, one  
40 thousand nine hundred ninety-five, relating to the state  
41 police (West Virginia state police professional standards  
42 investigations, 81CSR10), are authorized.

**§64-6-3. Division of veterans affairs.**

1 The legislative rules filed in the state register on the  
2 twenty-fourth day of July, one thousand nine hundred  
3 ninety-five, under the authority of section three, article  
4 two, chapter nine-a of this code, modified by the division  
5 of veterans affairs to meet the objections of the legislative  
6 rule-making review committee and refiled in the state  
7 register on the second day of November, one thousand  
8 nine hundred ninety-five, relating to the division of veter-  
9 ans affairs (state home for veterans-fiscal, 86CSR2), are  
10 authorized.

**§64-6-4. Fire commission.**

1 The legislative rules filed in the state register on the  
2 eighth day of August, one thousand nine hundred  
3 ninety-four, modified by the fire commission to meet the  
4 objections of the legislative rule-making review committee  
5 and refiled in the state register on the sixteenth day of  
6 November, one thousand nine hundred ninety-four, relat-  
7 ing to the fire commission (state building code, 87CSR4),  
8 are authorized with the following amendments:

9 "On page two, subsection 3.1, by striking out the  
10 words 'more stringent' and inserting in lieu thereof the  
11 words 'state fire';

12 And,

13 On page two, subsection 4.1, by striking out the words  
14 'However, Section PM-104.4 "Right of Entry"' and insert-  
15 ing in lieu thereof the words 'This maintenance code'."

## CHAPTER 167

(Com. Sub. for S. B. 171—By Senators Ross, Anderson, Boley, Buckalew, Grubb and Macnaughtan)

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[Passed March 7, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact article seven, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; legislative mandate or authorization for the promulgation of certain legislative rules by various executive and administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate legislative rules as amended by the Legislature; authorizing certain of the agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing the division of banking to promulgate legislative rules relating to the legal lending limit, as modified; authorizing the division of banking to promulgate legislative rules relating to permissible additional charges in connection with a consumer credit sale, as modified; authorizing the division of banking to promulgate legislative rules relating to the West Virginia industrial bank and industrial loan company act, as modified; authorizing the division of banking to promulgate legislative rules relating to the West Virginia consumer credit and protection act, as modified; authorizing the division of banking to promulgate legislative rules relating to the West Virginia consumer credit and protection act and the industrial bank and industrial loan company act, as modified; authorizing the tax division to promulgate legislative rules relating to the international fuel tax agreement, as modified; authorizing the tax division to promulgate legislative rules relating to bingo, as modified; authorizing the tax division to promulgate legislative rules relating to the tax credit for employing former members of the Colin Anderson center, as modified; authorizing the tax



division to promulgate legislative rules relating to pollution control facilities, as modified; authorizing the tax division to promulgate legislative rules relating to the business and occupation tax, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to actuarial opinions and memoranda, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to examiners' compensation, qualifications and classification, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to excess line brokers, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to continuing education for insurance agents, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to recognizing mortality tables for use in determining reserve liability for annuities, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to substandard risk motor vehicle insurance notice requirements, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to minimum reserve standards for individual and group health insurance contracts, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to filing procedures for health maintenance organizations, as modified; authorizing the insurance commissioner to promulgate legislative rules relating to health maintenance organizations, as modified; authorizing the lottery commission to promulgate legislative rules relating to licensees and the Americans with disabilities act, as modified; and authorizing the lottery commission to promulgate legislative rules relating to the state lottery, as modified.

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

That article seven, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section four, all to read as follows:

**ARTICLE 7. AUTHORIZATION FOR DEPARTMENT OF TAX AND REVENUE TO PROMULGATE LEGISLATIVE RULES.**

§64-7-1. Division of banking.

§64-7-2. Department of tax and revenue; tax division; and state tax commissioner.

§64-7-3. Insurance commissioner.

§64-7-4. Lottery commission.

**§64-7-1. Division of banking.**

1 (a) The legislative rules filed in the state register on the  
2 thirty-first day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section  
4 twenty-six, article four, chapter thirty-one-a of this code,  
5 modified by the division of banking to meet the objec-  
6 tions of the legislative rule-making review committee and  
7 refiled in the state register on the first day of December,  
8 one thousand nine hundred ninety-five, relating to the  
9 division of banking (legal lending limit, 106CSR9), are  
10 authorized.

11 (b) The legislative rules filed in the state register on  
12 the twenty-eighth day of July, one thousand nine hundred  
13 ninety-five, authorized under the authority of section four,  
14 article two, chapter thirty-one-a of this code modified by  
15 the division of banking to meet the objections of the legis-  
16 lative rule-making review committee and refiled in the  
17 state register on the first day of December, one thousand  
18 nine hundred ninety-five, relating to the division of bank-  
19 ing (permissible additional charges in connection with a  
20 consumer credit sale, 106CSR11), are authorized.

21 (c) The legislative rules filed in the state register on the  
22 twenty-eighth day of July, one thousand nine hundred  
23 ninety-five, authorized under the authority of section  
24 twenty-six, article seven, chapter thirty-one of this code,  
25 modified by the division of banking to meet the objec-  
26 tions of the legislative rule-making review committee and  
27 refiled in the state register on the first day of December,  
28 one thousand nine hundred ninety-five, relating to the  
29 division of banking (West Virginia industrial bank and  
30 industrial loan company act, 106CSR5), are authorized.

31 (d) The legislative rules filed in the state register on  
32 the twenty-eighth day of July, one thousand nine hundred  
33 ninety-five, authorized under the authority of section four,

34 article two, chapter thirty-one-a of this code, modified by  
35 the division of banking to meet the objections of the legis-  
36 lative rule-making review committee and refiled in the  
37 state register on the first day of December, one thousand  
38 nine hundred ninety-five, relating to the division of bank-  
39 ing (West Virginia consumer credit and protection act,  
40 106CSR4), are authorized.

41 (e) The legislative rules filed in the state register on the  
42 twenty-eighth day of July, one thousand nine hundred  
43 ninety-five, authorized under the authority of section  
44 twenty-six, article seven, chapter thirty-one of this code,  
45 modified by the division of banking to meet the objec-  
46 tions of the legislative rule-making review committee and  
47 refiled in the state register on the first day of December,  
48 one thousand nine hundred ninety-five, relating to the  
49 division of banking (West Virginia consumer credit and  
50 protection act and the industrial bank and industrial loan  
51 company act, 106CSR2), are authorized.

**§64-7-2. Department of tax and revenue; tax division; and  
state tax commissioner.**

1 (a) The legislative rules filed in the state register on the  
2 twenty-eighth day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section  
4 twelve, article fourteen-b, chapter eleven of this code,  
5 modified by the tax division to meet the objections of the  
6 legislative rule-making review committee and refiled in the  
7 state register on the twenty-second day of September, one  
8 thousand nine hundred ninety-five, relating to the tax  
9 division (international fuel tax agreement, 110CSR14B),  
10 are authorized.

11 (b) The legislative rules filed in the state register on the  
12 twenty-eighth day of July, one thousand nine hundred  
13 ninety-five, authorized under the authority of section  
14 twenty-three, article twenty, chapter forty-seven of this  
15 code, modified by the tax division to meet the objections  
16 of the legislative rule-making review committee and re-  
17 filed in the state register on the twenty-fourth day of Janu-  
18 ary, one thousand nine hundred ninety-six, relating to the

19 tax division (bingo, 110CSR16), are authorized with the  
20 amendments set forth below:

21 "On page seven, subdivision 3.1.9, by striking out the  
22 word 'are' and inserting in lieu thereof the word 'is';

23 On page nineteen, subsection 11.1, by striking out the  
24 words 'limited occasion licenses' and inserting in lieu  
25 thereof the words 'limited occasion licensees';

26 On page twenty-three, subdivision 16.1.4, by striking  
27 out the words 'these regulations' and inserting in lieu  
28 thereof the words 'this rule';

29 And,

30 On page twenty-five, subsection 18.1, by striking out  
31 the words 'these regulations' and inserting in lieu thereof  
32 the words 'this rule'."

33 (c) The legislative rules filed in the state register on the  
34 twenty-eighth day of July, one thousand nine hundred  
35 ninety-five, authorized under the authority of section  
36 three, article thirteen-i, chapter eleven of this code, modi-  
37 fied by the tax division to meet the objections of the legis-  
38 lative rule-making review committee and refiled in the  
39 state register on the twenty-second day of September, one  
40 thousand nine hundred ninety-five, relating to the tax  
41 division (tax credit for employing former members of  
42 Colin Anderson center, 110CSR13I), are authorized.

43 (d) The legislative rules filed in the state register on the  
44 twenty-eighth day of July, one thousand nine hundred  
45 ninety-five, authorized under the authority of section four,  
46 article six-a, chapter eleven of this code, modified by the  
47 tax division to meet the objections of the legislative  
48 rule-making review committee and refiled in the state  
49 register on the twenty-second day of September, one thou-  
50 sand nine hundred ninety-five, relating to the tax division  
51 (pollution control facilities, 110CSR6), are authorized.

52 (e) The legislative rules filed in the state register on the  
53 twenty-eighth day of July, one thousand nine hundred  
54 ninety-five, authorized under the authority of section five,  
55 article ten, chapter eleven of this code, modified by the tax  
56 division to meet the objections of the legislative  
57 rule-making review committee and refiled in the state  
58 register on the first day of December, one thousand nine  
59 hundred ninety-five, relating to the tax division (business  
60 and occupation tax, 110CSR13), are authorized.

**§64-7-3. Insurance commissioner.**

1 (a) The legislative rules filed in the state register on the  
2 twenty-seventh day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section nine,  
4 article seven, chapter thirty-three of this code, modified by  
5 the insurance commissioner to meet the objections of the  
6 legislative rule-making review committee and refiled in the  
7 state register on the twenty-seventh day of November, one  
8 thousand nine hundred ninety-five, relating to the insur-  
9 ance commissioner (actuarial opinion and memorandum  
10 rule, 114CSR41), are authorized.

11 (b) The legislative rules filed in the state register on  
12 the twenty-seventh day of July, one thousand nine hun-  
13 dred ninety-five, authorized under the authority of section  
14 ten, article two, chapter thirty-three of this code, modified  
15 by the insurance commissioner to meet the objections of  
16 the legislative rule-making review committee and refiled in  
17 the state register on the twenty-seventh day of November,  
18 one thousand nine hundred ninety-five, relating to the  
19 insurance commissioner (examiners' compensation, quali-  
20 fications and classification, 114CSR15), are authorized.

21 (c) The legislative rules filed in the state register on the  
22 twenty-eighth day of July, one thousand nine hundred  
23 ninety-five, authorized under the authority of section  
24 eleven, article twelve, chapter thirty-three of this code,  
25 modified by the insurance commissioner to meet the ob-  
26 jections of the legislative rule-making review committee

27 and refiled in the state register on the twenty-seventh day  
28 of November, one thousand nine hundred ninety-five,  
29 relating to the insurance commissioner (excess line bro-  
30 kers, 114CSR20), are authorized.

31 (d) The legislative rules filed in the state register on  
32 the twenty-eighth day of July, one thousand nine hundred  
33 ninety-five, authorized under the authority of section ten,  
34 article two, chapter thirty-three of this code, modified by  
35 the insurance commissioner to meet the objections of the  
36 legislative rule-making review committee and refiled in the  
37 state register on the twenty-seventh day of November, one  
38 thousand nine hundred ninety-five, relating to the insur-  
39 ance commissioner (continuing education for insurance  
40 agents, 114CSR42), are authorized.

41 (e) The legislative rules filed in the state register on the  
42 twenty-eighth day of July, one thousand nine hundred  
43 ninety-five, authorized under the authority of section nine,  
44 article seven, chapter thirty-three of this code, modified by  
45 the insurance commissioner to meet the objections of the  
46 legislative rule-making review committee and refiled in the  
47 state register on the twenty-seventh day of November, one  
48 thousand nine hundred ninety-five, relating to the insur-  
49 ance commissioner (recognizing mortality tables for use  
50 in determining reserve liability for annuities, 114CSR45),  
51 are authorized.

52 (f) The legislative rules filed in the state register on the  
53 twenty-eighth day of July, one thousand nine hundred  
54 ninety-five, authorized under the authority of section  
55 thirty-one-c, article six, chapter thirty-three of this code,  
56 modified by the insurance commissioner to meet the ob-  
57 jections of the legislative rule-making review committee  
58 and refiled in the state register on the twenty-seventh day  
59 of November, one thousand nine hundred ninety-five,  
60 relating to the insurance commissioner (substandard risk  
61 motor vehicle insurance notice requirements, 114CSR37),  
62 are authorized.

63 (g) The legislative rules filed in the state register on  
64 the twenty-eighth day of July, one thousand nine hundred  
65 ninety-five, authorized under the authority of section nine,  
66 article seven, chapter thirty-three of this code, modified by  
67 the insurance commissioner to meet the objections of the  
68 legislative rule-making review committee and refiled in the  
69 state register on the twenty-seventh day of November, one  
70 thousand nine hundred ninety-five, relating to the insur-  
71 ance commissioner (minimum reserve standards for indi-  
72 vidual and group health insurance contracts, 114CSR44),  
73 are authorized.

74 (h) The legislative rules filed in the state register on  
75 the thirty-first day of July, one thousand nine hundred  
76 ninety-five, authorized under the authority of section  
77 twenty, article twenty-five-a, chapter thirty-three of this  
78 code, modified by the insurance commissioner to meet the  
79 objections of the legislative rule-making review committee  
80 and refiled in the state register on the twenty-seventh day  
81 of November, one thousand nine hundred ninety-five,  
82 relating to the insurance commissioner (filing procedures  
83 for health maintenance organizations, 114CSR46), are  
84 authorized.

85 (i) The legislative rules filed in the state register on the  
86 thirty-first day of July, one thousand nine hundred  
87 ninety-five, authorized under the authority of section  
88 twenty, article twenty-five-a, chapter thirty-three of this  
89 code, modified by the insurance commissioner to meet the  
90 objections of the legislative rule-making review committee  
91 and refiled in the state register on the twenty-seventh day  
92 of November, one thousand nine hundred ninety-five,  
93 relating to the insurance commissioner (health mainte-  
94 nance organizations, 114CSR43), are authorized.

**§64-7-4. Lottery commission.**

1 (a) The legislative rules filed in the state register on the  
2 twenty-sixth day of May, one thousand nine hundred  
3 ninety-five, under the authority of section ten, article

4 twenty-two, chapter twenty-nine of this code, modified by  
5 the lottery commission to meet the objections of the legis-  
6 lative rule-making review committee and refiled in the  
7 state register on the fifteenth day of June, one thousand  
8 nine hundred ninety-five, relating to the lottery commis-  
9 sion (licensees and the Americans with disabilities act,  
10 179CSR3), are authorized.

11 (b) The legislative rules filed in the state register on the  
12 twenty-fourth day of July, one thousand nine hundred  
13 ninety-five, under the authority of section five, article  
14 twenty-two, chapter twenty-nine of this code, modified by  
15 the lottery commission to meet the objections of the legis-  
16 lative rule-making review committee and refiled in the  
17 state register on the fourteenth day of September, one  
18 thousand nine hundred ninety-five, relating to the lottery  
19 commission (state lottery rule, 179CSR1), are authorized.

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## CHAPTER 168

(Com. Sub. for S. B. 201—By Senators Ross, Anderson, Boley,  
Buckalew, Grubb and Macnaughtan)

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[Passed March 7, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact article eight, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; legislative mandate or authorization for the promulgation of certain legislative rules by various executive and administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate legislative rules as amended by the Legislature; authorizing certain of the agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; relating to authorizing the division of motor



vehicles to promulgate legislative rules relating to the motor vehicle alcohol test and lock program, as modified; and relating to authorizing the division of motor vehicles to promulgate legislative rules relating to motor vehicle dealers, wrecker/dismantler/rebuilders, license services, automobile auctions, vehicle leasing companies and administrative due process, as modified.

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

That article eight, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, to read as follows:

**ARTICLE 8. AUTHORIZATION FOR DEPARTMENT OF TRANSPORTATION TO PROMULGATE LEGISLATIVE RULES.**

**§64-8-1. Division of motor vehicles.**

1 (a) The legislative rules filed in the state register on the  
2 thirty-first day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section nine,  
4 article two, chapter seventeen-a of this code, modified by  
5 the division of motor vehicles to meet the objections of the  
6 legislative rule-making review committee and refiled in the  
7 state register on the nineteenth day of September, one  
8 thousand nine hundred ninety-five, relating to the division  
9 of motor vehicles (motor vehicle dealers, wreckers  
10 /dismantlers/rebuilders, license services, automobile auc-  
11 tions, vehicle leasing companies and administrative due  
12 process 91CSR6), are authorized.

13 (b) The legislative rules filed in the state register on  
14 the twenty-first day of July, one thousand nine hundred  
15 ninety-five, authorized under the authority of section  
16 three-a, article five-a, chapter seventeen-c of this code,  
17 modified by the division of motor vehicles to meet the  
18 objections of the legislative rule-making review committee  
19 and refiled in the state register on the nineteenth day of  
20 September, one thousand nine hundred ninety-five, relat-  
21 ing to the division of motor vehicles (motor vehicle alco-  
22 hol test and lock program, 91CSR9), are authorized.

## CHAPTER 169

(Com. Sub. for S. B. 162—By Senators Ross, Anderson, Boley,  
Buckalew, Grubb and Macnaughtan)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact article nine, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; legislative mandate or authorization for the promulgation of certain legislative rules by various executive and administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate legislative rules as amended by the Legislature; authorizing certain of the agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing the commissioner of agriculture to promulgate legislative rules relating to the inspection of meat and poultry, as modified; authorizing the commissioner of agriculture to promulgate legislative rules relating to certified pesticide applicator, as modified; authorizing the commissioner of agriculture to promulgate legislative rules relating to the West Virginia plant pest act, as modified; authorizing the commissioner of agriculture to promulgate legislative rules relating to dairy products and imitation dairy products, as modified; authorizing the commissioner of agriculture to promulgate legislative rules relating to frozen desserts and imitation frozen desserts, as modified; authorizing the commissioner of agriculture to promulgate legislative rules relating to integrated pest management programs in schools and day care centers, as amended; authorizing the secretary of state to promulgate legislative rules relating to agencies designated to provide voter registration service, as modified; authorizing the secretary of state to promulgate legislative rules relating to guidelines for the use of nicknames and other designations on the ballot, as modified; authorizing the

secretary of state to promulgate legislative rules relating to the procedures for canvassing electronic ballot elections using punch card or optical scan ballots, as modified; authorizing the secretary of state to promulgate legislative rules relating to absentee voting by military voters who are members of reserve units called to active duty, as modified; authorizing the secretary of state to promulgate legislative rules relating to numbered divisions for the election of circuit judges, as modified; authorizing the secretary of state to promulgate legislative rules relating to combined voter registration and the driver licensing fund, as filed; authorizing the secretary of state to promulgate legislative rules relating to official election forms and vendor authorization, as modified; authorizing the secretary of state to promulgate legislative rules relating to procedures for handling ballots and counting write-in votes in counties using punch card or optical scan ballots, as modified; authorizing the secretary of state to promulgate legislative rules relating to a standard size and format for rules and procedures for publication of the state register, as modified and amended; authorizing the governor's committee on crime, delinquency and correction to promulgate legislative rules relating to the basic training academy, annual in-service and biennial in-service training standards, as modified; authorizing the state election commission to promulgate legislative rules relating to election expenditures, as modified; authorizing the state election commission to promulgate legislative rules relating to the regulation of campaign finances, as modified and amended; authorizing the state election commission to promulgate legislative rules relating to the fair campaign practices, as modified; authorizing the state election commission to promulgate legislative rules relating to corporate political activity, as modified and amended; authorizing the cable television advisory board to promulgate legislative rules relating to the calculation and collection of late fees, as modified; authorizing the contractor licensing board to promulgate legislative rules relating to the West Virginia contractor licensing act, as modified; and authorizing the infrastructure and jobs development council to promulgate legislative rules relating to infrastructure and jobs development council funding rules, as modified and amended.

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

That article nine, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 9. AUTHORIZATION FOR MISCELLANEOUS AGENCIES AND BOARDS TO PROMULGATE LEGISLATIVE RULES.**

§64-9-1. Commissioner of agriculture.

§64-9-2. Secretary of state.

§64-9-3. Governor's committee on crime, delinquency and correction.

§64-9-4. State election commission.

§64-9-5. Cable television advisory board.

§64-9-6. Contractor licensing board.

§64-9-7. Infrastructure and jobs development council.

**§64-9-1. Commissioner of agriculture.**

1 (a) The legislative rules filed in the state register on the  
2 twenty-seventh day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section  
4 three, article two-b, chapter nineteen of this code, modified  
5 by the commissioner of agriculture to meet the objections  
6 of the legislative rule-making review committee and re-  
7 filed in the state register on the twentieth day of October,  
8 one thousand nine hundred ninety-five, relating to the  
9 commissioner of agriculture (inspection of meat and poul-  
10 try, 61CSR16), are authorized.

11 (b) The legislative rules filed in the state register on  
12 the thirty-first day of July, one thousand nine hundred  
13 ninety-five, authorized under the authority of section four,  
14 article sixteen-a, chapter nineteen of this code, modified  
15 by the commissioner of agriculture to meet the objections  
16 of the legislative rule-making review committee and re-  
17 filed in the state register on the nineteenth day of Septem-  
18 ber, one thousand nine hundred ninety-five, relating to the  
19 commissioner of agriculture (certified pesticide applica-  
20 tors, 61CSR12A), are authorized.

21 (c) The legislative rules filed in the state register on the  
22 first day of August, one thousand nine hundred  
23 ninety-five, authorized under the authority of section

24 three, article twelve, chapter nineteen of this code, modi-  
25 fied by the commissioner of agriculture to meet the objec-  
26 tions of the legislative rule-making review committee and  
27 refiled in the state register on the twenty-fifth day of Octo-  
28 ber, one thousand nine hundred ninety-five, relating to the  
29 commissioner of agriculture (West Virginia plant pest act,  
30 61CSR14), are authorized.

31 (d) The legislative rules filed in the state register on  
32 the thirty-first day of July, one thousand nine hundred  
33 ninety-five, authorized under the authority of section ten,  
34 article eleven-a, chapter nineteen of this code, modified by  
35 the commissioner of agriculture to meet the objections of  
36 the legislative rule-making review committee and refiled in  
37 the state register on the twentieth day of December, one  
38 thousand nine hundred ninety-five, relating to the com-  
39 missioner of agriculture (dairy products and imitation  
40 dairy products, 61CSR4C), are authorized.

41 (e) The legislative rules filed in the state register on the  
42 thirty-first day of July, one thousand nine hundred  
43 ninety-five, authorized under the authority of section ten,  
44 article eleven-b, chapter nineteen of this code, modified by  
45 the commissioner of agriculture to meet the objections of  
46 the legislative rule-making review committee and refiled in  
47 the state register on the twentieth day of December, one  
48 thousand nine hundred ninety-five, relating to the com-  
49 missioner of agriculture (frozen desserts and imitation  
50 frozen desserts, 61CSR4B), are authorized.

51 (f) The legislative rules filed in the state register on the  
52 thirty-first day of July, one thousand nine hundred  
53 ninety-five, authorized under the authority of section four,  
54 article sixteen-a, chapter nineteen of this code, relating to  
55 the commissioner of agriculture (integrated pest manage-  
56 ment programs in schools and day care centers,  
57 61CSR12J), are authorized, with the amendments set forth  
58 below:

59 "On page one, section 1.1, by striking out the words  
60 'These legislative rules establish' and inserting in lieu  
61 thereof the words 'This legislative rule establishes';

62 On page two, section 2.5, after the words 'that creates'  
63 by striking out the word 'to';

64 On page two, section 2.7, by striking out the words  
65 'integrated pest management';

66 On page two, section 2.10, by striking out the word  
67 'and' and inserting in lieu thereof the word 'an';

68 On page two, section 2.11, after the words 'bases or' by  
69 inserting the word 'the';

70 On page three, section 3.2, by striking out the words  
71 'Pesticides shall not be applied' and inserting in lieu there-  
72 of the words 'Schools and daycare centers covered by this  
73 rule shall not apply pesticides';

74 On page three, section 4.1, by striking out '1995';

75 On page three, section 4.1, by striking out the words  
76 'or the most recent revision';

77 On page three, section 4.3, after the words 'the school',  
78 by striking out the word 'shall' and inserting in lieu thereof  
79 the word 'should';

80 On page three, section 4.3, after the words 'success of'  
81 by striking out the word 'and' and inserting in lieu thereof  
82 the word 'an';

83 On page three, section 4.3, after the words 'This re-  
84 cord' by striking out the word 'shall' and inserting in lieu  
85 thereof the word 'should';

86 On page three, section 4.3, by striking out the word  
87 'every six months' and inserting in lieu thereof the word  
88 'periodically';

89 On page three, section 4.3, by striking out the word  
90 'so';

91 On page three, section 4.4, after the words 'created by'  
92 by inserting the words 'West Virginia Code';

93 On page three, section 4.4, by striking out the words  
94 'shall review and approve' and inserting in lieu thereof the  
95 words 'may comment on';

96 On page three, section 4.5, by striking out the words  
97 'The completed integrated pest management shall be filed  
98 with the Commissioner for compliance inspection' and  
99 inserting in lieu thereof the following: 'Schools covered  
100 by this rule shall file completed integrated pest manage-  
101 ment plans with the Commissioner for compliance inspec-  
102 tion';

103 On page three, section 4.5, after the words 'the pro-  
104 gram,' by inserting the words 'they shall submit';

105 On page three, section 4.5, by striking out the words  
106 'shall be submitted' and inserting in lieu thereof the word  
107 'to';

108 On page four, section 4.7, after the words 'Upon re-  
109 quest' by inserting the words 'schools covered by this rule  
110 shall provide';

111 On page four, section 4.7, by striking out the words  
112 'shall be provided';

113 On page four, section 4.8, by striking out the words  
114 'these rules' and inserting in lieu thereof the words 'this  
115 rule';

116 On page four, section 5.1, by striking out '1995';

117 On page four, section 5.1, by striking out the words 'or  
118 the most recent revision';

119 On page five, section 5.3, after the words 'day care  
120 center' by striking out the word 'shall' and inserting in lieu  
121 thereof the word 'should';

122 On page five, section 5.3, after the words 'success of',  
123 by striking out the word 'and' and inserting in lieu thereof  
124 the word 'an';

125 On page five, section 5.3, after the word 'this record'  
126 by striking out the word 'shall' and inserting in lieu thereof  
127 the word 'should';

128 On page five, section 5.3, by striking out the words  
129 'every six months' and inserting in lieu thereof the word  
130 'periodically';

131 On page five, section 5.3, by striking out the word 'so';

132 On page five, section 5.4, by striking out the words  
133 'The completed integrated pest management plan shall be  
134 filed with the Commissioner for compliance inspection'  
135 and inserting in lieu thereof the following: 'All day care  
136 centers covered by this rule shall file completed integrated  
137 pest management plans with the Commissioner for com-  
138 pliance inspection.';

139 On page five, section 5.4, after the words 'the pro-  
140 gram,' by inserting the words 'they shall submit';

141 On page five, section 5.4, by striking out the words  
142 'shall be submitted' and inserting in lieu thereof the word  
143 'to';

144 On page five, section 5.6, before the word 'Copies,' by  
145 inserting the words 'Day care centers covered by this rule  
146 shall provide';

147 On page five, section 5.6, by striking out the words  
148 'shall be given to' and inserting in lieu thereof the words  
149 'to a';

150 On page five, section 6.1.1, before the words 'The  
151 monitoring program,' by adding the following: 'Each  
152 school and day care center shall have a monitoring pro-  
153 gram.';

154 On page six, section 6.1.1, before the words 'The in-  
155 formation' by adding the words 'Each school and day care  
156 center shall evaluate';

157 On page six, section 6.1.1, by striking out the words  
158 'shall be evaluated';

159 On page six, section 6.1.2, by striking out the words 'A  
160 monitoring program shall be conducted in each facility on  
161 an ongoing basis' and inserting in lieu thereof the follow-  
162 ing: 'Each school and day care center shall conduct a  
163 monitoring program in suspect areas of their facility on an  
164 ongoing basis';

165 On page six, section 6.1.3.b.A, before the word 'Trap'  
166 by adding the word 'The';



167 On page six, section 6.1.3.b.A, after the word 'and' by  
168 inserting the word 'its';

169 On page six, section 6.1.3.b.B, before the word 'Date'  
170 by adding the word 'The';

171 On page six, section 6.1.3.b.C, by striking out the  
172 word 'Trap' and inserting in lieu thereof the words 'The  
173 trap's';

174 On page six, section 6.1.3.b.D, before the word 'Num-  
175 bers' by inserting the word 'The';

176 On page six, section 6.1.3.b.F, after the words 'pest  
177 management,' by adding a semicolon and the word 'and';

178 On page six, section 6.1.3.c, by striking out the words  
179 'at least every two months or';

180 On page six, section 6.1.3.c, after the words 'tacky or  
181 when' by inserting the word 'the';

182 On page six, section 6.1.3.c, after the word 'first' by  
183 adding a semicolon and the word 'and';

184 On page seven, section 6.2, by striking out the comma  
185 and the words 'Use of the Least Hazardous Materials', and  
186 inserting in lieu thereof the words 'of this rule';

187 On page seven, after the section heading, by adding  
188 the following:

189 'In an integrated pest management program, persons  
190 responsible for pest management should evaluate all possi-  
191 ble control options. Control options range from non-  
192 chemical methods to least hazardous pesticides to pesti-  
193 cides with a higher degree of risk to human health. In  
194 keeping with the legislative mandate for integrated pest  
195 management, the pest control contractor shall, after moni-  
196 toring for pest infestations, proceed in controlling pests  
197 using the least hazardous method that is both practical and  
198 effective as outlined in this section.'

199 And by renumbering the remaining sections.;

200 On page seven, section 7.1.1, by striking out the word  
201 'shall' and inserting in lieu thereof the word 'should';

- 202        On page seven, section 7.1.1, before the word 'preven-  
203        tive' by striking out the word 'Such' and inserting in lieu  
204        thereof the word 'These';
- 205        On page seven, section 7.1.1, before the word 'Consult'  
206        by adding the words 'A school or day care center shall';
- 207        On page seven, section 7.1.1, by striking out the words  
208        '1995, or the most recent revision';
- 209        On page seven, section 7.1.1, by striking out the word  
210        'IPM' and inserting in lieu thereof the words 'integrated  
211        pest management';
- 212        On page seven, section 7.1.1, by striking out the words  
213        'Note that';
- 214        On page seven, section 7.2.1, after the word 'necessary'  
215        by inserting the words, 'for a school or day care center';
- 216        On page seven, section 7.3.1, before the word 'Prod-  
217        ucts' by adding the words 'Schools and day care centers  
218        shall apply';
- 219        On page seven, section 7.3.1, by striking out the words  
220        'and applied';
- 221        On page eight, section 7.3.3, by striking out the word  
222        'are' and inserting in lieu thereof the word 'shall';
- 223        On page eight, section 7.3.3, after the word 'out' and  
224        by inserting the words 'of the treated area';
- 225        On page eight, section 7.4.3, after the word 'greater' by  
226        adding the words 'except when the air in the treated area  
227        can be purged by the heating, cooling and ventilation  
228        system, the period of reentry shall be 4 hours or the peri-  
229        od specified on the label of the pesticide product as regis-  
230        tered by the United States Environmental Protection  
231        Agency, which ever is greater.';
- 232        On page eight, section 8.1.a, by striking out the com-  
233        ma and the words 'Use of the Least Hazardous Materials';
- 234        On page eight, section 8.1.b, before the word 'School'  
235        by adding the words 'At the beginning of the school year,';

236 On page eight, section 8.1.b, at the end of the section  
237 by adding the following: 'The notice shall instruct the  
238 employee of the location of posting of the treatment  
239 schedule and notification of any necessary unscheduled  
240 treatments. School administrators shall also notify their  
241 employees of the treatment schedule at faculty senate  
242 meetings.';

243 On page eight, section 8.2.a, by striking out the word  
244 'in' and inserting in lieu thereof the word 'is';

245 On page eight, section 8.2.a, after the words 'parents  
246 or' by inserting the word 'legal';

247 On page eight, section 8.2.a, after the word 'pesticides'  
248 by striking out the words 'in levels 3 and 4 as detailed in  
249 section 4, Use of the Least Hazardous Materials, of this  
250 rule.' and inserting in lieu thereof the words 'as detailed in  
251 section 4 of this rule.';

252 On page nine, section 8.2.b, after the words 'parents or'  
253 by inserting the word 'legal';

254 On page nine, section 8.2.b, after the words 'parent or'  
255 by inserting the word 'legal';

256 On page nine, section 8.2.c, after the words 'parent or'  
257 by inserting in the word 'legal';

258 On page nine, section 8.2.c, by striking out the word  
259 'such';

260 On page nine, section 8.3.a, after the words 'parent or'  
261 by adding the word 'legal';

262 On page nine, section 8.3.a, after the word 'pesticide'  
263 by striking out the words 'in levels 3 and 4 as detailed in  
264 section 4, Use of the Least Hazardous Materials, of this  
265 rule.' and inserting in lieu thereof the words 'as detailed in  
266 section 4 of this rule.';

267 On page nine, section 8.3.b, after the words 'to the  
268 parent or' by inserting the word 'legal';

269 On page nine, section 8.3.b, by striking out the word  
270 'Such' and inserting in lieu the word 'The';

- 271        On page nine, section 8.3.b, after the words 'where the  
272 parent or' by inserting the word 'legal';
- 273        On page nine, section 9.1, after the word 'pesticide  
274 applicators' by striking out the comma and inserting in  
275 lieu thereof a period.;
- 276        On page nine, section 9.1, by striking out the words  
277 'Except that';
- 278        On page nine, section 9.4, after the words 'pesticide  
279 applicators', by inserting a comma and striking out the  
280 word 'or';
- 281        On page nine, section 9.4, by striking out the words  
282 'certified in General Pest Control';
- 283        On page nine, section 9.4, after the words 'outlined in'  
284 by striking out the words 'Title 61 Series 12A, Certified  
285 Pesticide Applicator Rules' and inserting in lieu thereof the  
286 words 'West Virginia Department of Agriculture Certified  
287 Pesticide Applicator Rules, 61 CSR 12A';
- 288        On page ten, section 9.5.1, before the word 'special-  
289 ized' by striking out the word 'The' and inserting in lieu  
290 thereof the word 'Any';
- 291        On page ten, section 9.5.1, by striking out the word  
292 'program' and inserting in lieu thereof the words 'pro-  
293 grams not offered by the commissioner';
- 294        On page ten, section 9.5.2, by striking out the words  
295 'Title 61 Series 12A' and inserting in lieu thereof the  
296 words '61 CSR 12A';
- 297        On page ten, section 9.5.2, by striking out the word  
298 'July' and inserting in lieu thereof the word 'September';
- 299        On page ten, section 9.5.3, by striking out the word  
300 'July' and inserting in lieu thereof the word 'September';
- 301        On page ten, section 9.5.3, by striking out the words  
302 'Title 61 Series 12A' and inserting in lieu thereof the  
303 words '61 CSR 12A';
- 304        On page ten by striking out all of section 10.1, and  
305 inserting in lieu thereof the following:

306 '10.1. Schools and day care centers covered by this  
307 rule shall keep for a period of two years all documents  
308 required to be in the Integrated Pest Management Files as  
309 detailed in Section 4.6 and Section 5.5, respectively, of  
310 this rule.';

311 On page ten, by striking out all of section 11.1 and  
312 renumbering the remaining sections;

313 On page ten, section 11.2, by striking out '1995';

314 And,

315 On page eleven, section 11.5, by striking out the words  
316 'these rules' and inserting in lieu thereof the words 'this  
317 rule'."

#### §64-9-2. Secretary of state.

1 (a) The legislative rules filed in the state register on the  
2 twelfth day of January, one thousand nine hundred  
3 ninety-five, authorized under the authority of section  
4 thirteen, article two, chapter three of this code, modified  
5 by the secretary of state to meet the objections of the leg-  
6 islative rule-making review committee and refiled in the  
7 state register on the twenty-second day of June, one thou-  
8 sand nine hundred ninety-five, relating to the secretary of  
9 state (agencies designated to provide voter registration  
10 services, 153CSR28), are authorized.

11 (b) The legislative rules filed in the state register on  
12 the twenty-fifth day of July, one thousand nine hundred  
13 ninety-five, authorized under the authority of section six,  
14 article one-a, chapter three of this code, modified by the  
15 secretary of state to meet the objections of the legislative  
16 rule-making review committee and refiled in the state  
17 register on the twenty-third day of January, one thousand  
18 nine hundred ninety-six, relating to the secretary of state  
19 (guidelines for the use of nicknames and other designa-  
20 tions on the ballot, 153CSR14), are authorized.

21 (c) The legislative rules filed in the state register on the  
22 twenty-eighth day of July, one thousand nine hundred  
23 ninety-five, authorized under the authority of section six,  
24 article one-a, chapter three of this code, modified by the

25 secretary of state to meet the objections of the legislative  
26 rule-making review committee and refiled in the state  
27 register on the eighth day of December, one thousand  
28 nine hundred ninety-five, relating to the secretary of state  
29 (procedures for canvassing electronic ballot elections  
30 using punch card or optical scan ballots, 153CSR18), are  
31 authorized.

32 (d) The legislative rules filed in the state register on  
33 the twenty-fifth day of July, one thousand nine hundred  
34 ninety-five, authorized under the authority of section six,  
35 article one-a, chapter three of this code, modified by the  
36 secretary of state to meet the objections of the legislative  
37 rule-making review committee and refiled in the state  
38 register on the twenty-fourth day of January, one thou-  
39 sand nine hundred ninety-six, relating to the secretary of  
40 state (absentee voting by military voters who are members  
41 of reserve units called to active duty, 153CSR23), are au-  
42 thorized.

43 (e) The legislative rules filed in the state register on the  
44 twenty-sixth day of July, one thousand nine hundred  
45 ninety-five, authorized under the authority of section six,  
46 article one-a, chapter three of this code, modified by the  
47 secretary of state to meet the objections of the legislative  
48 rule-making review committee and refiled in the state  
49 register on the twenty-fourth day of January, one thou-  
50 sand nine hundred ninety-six, relating to the secretary of  
51 state (numbered divisions for the election of circuit judges,  
52 153CSR24), are authorized.

53 (f) The legislative rules filed in the state register on the  
54 twenty-sixth day of July, one thousand nine hundred  
55 ninety-five, authorized under the authority of section  
56 three, article two, chapter three of this code, relating to the  
57 secretary of state (combined voter registration and driver  
58 licensing fund, 153CSR 25), are authorized.

59 (g) The legislative rules filed in the state register on  
60 the twenty-sixth day of July, one thousand nine hundred  
61 ninety-five, authorized under the authority of section six,  
62 article one-a, chapter three of this code, relating to the  
63 secretary of state (official election forms and vendor au-  
64 thorization, 153CSR26), are authorized.

65 (h) The legislative rules filed in the state register on  
66 the twenty-sixth day of July, one thousand nine hundred  
67 ninety-five, authorized under the authority of section six,  
68 article one-a, chapter three of this code, modified by the  
69 secretary of state to meet the objections of the legislative  
70 rule-making review committee and refiled in the state  
71 register on the twenty-fourth day of January, one thou-  
72 sand nine hundred ninety-six, relating to the secretary of  
73 state (procedures for handling ballots and counting  
74 write-in votes in counties using punch card or optical scan  
75 ballots, 153CSR27), are authorized.

76 (i) The legislative rules filed in the state register on the  
77 twenty-seventh day of July, one thousand nine hundred  
78 ninety-five, authorized under the authority of section six,  
79 article two, chapter twenty-nine-a of this code, modified  
80 by the secretary of state to meet the objections of the leg-  
81 islative rule-making review committee and refiled in the  
82 state register on the twenty-second day of January, one  
83 thousand nine hundred ninety-six, relating to the secretary  
84 of state (standard size and format for rules and procedures  
85 for publication of the state register, 153CSR6), are autho-  
86 rized, with the amendments set forth below:

87 "On page ten, subsection 13.1, after the word 'format'  
88 by inserting a comma and the words 'following all format-  
89 ting rules of the Secretary of State,';

90 On page ten, paragraph 13.1.b, by striking out the  
91 word 'double' and inserting in lieu thereof the word 'high';

92 On page ten, after subparagraph 13.1.b.2, by adding a  
93 new subsection to read as follows:

94 '13.2. If an agency does not comply with the format-  
95 ting as specified by the Secretary of State, the electronic  
96 version will be refused and sent back for correction to the  
97 agency'."

**§64-9-3. Governor's committee on crime, delinquency and  
correction.**

1 The legislative rules filed in the state register on the  
2 twenty-eighth day of July, one thousand nine hundred  
3 ninety-five, under the authority of section three, article

4 twenty-nine, chapter thirty of this code, modified by the  
5 governor's committee on crime, delinquency and correc-  
6 tion to meet the objections of the legislative rule-making  
7 review committee and refiled in the state register on the  
8 nineteenth day of December, one thousand nine hundred  
9 ninety-five, relating to the governor's committee on crime,  
10 delinquency and correction (basic training academy, an-  
11 nual in-service and biennial in-service training standards,  
12 149CSR2), are authorized.

**§64-9-4. State election commission.**

1 (a) The legislative rules filed in the state register on the  
2 thirty-first day of July, one thousand nine hundred  
3 ninety-five, under the authority of section five, article  
4 one-a, chapter three of this code, modified by the state  
5 election commission to meet the objections of the legisla-  
6 tive rule-making review committee and refiled in the state  
7 register on the twenty-second day of December, one thou-  
8 sand nine hundred ninety-five, relating to the state election  
9 commission (election expenditures, 146CSR4), are autho-  
10 rized.

11 (b) The legislative rules filed in the state register on  
12 the thirty-first day of July, one thousand nine hundred  
13 ninety-five, under the authority of section five, article  
14 one-a, chapter three of this code, modified by the state  
15 election commission to meet the objections of the legisla-  
16 tive rule-making review committee and refiled in the state  
17 register on the twenty-third day of January, one thousand  
18 nine hundred ninety-six, relating to the state election com-  
19 mission (regulation of campaign finances, 146CSR3), are  
20 authorized, with the amendments set forth below:

21 "On page seventeen, section 12.2, by striking out sec-  
22 tion 12.1 in its entirety, and inserting in lieu thereof the  
23 following:

24 '12.1. Any person violating this rule is subject to the  
25 penalties imposed by W. Va. Code §§3-8-7, 3-8-11 and  
26 3-9-23'."

27 (c) The legislative rules filed in the state register on the  
28 thirty-first day of July, one thousand nine hundred



29 ninety-five, under the authority of section five, article  
30 one-a, chapter three of this code, modified by the state  
31 election commission to meet the objections of the legisla-  
32 tive rule-making review committee and refiled in the state  
33 register on the twenty-second day of December, one thou-  
34 sand nine hundred ninety-five, relating to the state election  
35 commission (fair campaign practices, 146CSR2), are au-  
36 thorized.

37 (d) The legislative rules filed in the state register on  
38 the thirty-first day of July, one thousand nine hundred  
39 ninety-five, under the authority of section eight, article  
40 eight, chapter three of this code, modified by the state  
41 election commission to meet the objections of the legisla-  
42 tive rule-making review committee and refiled in the state  
43 register on the twenty-second day of December, one thou-  
44 sand nine hundred ninety-five, relating to the state election  
45 commission (corporate political activity, 146CSR1), are  
46 authorized, with the amendments set forth below:

47 "On page 8, section 146-1-7. penalty provisions, by  
48 striking out section 7.1 and inserting in lieu thereof the  
49 following:

50 '7.1. Any person violating this rule shall be guilty of a  
51 misdemeanor and, upon conviction thereof, shall be fined  
52 not more than five thousand dollars pursuant to West Vir-  
53 ginia Code §3-8-8'."

#### **§64-9-5. Cable television advisory board.**

1 The legislative rules filed in the state register on the  
2 eighteenth day of July, one thousand nine hundred  
3 ninety-five, under the authority of section twenty-six,  
4 article eighteen, chapter five of this code, modified by the  
5 cable television advisory board to meet the objections of  
6 the legislative rule-making review committee and refiled in  
7 the state register on the nineteenth day of September, one  
8 thousand nine hundred ninety-five, relating to the cable  
9 television advisory board (calculation and collection of  
10 late fees, 187CSR6), are authorized.

#### **§64-9-6. Contractor licensing board.**

1       The legislative rules filed in the state register on the  
2 twenty-eighth day of July, one thousand nine hundred  
3 ninety-five, under the authority of section five, article  
4 eleven, chapter twenty-one of this code, modified by the  
5 contractor licensing board to meet the objections of the  
6 legislative rule-making review committee and refiled in the  
7 state register on the fourth day of December, one thou-  
8 sand nine hundred ninety-five, relating to the contractor  
9 licensing board (West Virginia contractor licensing act,  
10 28CSR2), are authorized.

**§64-9-7. Infrastructure and jobs development council.**

1       The legislative rules filed in the state register on the  
2 seventh day of July, one thousand nine hundred  
3 ninety-five, under the authority of section four, article  
4 fifteen-a, chapter thirty-one of this code, modified by the  
5 infrastructure and jobs development council to meet the  
6 objections of the legislative rule-making review committee  
7 and refiled in the state register on the sixth day of Decem-  
8 ber, one thousand nine hundred ninety-five, relating to the  
9 infrastructure and jobs development council (infrastruc-  
10 ture and jobs development council funding rules,  
11 167CSR1), are authorized, with the amendments set forth  
12 below:

13       "On page ten, section five, subsection 5.7, by striking  
14 out '1 1/2%' and inserting in lieu thereof '1%';

15       And,

16       On page eleven, section five, subsection 5.9, by strik-  
17 ing out all of subsection 5.9 and inserting in lieu thereof  
18 the following: "Terms of Grant. Where a project sponsor  
19 has received infrastructure grant money to fund a project  
20 and the project is thereafter sold, then to the extent that  
21 proceeds are available, the project sponsor shall reimburse  
22 the infrastructure fund the amount of the infrastructure  
23 grant. In the alternative, the council may allow repayment  
24 of the grant by converting the grant into a loan from the  
25 infrastructure fund. The proceeds from the repayment of  
26 any such grant or grant which has been converted to a  
27 loan shall retain their character as proceeds available for  
28 grants. The amount of repayment may be reduced by the

29 applicable share of accumulated depreciation of the pro-  
30 ject or the applicable share of accumulated accelerated  
31 depreciation of the project as determined by the council.  
32 The infrastructure council shall review any agreement  
33 between the project sponsor and the person or entity pur-  
34 chasing the project to determine whether the agreement  
35 was structured so that no proceeds would become available  
36 for the repayment of the grant funds. If the infrastructure  
37 council finds that the transaction was structured by the  
38 parties to intentionally preclude the availability of pro-  
39 ceeds for the repayment of the infrastructure grant funds,  
40 then the council may require the project sponsor to repay  
41 the full amount of any infrastructure grant. The council  
42 shall prepare a report listing those projects which received  
43 infrastructure grant money and are sold. The report shall  
44 include a description of the terms by which the infrastruc-  
45 ture grant will be repaid. The report shall be provided on  
46 or before the tenth day of January each year to the Joint  
47 Committee on Government and Finance.' "

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## CHAPTER 170

(Com. Sub. for H. B. 4268—By Delegates Douglas, Linch, Compton, Gallagher,  
Riggs and Faircloth)

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[Passed March 8, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact article ten, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; the legislative mandate or authorization for the promulgation of certain legislative rules by various executive and administrative agencies of the state; authorizing certain of the agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing certain of the agencies to promulgate legislative rules as amended by the Legislature; authorizing certain of the agencies to promul-

gate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing division of labor to promulgate legislative rules relating to commercial bungee jumping safety act, as modified; authorizing board of miner training to promulgate legislative rules relating to safety training program for prospective coal miners; authorizing division of natural resources to promulgate legislative rules relating to commercial sale of wildlife, as modified; authorizing division of natural resources to promulgate legislative rules relating to miscellaneous permits and licenses, as modified; authorizing division of natural resources to promulgate legislative rules relating to boating, as modified; authorizing division of natural resources to promulgate legislative rules relating to special boating, as modified and amended; authorizing division of natural resources to promulgate legislative rules relating to wildlife damage control agents, as modified; authorizing division of natural resources to promulgate legislative rules relating to wildlife scientific collecting permits, as modified; authorizing division of natural resources to promulgate legislative rules relating to hunting and trapping prohibitions, as modified; authorizing division of natural resources to promulgate legislative rules relating to special waterfowl hunting, as modified; authorizing division of natural resources to promulgate legislative rules relating to public use of state parks, forests and wildlife management areas, as modified and amended; authorizing division of natural resources to promulgate legislative rules relating to public use of state campgrounds, as modified; authorizing division of natural resources to promulgate legislative rules relating to public use of state swimming areas, as modified.

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

That article ten, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 10. AUTHORIZATION FOR BUREAU OF COMMERCE  
TO PROMULGATE LEGISLATIVE RULES.**

§64-10-1. Division of labor.

§64-10-2. Division of natural resources.

**§64-10-1. Division of labor.**

1 (a) The legislative rules filed in the state register on  
2 the thirty-first day of July, one thousand nine hundred  
3 ninety-five, authorized under the authority of section  
4 three, article twelve, chapter twenty-one of this code, modi-  
5 fied by the division of labor to meet the objections of the  
6 legislative rule-making review committee and refiled in the  
7 state register on the eighth day of November, one thou-  
8 sand nine hundred ninety-five, relating to the division of  
9 labor (commercial bungee jumping safety act, 42 CSR  
10 23), are authorized.

11 (b) The legislative rules filed in the state register on  
12 the twenty-seventh day of March, one thousand nine hun-  
13 dred ninety-five, authorized under the authority of section  
14 six, article seven, chapter twenty-two-a of this code, relat-  
15 ing to the board of miner training, education and certifica-  
16 tion (governing the safety training program for prospec-  
17 tive surface coal miners in West Virginia, 48 CSR 3), are  
18 authorized.

**§64-10-2. Division of natural resources.**

1 (a) The legislative rules filed in the state register on  
2 the twenty-second day of December, one thousand nine  
3 hundred ninety-four, authorized under the authority of  
4 section eleven, article two, chapter twenty of this code,  
5 modified by the division of natural resources to meet the  
6 objections of the legislative rule-making review committee  
7 and refiled in the state register on the twentieth day of  
8 July, one thousand nine hundred ninety-five, relating to  
9 the division of natural resources (commercial sale of wild-  
10 life, 58 CSR 63), are authorized.

11 (b) The legislative rules filed in the state register on  
12 the twenty-second day of December, one thousand nine  
13 hundred ninety-four, authorized under the authority of  
14 section eleven, article two, chapter twenty of this code,  
15 modified by the division of natural resources to meet the  
16 objections of the legislative rule-making review committee  
17 and refiled in the state register on the twentieth day of  
18 September, one thousand nine hundred ninety-five, relat-  
19 ing to the division of natural resources (miscellaneous  
20 permits and licenses, 58 CSR 64), are authorized.

21 (c) The legislative rules filed in the state register on  
22 the thirty-first day of July, one thousand nine hundred  
23 ninety-five, authorized under the authority of section  
24 twenty-two, article seven, chapter twenty of this code, mod-  
25 ified by the division of natural resources to meet the ob-  
26 jections of the legislative rule-making review committee  
27 and refiled in the state register on the twentieth day of  
28 September, one thousand nine hundred ninety-five, relat-  
29 ing to the division of natural resources (boating, 58 CSR  
30 25), are authorized.

31 (d) The legislative rules filed in the state register on  
32 the thirty-first day of July, one thousand nine hundred  
33 ninety-five, authorized under the authority of section  
34 twenty-two, article seven, chapter twenty of this code, mod-  
35 ified by the division of natural resources to meet the ob-  
36 jections of the legislative rule-making review committee  
37 and refiled in the state register on the twenty-eighth day of  
38 October, one thousand nine hundred ninety-five, relating  
39 to the division of natural resources (special boating, 58  
40 CSR 26), are authorized, with the following amendments:

41 On page two, six, eight and nine, sections 3.6, 3.65,  
42 3.71, 3.87, 3.102 and 3.109, following the words "must  
43 have the propeller removed", by inserting the words "or  
44 have the motor withdrawn to the maximum trailorable  
45 limit".

46 (e) The legislative rules filed in the state register on  
47 the thirty-first day of July, one thousand nine hundred  
48 ninety-five, authorized under the authority of section  
49 fifty-a, article two, chapter twenty of this code, modified  
50 by the division of natural resources to meet the objections  
51 of the legislative rule-making review committee and re-  
52 filed in the state register on the twentieth day of Septem-  
53 ber, one thousand nine hundred ninety-five, relating to the  
54 division of natural resources (wildlife damage control  
55 agents, 58 CSR 41), are authorized.

56 (f) The legislative rules filed in the state register on the  
57 thirty-first day of July, one thousand nine hundred  
58 ninety-five, authorized under the authority of section  
59 seven, article one, chapter twenty of this code, modified by  
60 the division of natural resources to meet the objections of

61 the legislative rule-making review committee and refiled in  
62 the state register on the twentieth day of September, one  
63 thousand nine hundred ninety-five, relating to the division  
64 of natural resources (wildlife scientific collecting permits,  
65 58 CSR 42), are authorized.

66 (g) The legislative rules filed in the state register on  
67 the thirty-first day of July, one thousand nine hundred  
68 ninety-five, authorized under the authority of section  
69 seven, article one, chapter twenty of this code, modified by  
70 the division of natural resources to meet the objections of  
71 the legislative rule-making review committee and refiled in  
72 the state register on the twentieth day of September, one  
73 thousand nine hundred ninety-five, relating to the division  
74 of natural resources (prohibitions when hunting and trap-  
75 ping, 58 CSR 47) are authorized.

76 (h) The legislative rules filed in the state register on  
77 the thirty-first day of July, one thousand nine hundred  
78 ninety-five, authorized under the authority of section  
79 seven, article one, chapter twenty of this code, modified by  
80 the division of natural resources to meet the objections of  
81 the legislative rule-making review committee and refiled in  
82 the state register on the twentieth day of September, one  
83 thousand nine hundred ninety-five, relating to the division  
84 of natural resources (special waterfowl hunting, 58 CSR  
85 58), are authorized.

86 (i) The legislative rules filed in the state register on the  
87 thirty-first day of July, one thousand nine hundred  
88 ninety-five, authorized under the authority of section  
89 seventeen-a, article one, chapter five-b of this code, modi-  
90 fied by the division of natural resources to meet the objec-  
91 tions of the legislative rule-making review committee and  
92 refiled in the state register on the twenty-fifth day of Octo-  
93 ber, one thousand nine hundred ninety-five, relating to the  
94 division of natural resources (public use of West Virginia  
95 state parks, state forests, and state wildlife management  
96 areas under the division of natural resources, 58 CSR 31),  
97 are authorized,

98 "with the following amendment:

99 On page 4 section 2.22 by striking out section 2.22 in  
100 its entirety and inserting in lieu thereof the following:

101       2.22. The Director of the Division of Natural Re-  
102 sources is authorized to issue special use permits and enter  
103 into written agreements with persons who demonstrate to  
104 the satisfaction of the Director that they have good cause  
105 to utilize a motor driven vehicle on the Greenbrier River  
106 Trail or the North Bend Rail Trail. The Director may also  
107 authorize persons with legitimate need to utilize motorized  
108 vehicles on the trails as authorized in subdivision 2.22.3.

109       2.22.1. The director may, upon application in writing  
110 and for good cause shown, issue a written special use per-  
111 mit authorizing limited use of motorized vehicles on either  
112 the North Bend Rail Trail or Greenbrier River Trail. A  
113 separate permit is required for each use. Each permit shall  
114 specify the limitation on access, including such things as  
115 the date, time not to exceed three days, place, method and  
116 distance the applicant will be allowed to have access to the  
117 trail. As part of the permit process, the Director shall enter  
118 into a written agreement to allow the use of motorized  
119 vehicles on the trails. The agreement shall specify the  
120 limitations of the use and require, in exchange for such  
121 use, that the persons allowed to use motorized vehicles on  
122 the trails shall maintain a specified area of the trail for a  
123 specified length of time. The terms of the maintenance  
124 portion of the agreement shall depend on the length and  
125 nature of the use.

126       2.22.2. Good cause may be shown by (a) those per-  
127 sons in need of limited access to adjacent land that the  
128 applicant owns or leases for agriculture purposes and who  
129 have demonstrated no other reasonable means to gain  
130 entry to the adjacent land; (b) those persons who have a  
131 vested right of ingress to and egress from the trail and (c)  
132 those persons required by law to plug or reclaim oil or gas  
133 wells.

134       2.22.3. Persons with a legitimate need to use motor-  
135 ized vehicles on the trails are exempt from the permit  
136 requirements. A legitimate need is limited to (a) those  
137 persons who are authorized by the Director to use motor-  
138 ized vehicles in the management, construction, mainte-  
139 nance and operation of the trails and facilities and (b)



140 persons and equipment to fight forest fires and handle  
141 other emergencies."

142 (j) The legislative rules filed in the state register on the  
143 thirty-first day of July, one thousand nine hundred  
144 ninety-five, authorized under the authority of section  
145 seven, article one, chapter twenty of this code, modified by  
146 the division of natural resources to meet the objections of  
147 the legislative rule-making review committee and refiled in  
148 the state register on the twenty-fifth day of October, one  
149 thousand nine hundred ninety-five, relating to the division  
150 of natural resources (rules governing public use of camp-  
151 grounds in West Virginia state parks, state forests and state  
152 wildlife management areas under the division of natural  
153 resources, 58 CSR 32), are authorized.

154 (k) The legislative rules filed in the state register on  
155 the thirty-first day of July, one thousand nine hundred  
156 ninety-five, authorized under the authority of section  
157 seven, article one, chapter twenty of this code, modified by  
158 the division of natural resources to meet the objections of  
159 the legislative rule-making review committee and refiled in  
160 the state register on the twenty-fifth day of October, one  
161 thousand nine hundred ninety-five, relating to the division  
162 of natural resources (rules governing public use of swim-  
163 ming areas in West Virginia state parks, state forests and  
164 state wildlife management areas under the division of  
165 natural resources, 58 CSR 33), are authorized.

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## CHAPTER 171

(H. B. 4310—By Delegates Douglas, Gallagher, Faircloth, Compton,  
Linch and Riggs)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by

adding thereto a new article, designated article eleven, relating generally to the promulgation of administrative rules by the various executive and administrative agencies and the procedures relating thereto; and authorizing certain of these agencies to update and make technical corrections to legislative rules.

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

That chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article eleven, to read as follows:

**ARTICLE 11. TECHNICAL CORRECTIONS TO THE CODE OF STATE RULES.**

- §64-11-1. Purpose.
- §64-11-2. Radiologic technologists board of examiners.
- §64-11-3. Division of labor.
- §64-11-4. Water development authority.
- §64-11-5. Environmental quality board.
- §64-11-6. Solid waste management board.
- §64-11-7. Division of natural resources.
- §64-11-8. Agriculture.
- §64-11-9. Division of banking.
- §64-11-10. Insurance commissioner.
- §64-11-11. Criminal justice and highway safety division, Governor's committee on crime, delinquency and correction.
- §64-11-12. Division of highways.

**§64-11-1. Purpose.**

- 1 (a) It is hereby declared to be the purpose and policy
- 2 of the Legislature in enacting this article to allow technical
- 3 corrections to the code of state rules. Corrections made
- 4 under this article shall be limited to those necessary to
- 5 correct and update the names of agencies and their subdi-
- 6 visions and boards, addresses, phone numbers, code refer-
- 7 ences, gender specific pronouns and any other changes
- 8 considered necessary which do not effect substantive
- 9 changes in the rules. Any amendment contained in this
- 10 article which imparts the force of law, supplies a basis for
- 11 the imposition of civil or criminal liability, or grants or
- 12 denies a specific benefit is void and the language of the

13 rule in effect immediately prior to the passage of the  
14 amendment remains in full force and effect.

15 (b) The secretary of state is hereby granted the author-  
16 ity to correct inconsistencies with regard to effective dates  
17 of rules and numbers of series, pages, sections or subsec-  
18 tions contained in this article to meet the purpose and  
19 intent of the amendments offered in this article.

**§64-11-2. Radiologic technologists board of examiners.**

1 The legislative rule relating to the radiologic technolo-  
2 gists board of examiners (rules and regulations of the West  
3 Virginia board of examiners of radiologic technologists,  
4 18 CSR 1), effective the twenty-third day of May, one  
5 thousand nine hundred eighty-four, is reauthorized with  
6 the following amendment:

7 "On page 1, subsection 1.7, by striking out the words  
8 'Room 514, Medical Arts Bldg., 1021 Quarrier St.,  
9 Charleston, West Virginia 25301' and inserting in lieu  
10 thereof the words 'Room 303, 3049 Robert C. Byrd Drive,  
11 Beckley, West Virginia 25801'."

**§64-11-3. Division of labor.**

1 (a) The legislative rule relating to the division of labor  
2 (supervision of private employment agencies, legislative  
3 and procedural rules and regulations, 42 CSR 1), effective  
4 the thirty-first day of December, one thousand nine hun-  
5 dred eighty-two, is reauthorized with the following amend-  
6 ments:

7 "Beginning on page 1, in the title, and continuing  
8 throughout the text of the rule, by striking out the words  
9 'DEPARTMENT OF LABOR' and inserting in lieu thereof  
10 the words 'DIVISION OF LABOR';

11 And,

12 On page 3, subsection 7.1(d), by inserting the words  
13 'or her' immediately following the word 'his'."

14 (b) The legislative rule relating to the division of  
15 labor (West Virginia safety code for aerial passenger  
16 tramways, lifts and tows, 42 CSR 2), effective the  
17 twenty-sixth day of May, one thousand nine hundred

18 eighty-three, is reauthorized with the following amend-  
19 ment:

20 "On page 1, in the title, by striking out the words 'DE-  
21 PARTMENT OF LABOR' and inserting in lieu thereof the  
22 words 'DIVISION OF LABOR'."

23 (c) The legislative rule relating to the division of labor  
24 (steam boiler inspection, 42 CSR 3), effective the first day  
25 of April, one thousand nine hundred eighty-eight, is  
26 reauthorized with the following amendments:

27 "Beginning on page 1, in the title, and continuing  
28 throughout the text of the rule, by striking out the words  
29 'DEPARTMENT OF LABOR' and inserting in lieu thereof  
30 the words 'DIVISION OF LABOR';

31 Beginning on page 1, subsection 2.2, and continuing  
32 throughout the text of the rule, by inserting the words 'or  
33 her' immediately following the word 'his';

34 Beginning on page 2, subsection 2.2, and continuing  
35 throughout the text of the rule, by inserting the words 'or  
36 her' immediately following the word 'him';

37 Beginning on page 3, subsection 2.11, and continuing  
38 throughout the text of the rule, by inserting the words 'or  
39 herself' immediately following the word 'himself';

40 Beginning on page 4, subsection 2.15, and continuing  
41 throughout the text of the rule, by inserting the words 'or  
42 she' immediately following the word 'he';

43 And,

44 Beginning on page 6, subsection 2.27, and continuing  
45 throughout the text of the rule, by striking out the words  
46 'this Department' and inserting in lieu thereof the words  
47 'the Division of Labor'."

48 (d) The legislative rule relating to the division of  
49 labor (hazardous chemical substances, 42 CSR 4), effective  
50 the thirty-first day of December, one thousand nine hun-  
51 dred eighty-two, is reauthorized with the following amend-  
52 ment:

53 "On page 1, in the title, by striking out the words 'DE-  
54 PARTMENT OF LABOR' and inserting in lieu thereof the  
55 words 'DIVISION OF LABOR'."

56 (e) The legislative rule relating to the division of labor  
57 (wage payment and collection act, 42 CSR 5), effective the  
58 twenty-ninth day of May, one thousand nine hundred  
59 ninety, is reauthorized with the following amendments:

60 "Beginning on page 1, in the title, and continuing  
61 throughout the text of the rule, by striking out the word  
62 'DEPARTMENT' and inserting in lieu thereof the word  
63 'DIVISION';

64 Beginning on page 2, subsection 2.5(b), and continu-  
65 ing throughout the text of the rule, by inserting the words  
66 'or her' immediately following the word 'his';

67 Beginning on page 4, subsection 9.1, and continuing  
68 throughout the text of the rule, by inserting the words 'or  
69 she' immediately following the word 'he';

70 On page 1, subsection 2.4, by striking the words 'the  
71 Wage and Hour Division of the Labor Department' and  
72 inserting in lieu thereof the words 'the Wage and Hour  
73 Section of the Division of Labor';

74 And,

75 On page 7, subsection 14.3, in two occurrences in the  
76 paragraph numbered 6., by inserting the words 'or her'  
77 immediately following the word 'him'."

78 (f) The legislative rule relating to the division of labor  
79 (polygraph examinations, limitations of use, requirements,  
80 licenses and penalties, 42 CSR 6), effective the sixth day of  
81 June, one thousand nine hundred eighty-five, is  
82 reauthorized with the following amendments:

83 "On page 1, in the title, by striking out the words 'DE-  
84 PARTMENT OF LABOR' and inserting in lieu thereof the  
85 words 'DIVISION OF LABOR';

86 And,

87 On page 1, subsection 2.1, by inserting the words 'or  
88 her' immediately following the word 'his'."

89 (g) The legislative rule relating to the division of  
90 labor (rules and regulations for the West Virginia prevail-  
91 ing wage act, 42 CSR 7), effective the thirty-first day of  
92 December, one thousand nine hundred eighty-two, is  
93 reauthorized with the following amendments:

94 "Beginning on page 1, subsection 1.1, and continuing  
95 throughout the text of the rule, by inserting the words 'or  
96 her' immediately following the word 'his';

97 On page 1, in the title, by striking out the words 'DE-  
98 PARTMENT OF LABOR' and inserting in lieu thereof the  
99 words 'DIVISION OF LABOR';

100 On page 1, subsection 2.3, by striking out the word  
101 'Department' and inserting in lieu thereof the word 'Divi-  
102 sion' in each of the two occurrences;

103 On page 4, subsection 3.1(m), by striking out the  
104 words 'No person, for himself or another, shall not request'  
105 and inserting in lieu thereof the words 'No person, whether  
106 personally or for another, shall request';

107 On page 4, subsection 5.1, by striking out the word  
108 'Department' and inserting in lieu thereof the word 'Divi-  
109 sion' in each of the two occurrences;

110 On page 6, subsection 8.3, by striking out the words  
111 'for himself or another' and inserting in lieu thereof the  
112 words 'whether personally or for another';

113 And,

114 On page 7, subsection 12.1(b)(1), by inserting the  
115 words 'or she' immediately following the word 'he' in each  
116 of the two occurrences."

117 (h) The legislative rule relating to the division of  
118 labor (minimum wages and maximum hours standards  
119 regulations, 42 CSR 8), effective the thirty-first day of  
120 December, one thousand nine hundred eighty-two, is  
121 reauthorized with the following amendments:

122 "Beginning on page 1, subsection 2.3, and continuing  
123 throughout the text of the rule, by inserting the words 'or  
124 her' immediately following the word 'his';

125 Beginning on page 3, subsection 5.1, and continuing  
126 throughout the text of the rule, by inserting the words 'or  
127 her' immediately following the word 'him';

128 Beginning on page 3, subsection 6.1, and continuing  
129 throughout the text of the rule, by inserting the words 'or  
130 she' immediately following the word 'he';

131 On page 1, in the title, by striking out the words 'DE-  
132 PARTMENT OF LABOR' and inserting in lieu thereof the  
133 words 'DIVISION OF LABOR';

134 On page 1, subsection 2.3, by striking out the word  
135 'Department' and inserting in lieu thereof the word 'Divi-  
136 sion';

137 On page 1, subsection 2.5, by striking out the word  
138 'Department' and inserting in lieu thereof the word 'Divi-  
139 sion' in each of the two occurrences;

140 On page 1, subsection 2.6, by striking out the word  
141 'Division' and inserting in lieu thereof the word 'Section' in  
142 each of the two occurrences;

143 On page 2, subsection 3.3, in the subsection heading,  
144 by striking out the word 'department' and inserting in lieu  
145 thereof the word 'division';

146 On page 2, subsection 3.3, by striking out the words  
147 'The Wage and Hour Division of the West Virginia Depart-  
148 ment of Labor' and inserting in lieu thereof the words 'The  
149 Wage and Hour Section of the West Virginia Division of  
150 Labor';

151 On page 3, subsection 4.4, by striking out the word  
152 'Division' and inserting in lieu thereof the word 'Section';

153 On page 4, subsection 7.2, by striking out the word  
154 'Department' and inserting in lieu thereof the word 'Divi-  
155 sion';

156 On page 7, subsection 8.17, by striking out the word  
157 'Salesmen' and inserting in lieu thereof the word 'Salesper-  
158 sons', by striking out the word 'salesman' and inserting in  
159 lieu thereof the word 'salesperson', and by striking out the  
160 word 'partsman' and inserting in lieu thereof the word  
161 'partsperson'."

162 (i) The legislative rule relating to the division of labor  
163 (child labor, 42 CSR 9), effective the fourteenth day of  
164 April, one thousand nine hundred seventy-five, is  
165 reauthorized with the following amendments:

166 "Beginning on page 1, in the title, and continuing  
167 throughout the text of the rule, by striking out the words  
168 'DEPARTMENT OF LABOR' and inserting in lieu thereof  
169 the words 'DIVISION OF LABOR';

170 Beginning on page 7, subsection 8.2(c)(2), and con-  
171 tinuing throughout the text of the rule, by inserting the  
172 words 'or her' immediately following the word 'his';

173 Beginning on page 14, subsection 9.1, and continuing  
174 throughout the text of the rule, by inserting the words 'or  
175 she' immediately following the word 'he';

176 On page 8, subsection 8.4(b)(10), by inserting the  
177 words 'or herself' immediately following the word 'him-  
178 self';

179 And,

180 On page 15, subsection 10.1(a)(1), by inserting the  
181 words 'or her' immediately following the word 'him'."

182 (j) The legislative rule relating to the division of labor  
183 (bedding and upholstered furniture, 42 CSR 12), effective  
184 the thirty-first day of December, one thousand nine hun-  
185 dred eighty-two, is reauthorized with the following amend-  
186 ments:

187 "Beginning on page 1, in the title, and continuing  
188 throughout the text of the rule, by striking out the word  
189 'DEPARTMENT' and inserting in lieu thereof the word  
190 'DIVISION';

191 On page 1, subsection 2.3, by striking out the words  
192 'Division refers to the Division of weights, measures and  
193 bedding' and by inserting in lieu thereof the words 'Sec-  
194 tion refers to the weights, measures and bedding section';

195 On page 2, subsection 3.1, by striking out the words 'a  
196 division entitled "The Division of Weights, Measures and  
197 Bedding" ' and by inserting in lieu thereof the words



198 'section entitled "The Weights, Measures and Bedding  
199 Section'";

200 And,

201 On page 2, subsection 3.1, in the third sentence, by  
202 striking out the word 'Division' and inserting the word  
203 'Section'."

204 (k) The legislative rule relating to the division of  
205 labor (safety glazing act, 42 CSR 13), effective the sixth  
206 day of August, one thousand nine hundred seventy-one, is  
207 reauthorized with the following amendment:

208 "Beginning on page 1, in the title, and continuing  
209 throughout the text of the rule, by striking out the words  
210 'DEPARTMENT OF LABOR' and inserting in lieu thereof  
211 the words 'DIVISION OF LABOR'."

212 (l) The legislative rule relating to the division of labor  
213 (building construction, highway construction and heavy  
214 construction, 42 CSR 14), effective the sixth day of Janu-  
215 ary, one thousand nine hundred ninety-four, is  
216 reauthorized with the following amendment:

217 "Beginning on page 1, in the title, and continuing  
218 throughout the text of the rule, by striking out the words  
219 'DEPARTMENT OF LABOR' and inserting in lieu thereof  
220 the words 'DIVISION OF LABOR'."

221 (m) The legislative rule relating to the division of  
222 labor (West Virginia occupational safety and health act -  
223 adoption of federal standards, 42 CSR 15), effective the  
224 first day of April, one thousand nine hundred  
225 eighty-eight, is reauthorized with the following amend-  
226 ment:

227 "Beginning on page 1, in the title, and continuing  
228 throughout the text of the rule, by striking out the words  
229 'DEPARTMENT OF LABOR' and inserting in lieu thereof  
230 the words 'DIVISION OF LABOR'."

231 (n) The legislative rule relating to the division of  
232 labor (standards for weights and measures inspectors -  
233 adoption of NBS handbook 130, 1987, 42 CSR 16), effec-  
234 tive the first day of April, one thousand nine hundred

235 eighty-eight, is reauthorized with the following amend-  
236 ment:

237 "On page 1, in the title, by striking out the words 'DE-  
238 PARTMENT OF LABOR' and inserting in lieu thereof the  
239 words 'DIVISION OF LABOR'."

240 (o) The legislative rule relating to the division of  
241 labor (amusement rides and amusement attractions safety  
242 act, 42 CSR 17), effective the fifteenth day of June, one  
243 thousand nine hundred eighty-nine, is reauthorized with  
244 the following amendments:

245 "Beginning on page 1, subsection 2.6, and continuing  
246 throughout the text of the rule, by inserting the words 'or  
247 her' immediately following the word 'his';

248 Beginning on page 2, and continuing throughout the  
249 text of the rule, by striking out the word 'department' and  
250 inserting in lieu thereof the word 'division';

251 On page 1, in the title, by striking out the words 'DE-  
252 PARTMENT OF LABOR' and inserting in lieu thereof the  
253 words 'DIVISION OF LABOR';

254 On page 1, SUBSECTION 2.6, by striking out the  
255 words 'Department of Labor' and inserting in lieu thereof  
256 the words 'Division of Labor';

257 And,

258 On page 1, subsection 2.7, by striking out the words  
259 'Department. The West Virginia Department of Labor to  
260 include all its divisions and personnel.' and inserting in  
261 lieu thereof the words 'Division. The West Virginia Divi-  
262 sion of Labor to include all its sections and personnel.'."

#### **§64-11-4. Water development authority.**

1 (a) The legislative rule relating to the water develop-  
2 ment authority (requirements governing disbursement of  
3 loans and grants to governmental agencies for the design,  
4 acquisition or construction of water development projects,  
5 44 CSR 1), effective the first day of June, one thousand  
6 nine hundred eighty-seven, is reauthorized with the fol-  
7 lowing amendments:

8 "Beginning on page 1, section 2, and continuing  
9 throughout the text of the rule, by striking out the words  
10 'article five-c, chapter twenty of the Code of West Virginia'  
11 and inserting in lieu thereof the words 'W. Va. Code Chap-  
12 ter 22C, Article 1';

13 Beginning on page 1, subsection 2.1.1, and continuing  
14 throughout the text of the rule, by striking out the words  
15 'Department of Natural Resources' and inserting in lieu  
16 thereof the words 'Division of Environmental Protection';

17 Beginning on page 1, subsection 2.1.1, and continuing  
18 throughout the text of the rule, by striking out the words  
19 'State Water Resources Board' and inserting in lieu thereof  
20 the words 'State Environmental Quality Board';

21 Beginning on page 13, subsection 8.1, and continuing  
22 throughout the text of the rule, by striking out the words  
23 'Division of Water Resources' and inserting in lieu thereof  
24 the words 'Office of Water Resources';

25 On page 1, subsection 1.2, by striking out the code  
26 reference '§20-5C-6' and inserting in lieu thereof the code  
27 reference '§22C-1-6(1)';

28 And,

29 On page 16, subsection 9.4.3(a), by striking out the  
30 words 'Water Resources Board for the State of West Vir-  
31 ginia' and inserting in lieu thereof the words 'State Envi-  
32 ronmental Quality Board'."

33 (b) The legislative rule relating to the water develop-  
34 ment authority (requirements governing disbursement of  
35 loans and grants to governmental agencies for the acquisi-  
36 tion or construction of water development projects (water  
37 facilities), 44 CSR 2), effective the first day of July, one  
38 thousand nine hundred eighty-five, is reauthorized with  
39 the following amendments:

40 "Beginning on page 1, section 2, and continuing  
41 throughout the text of the rule, by striking out the words  
42 'article five-c, chapter twenty of the Code of West Virginia'  
43 and inserting in lieu thereof the words 'W. Va. Code Chap-  
44 ter 22C, Article 1';

45 On page 1, subsection 1.2, by striking out the code  
46 reference '§20-5C-6' and inserting in lieu thereof the code  
47 reference '§22C-1-6(1)';

48 And,

49 On page 3, subsection 3.5.2(i), by striking out the  
50 words 'Department of Health' and inserting in lieu thereof  
51 the words 'Bureau of Public Health'."

52 (c) The legislative rule relating to the water develop-  
53 ment authority (rule confirming existing practices and  
54 establishing additional, new procedures in relation to pro-  
55 viding public notice of date, time, place and purpose of  
56 meetings of West Virginia water development board, 44  
57 CSR 3), effective the seventh day of July, one thousand  
58 nine hundred eighty-nine, is reauthorized with the follow-  
59 ing amendment:

60 "On page 1, subsection 1.2, by striking out the code  
61 reference '§20-5C-6(1)' and inserting in lieu thereof the  
62 code reference '§22C-1-6(1).' "

#### **§64-11-5. Environmental quality board.**

1 The legislative rule relating to the environmental qual-  
2 ity board (requirements governing groundwater standards,  
3 46 CSR 12), effective the twenty-fifth day of August, one  
4 thousand nine hundred ninety-three, is reauthorized with  
5 the following amendments:

6 "On page 1, in the title of the rule, by striking out the  
7 words 'Water Resources Board' and inserting in lieu there-  
8 of the words 'Bureau of the Environment' on one line and  
9 on the next line the words 'Environmental Quality Board';

10 On page 1, subsection 1.2, by striking out the code  
11 references '§§20-5M-4 and 20-5-5' and inserting in lieu  
12 thereof the code references '§22-12-4 and §22B-3-4';

13 On page 1, subsection 2.2, by striking out the words  
14 'State Water Resources Board' and inserting in lieu thereof  
15 the words 'Environmental Quality Board';

16 On page 2, subsection 3.4(a), by striking out the code  
17 reference '§22B' and inserting in lieu thereof the words  
18 'Chapter 22, Articles 6, 7, 8, 9 or 10';

19 On page 2, subsection 3.4(c), by striking out the code  
20 reference '§20-5M-5(1)' and inserting in lieu thereof the  
21 code reference '§22-12-5(1)';

22 And,

23 On page 2, subsection 3.4(d), by striking out the  
24 words 'W. Va. Code §Chapter 22A, Article 3 or Chapter  
25 20, Article 5A' and inserting in lieu thereof the words 'W.  
26 Va. Code §22-3-2 et seq. or §22-11-2 et seq.' "

#### §64-11-6. Solid waste management board.

1 (a) The legislative rule relating to the solid waste man-  
2 agement board (disbursement of loans and grants to gov-  
3 ernmental agencies for the acquisition or construction of  
4 solid waste disposal projects, 54 CSR 1), effective the sev-  
5 enth day of June, one thousand nine hundred ninety-one,  
6 is reauthorized with the following amendments:

7 "On page 1, subsection 1.2, by striking out the code  
8 reference '§16-26-1 et seq.' and inserting in lieu thereof  
9 the code reference '§22C-3-1 et seq.';

10 On page 1, subsection 2.1.1, by striking out the code  
11 reference '§16-26-1 et seq.' and inserting in lieu thereof  
12 the code reference '§22C-3-1 et seq.';

13 On page 1, subsection 2.1.3, by striking out the code  
14 reference '§16-26-4' and inserting in lieu thereof the code  
15 reference '§22C-3-4';

16 And,

17 On page 4, subsection 3.5.2, by striking out the words  
18 'Department of Commerce, Labor and Environmental  
19 Resources' and inserting in lieu thereof the words 'Bureau  
20 of Environment'."

21 (b) The legislative rule relating to the solid waste man-  
22 agement board (the establishment of fee schedule and cost  
23 allocations applicable to the issuance of bonds by the West  
24 Virginia solid waste management board, 54 CSR 2), effec-  
25 tive the seventeenth day of June, one thousand nine hun-  
26 dred ninety-one, is reauthorized with the following  
27 amendments:

28 "On page 1, subsection 1.2, by striking out the code  
29 reference '§16-26-1 et seq.' and inserting in lieu thereof  
30 the code references '§22C-3-1 et seq.';

31 On page 1, subsection 2.1.1, by striking out the code  
32 reference '§16-26-1 et seq.' and inserting in lieu thereof  
33 the code references '§22C-3-1 et seq.';

34 And,

35 On page 1, subsection 2.1.3, by striking out the code  
36 reference '§16-26-4' and inserting in lieu thereof the code  
37 reference '§22C-3-4'."

38 (c) The legislative rule relating to the solid waste man-  
39 agement board (the development of commercial solid  
40 waste facility siting plans, 54 CSR 4), effective the seven-  
41 teenth day of June, one thousand nine hundred  
42 ninety-one, is reauthorized with the following amend-  
43 ments:

44 "On page 1, subsection 1.1, by striking out the code  
45 reference '§20-9-12a' and inserting in lieu thereof the  
46 code reference '§22C-4-24';

47 On page 1, subsection 1.4, by striking out the code  
48 reference '§16-26-6' and inserting in lieu thereof the code  
49 reference '§22C-3-6' and by striking out the code refer-  
50 ence '§20-9-12a' and inserting in lieu thereof the code  
51 reference '§22C-4-24';

52 On page 1, subsection 2.1, by striking out the code  
53 reference '§20-5F-1 et seq.' and inserting in lieu thereof  
54 the code reference '§22-15-1 et seq.';

55 On page 1, subsection 2.2, by striking out the code  
56 reference '§20-9-3' and inserting in lieu thereof the code  
57 reference '§22C-4-3', by striking out the code reference  
58 '§20-9-4' and inserting in lieu thereof the code reference  
59 '§22C-4-4', and by striking out the code reference  
60 '§20-9-5a' and inserting in lieu thereof the code reference  
61 '§22C-4-6';

62 On page 1, subsection 2.3, by striking out the code  
63 reference '§16-26-4' and inserting in lieu thereof the code  
64 reference '§22C-3-4';

65 On page 1, subsection 2.4, by striking out the code  
66 reference '§20-9' and inserting in lieu thereof the code  
67 reference '§22C-4';

68 On page 2, subsection 2.17, by striking out the code  
69 reference '§20-9-12a' and inserting in lieu thereof the  
70 code reference '§22C-4-24';

71 On page 3, subsection 2.21, by striking out the code  
72 reference '§20-5A' and inserting in lieu thereof the code  
73 reference '§22-11', by striking out the code reference  
74 '§20-SE' and inserting in lieu thereof the code reference  
75 '§22-18', and by striking out the words 'Chapter 22B' and  
76 inserting in lieu thereof the words 'Chapter 22C';

77 And,

78 On page 4, subsection 5.1.2, by striking out the code  
79 reference '§20-9-7' and inserting in lieu thereof the code  
80 reference '§22C-4-8'."

#### §64-11-7. Division of natural resources.

1 (a) The legislative rule relating to the division of natu-  
2 ral resources (West Virginia wildlife management areas, 58  
3 CSR 6), effective the ninth day of May, one thousand nine  
4 hundred ninety-five, is reauthorized with the following  
5 amendments:

6 "Beginning on page 1, in the title, and continuing  
7 throughout the text of the rule, by striking out the series  
8 number '6' and inserting in lieu thereof the series number  
9 '43';

10 On page 1, subsection 2.7, by striking out the refer-  
11 ence '47 C.S.R. 11A' and inserting in lieu thereof the ref-  
12 erence '58 CSR 46';

13 And,

14 On page 2, subsection 3.7, by striking out the refer-  
15 ence '47 C.S.R. 11, 12 and 20' and inserting in lieu thereof  
16 the reference '58 CSR 45, 55 and 60'."

17 (b) The legislative rule relating to the division of  
18 natural resources (cooperation with federal government in  
19 management of federal lands within the state, 58 CSR 7),

20 effective the third day of October, one thousand nine  
21 hundred eighty-three, is reauthorized with the following  
22 amendments:

23 "Beginning on page 1, in the title, and continuing  
24 throughout the text of the rule, by striking out the series  
25 number '7' and inserting in lieu thereof the series number  
26 '44';

27 And,

28 On page 1, in the title, by striking out the words 'DE-  
29 PARTMENT OF NATURAL RESOURCES' and inserting  
30 in lieu thereof the words 'DIVISION OF NATURAL RE-  
31 SOURCES'."

32 (c) The legislative rule relating to the division of natu-  
33 ral resources (rules and regulations governing shoreline  
34 camping on government owned reservoir areas in West  
35 Virginia, 58 CSR 8), effective the first day of January, one  
36 thousand nine hundred eighty-three, is reauthorized with  
37 the following amendments:

38 "Beginning on page 1, in the title, and continuing  
39 throughout the text of the rule, by striking out the words  
40 'DEPARTMENT OF NATURAL RESOURCES' and insert-  
41 ing in lieu thereof the words 'DIVISION OF NATURAL  
42 RESOURCES';

43 And,

44 Beginning on page 1, in the title, and continuing  
45 throughout the text of the rule, by striking out the series  
46 number '8' and inserting in lieu thereof the series number  
47 '30'."

48 (d) The legislative rule relating to the division of  
49 natural resources (regulations defining the terms to be  
50 used concerning all hunting and trapping regulations, 58  
51 CSR 11A), effective the first day of July, one thousand  
52 nine hundred ninety-three, is reauthorized with the follow-  
53 ing amendment:

54 "Beginning on page 1, in the title, and continuing  
55 throughout the text of the rule, by striking out the series  
56 number '11A' and inserting in lieu thereof the series num-  
57 ber '46'."



58 (e) The legislative rule relating to the division of natu-  
59 ral resources (special bear hunting rule, 58 CSR 11C),  
60 effective the ninth day of May, one thousand nine hun-  
61 dred ninety-five, is reauthorized with the following  
62 amendments:

63 "Beginning on page 1, in the title, and continuing  
64 throughout the text of the rule, by striking out the series  
65 number '11C' and inserting in lieu thereof the series num-  
66 ber '48';

67 On page 1, subsection 2.1, by striking out the refer-  
68 ence '58 C.S.R. 11A' and inserting in lieu thereof the refer-  
69 ence '58 CSR 46';

70 And,

71 On page 1, subsection 3.2, by striking out the refer-  
72 ence '58 C.S.R. 11' and inserting in lieu thereof the refer-  
73 ence '58 CSR 45'."

74 (f) The legislative rule relating to the division of natu-  
75 ral resources (general hunting regulations, 58 CSR 11D),  
76 effective the first day of July, one thousand nine hundred  
77 ninety-three, is reauthorized with the following amend-  
78 ments:

79 "Beginning on page 1, in the title, and continuing  
80 throughout the text of the rule, by striking out the series  
81 number '11D' and inserting in lieu thereof the series num-  
82 ber '49';

83 And,

84 On page 1, subsection 2.1, by striking out the refer-  
85 ence '58 C.S.R. 11A' and inserting in lieu thereof the refer-  
86 ence '58 CSR 46'."

87 (g) The legislative rule relating to the division of  
88 natural resources (deer hunting regulations, 58 CSR 11E),  
89 effective the first day of July, one thousand nine hundred  
90 ninety-three, is reauthorized with the following amend-  
91 ments:

92 "Beginning on page 1, in the title, and continuing  
93 throughout the text of the rule, by striking out the series  
94 number '11E' and inserting in lieu thereof the series num-  
95 ber '50';

96 On page 1, subsection 2.1, by striking out the refer-  
97 ence '47 C.S.R. 11A' and inserting in lieu thereof the refer-  
98 ence '58 CSR 46';

99 On page 1, subsection 3.1, by striking out the refer-  
100 ence '47 C.S.R. 11' and inserting in lieu thereof the refer-  
101 ence '58 CSR 45' in each of the two occurrences;

102 And,

103 On page 1, subsection 3.6, by striking out the refer-  
104 ence '47 C.S.R. 11' and inserting in lieu thereof the refer-  
105 ence '58 CSR 45'."

106 (h) The legislative rule relating to the division of  
107 natural resources (wild turkey regulations, 58 CSR 11F),  
108 effective the first day of July, one thousand nine hundred  
109 ninety-three, is reauthorized with the following amend-  
110 ments:

111 "Beginning on page 1, in the title, and continuing  
112 throughout the text of the rule, by striking out the series  
113 number '11F' and inserting in lieu thereof the series num-  
114 ber '51';

115 And,

116 On page 1, subsection 2.1, by striking out the refer-  
117 ence '47 C.S.R. 11A' and inserting in lieu thereof the refer-  
118 ence '58 CSR 46'."

119 (i) The legislative rule relating to the division of natu-  
120 ral resources (wild boar hunting regulations, 58 CSR 11G),  
121 effective the ninth day of May, one thousand nine hun-  
122 dred ninety-five, is reauthorized with the following  
123 amendments:

124 "Beginning on page 1, in the title, and continuing  
125 throughout the text of the rule, by striking out the series  
126 number '11G' and inserting in lieu thereof the series num-  
127 ber '52';

128 And,

129 On page 1, subsection 2.1, by striking out the refer-  
130 ence '58 C.S.R. 11A' and inserting in lieu thereof the refer-  
131 ence '58 CSR 46'."

132 (j) The legislative rule relating to the division of natu-  
133 ral resources (general trapping regulations, 58 CSR 11H),  
134 effective the first day of July, one thousand nine hundred  
135 ninety-three, is reauthorized with the following amend-  
136 ments:

137 "Beginning on page 1, in the title, and continuing  
138 throughout the text of the rule, by striking out the series  
139 number '11H' and inserting in lieu thereof the series num-  
140 ber '53';

141 On page 1, subsection 2.1, by striking out the refer-  
142 ence '47 C.S.R. 11A' and inserting in lieu thereof the refer-  
143 ence '58 CSR 46';

144 And,

145 On page 2, subsection 3.17, by striking out the refer-  
146 ence '47 C.S.R. 11' and inserting in lieu thereof the refer-  
147 ence '58 CSR 45'."

148 (k) The legislative rule relating to the division of  
149 natural resources (dog training regulations, 58 CSR 11I),  
150 effective the first day of July, one thousand nine hundred  
151 ninety-three, is reauthorized with the following amend-  
152 ments:

153 "Beginning on page 1, in the title, and continuing  
154 throughout the text of the rule, by striking out the series  
155 number '11I' and inserting in lieu thereof the series num-  
156 ber '54';

157 And,

158 On page 1, subsection 2.1, by striking out the refer-  
159 ence '47 C.S.R. 11A' and inserting in lieu thereof the refer-  
160 ence '58 CSR 46'."

161 (l) The legislative rule relating to the division of natu-  
162 ral resources (special migratory bird hunting regulations,  
163 58 CSR 12A), effective the first day of July, one thousand  
164 nine hundred ninety-three, is reauthorized with the follow-  
165 ing amendments:

166 "Beginning on page 1, in the title, and continuing  
167 throughout the text of the rule, by striking out the series  
168 number '12A' and inserting in lieu thereof the series num-  
169 ber '56';

170 And,

171 On page 1, subsection 2.6, by striking out the refer-  
172 ence '47 C.S.R. 12' and inserting in lieu thereof the refer-  
173 ence '58 CSR 55'."

174 (m) The legislative rule relating to the division of  
175 natural resources (transporting and selling wildlife pelts,  
176 58 CSR 16), effective the first day of May, one thousand  
177 nine hundred ninety, is reauthorized with the following  
178 amendments:

179 "Beginning on page 1, in the title, and continuing  
180 throughout the text of the rule, by striking out the word  
181 'Department' and inserting in lieu thereof the word 'Divi-  
182 sion';

183 Beginning on page 1, subsection 2.8, and continuing  
184 throughout the text of the rule, by striking out the words  
185 'Series 16A' and inserting in lieu thereof the words 'Series  
186 17';

187 Beginning on page 2, subsection 4.2, and continuing  
188 throughout the text of the rule, immediately following the  
189 word 'his', by inserting the words 'or her';

190 On page 1, subsection 2.8, by striking out the words  
191 'Title 47' and inserting in lieu thereof the words 'Title 58';

192 And,

193 On page 1, subsection 2.8, by striking out the refer-  
194 ence '47 CSR 16A' and inserting in lieu thereof the refer-  
195 ence '58 CSR 17'."

196 (n) The legislative rule relating to the division of  
197 natural resources (special fishing rule, 58 CSR 21), effec-  
198 tive the ninth day of May, one thousand nine hundred  
199 ninety-five, is reauthorized with the following amend-  
200 ments:

201 "Beginning on page 1, in the title, and continuing  
202 throughout the text of the rule, by striking out the series  
203 number '21' and inserting in lieu thereof the series number  
204 '61';

205 And,

206       On page 1, subsection 1.5, by striking out the refer-  
207       ence '58 C.S.R. 20' and inserting in lieu thereof the refer-  
208       ence '58 CSR 60'."

209       (o) The legislative rule relating to the division of  
210       natural resources (catching and selling bait fish, 58 CSR  
211       22), effective the first day of June, one thousand nine  
212       hundred eighty-nine, is reauthorized with the following  
213       amendments:

214       "Beginning on page 1, in the title, and continuing  
215       throughout the text of the rule, by striking out the series  
216       number '22' and inserting in lieu thereof the series number  
217       '62';

218       And,

219       On page 2, subsection 8.1, by striking out the refer-  
220       ence '47 C.S.R. 20' and inserting in lieu thereof the refer-  
221       ence '58 CSR 60'."

222       (p) The legislative rule relating to the division of  
223       natural resources (point system for the revocation of hunt-  
224       ing and fishing licenses, 58 CSR 24), effective the first day  
225       of January, one thousand nine hundred eighty-three, is  
226       reauthorized with the following amendments:

227       "Beginning on page 1, in the title, and continuing  
228       throughout the text of the rule, by striking out the word  
229       'Department' and inserting in lieu thereof the word 'Divi-  
230       sion';

231       On page 1, subsection 6.1, immediately preceding the  
232       word 'Department' by striking out the word 'the';

233       And,

234       On page 1, subsection 6.3, immediately following the  
235       word 'his', by inserting the words 'or her'."

236       (q) The legislative rule relating to the division of  
237       natural resources (special motorboating regulations, 58  
238       CSR 25C), effective the tenth day of May, one thousand  
239       nine hundred ninety-two, is reauthorized with the follow-  
240       ing amendment:

241 "Beginning on page 1, in the title, and continuing  
242 throughout the text of the rule, by striking out the series  
243 number '25C' and inserting in lieu thereof the series num-  
244 ber '27'."

245 (r) The legislative rule relating to the division of natu-  
246 ral resources (special requirements concerning boating, 58  
247 CSR 25D), effective the first day of October, one thousand  
248 nine hundred ninety-three, is reauthorized with the follow-  
249 ing amendments:

250 "Beginning on page 1, in the title, and continuing  
251 throughout the text of the rule, by striking out the series  
252 number '25D' and inserting in lieu thereof the series num-  
253 ber '28';

254 And,

255 On page 1, subsection 2.1, by striking out the refer-  
256 ence '47 CSR 25' and inserting in lieu thereof the refer-  
257 ence '58 CSR 25'."

258 (s) The legislative rule relating to the division of natu-  
259 ral resources (commercial whitewater outfitters, 58 CSR  
260 27), effective the seventh day of April, one thousand nine  
261 hundred ninety-four, is reauthorized with the following  
262 amendments:

263 "Beginning on page 1, in the title, and continuing  
264 throughout the text of the rule, by striking out the series  
265 number '27' and inserting in lieu thereof the series number  
266 '12';

267 Beginning on page 2, subsection 4.3, and continuing  
268 throughout the text of the rule, by inserting the words 'or  
269 her' immediately following the word 'him';

270 And,

271 Beginning on page 4, subsection 7.2, and continuing  
272 throughout the text of the rule, by inserting the words 'or  
273 her' immediately following the word 'his'."

274 (t) The legislative rule relating to the division of natu-  
275 ral resources (recycling assistance fund grant program, 58  
276 CSR 43), effective the thirtieth day of June, one thousand

277 nine hundred ninety-three, is reauthorized with the follow-  
278 ing amendment:

279 "Beginning on page 1, in the title, and continuing  
280 throughout the text of the rule, by striking out the series  
281 number '43' and inserting in lieu thereof the series number  
282 '5'."

283 (u) The legislative rule relating to the division of  
284 natural resources (conservation officers - supplemental  
285 pay in lieu of overtime, 58 CSR 45), effective the first day  
286 of January, one thousand nine hundred eighty-three, is  
287 reauthorized with the following amendments:

288 "Beginning on page 1, in the title, and continuing  
289 throughout the text of the rule, by striking out the words  
290 'DEPARTMENT OF NATURAL RESOURCES' and insert-  
291 ing in lieu thereof the words 'DIVISION OF NATURAL  
292 RESOURCES';

293 And,

294 Beginning on page 1, in the title, and continuing  
295 throughout the text of the rule, by striking out the series  
296 number '45' and inserting in lieu thereof the series number  
297 '13'."

298 (v) The legislative rule relating to the division of natu-  
299 ral resources (regulations for handling and firing of fire-  
300 arms, 58 CSR 46), effective the first day of January, one  
301 thousand nine hundred eighty-three, is reauthorized with  
302 the following amendments:

303 "Beginning on page 1, in the title, and continuing  
304 throughout the text of the rule, by striking out the words  
305 'DEPARTMENT OF NATURAL RESOURCES' and insert-  
306 ing in lieu thereof the words 'DIVISION OF NATURAL  
307 RESOURCES';

308 Beginning on page 1, in the title, and continuing  
309 throughout the text of the rule, by striking out the series  
310 number '46' and inserting in lieu thereof the series number  
311 '14';

312 And,

313 On page 1, subsection 1.2, by striking out the code  
314 reference '61-7-2(e)' and inserting in lieu thereof the code  
315 reference '61-7-4(a)(8)'."

316 (w) The legislative rule relating to the division of  
317 natural resources (revocation of hunting and fishing li-  
318 censes, 58 CSR 49), effective the first day of August, one  
319 thousand nine hundred ninety-three, is reauthorized with  
320 the following amendments:

321 "Beginning on page 1, in the title, and continuing  
322 throughout the text of the rule, by striking out the series  
323 number '49' and inserting in lieu thereof the series number  
324 '23';

325 And,

326 Beginning on page 2, subsection 3.3, and continuing  
327 throughout the text of the rule, by inserting the words 'or  
328 her' immediately following the word 'his'."

329 (x) The legislative rule relating to the division of  
330 natural resources (hunting or fishing outfitters and guides,  
331 58 CSR 50), effective the first day of April, one thousand  
332 nine hundred eighty-eight, is reauthorized with the follow-  
333 ing amendments:

334 "Beginning on page 1, in the title, and continuing  
335 throughout the text of the rule, by striking out the words  
336 'DEPARTMENT OF NATURAL RESOURCES' and insert-  
337 ing in lieu thereof the words 'DIVISION OF NATURAL  
338 RESOURCES';

339 Beginning on page 1, in the title, and continuing  
340 throughout the text of the rule, by striking out the series  
341 number '50' and inserting in lieu thereof the series number  
342 '11';

343 Beginning on page 1, subsection 2.1, and continuing  
344 throughout the text of the rule, by inserting the words 'or  
345 her' immediately following the word 'his';

346 And,

347 On page 1, subsection 3.5, by striking out the word  
348 'Department's' and inserting in lieu thereof the word 'Divi-  
349 sion's'."



**§64-11-8. Agriculture.**

1 (a) The legislative rule relating to the West Virginia  
2 department of agriculture (primary and secondary con-  
3 tainment of fertilizers, 61 CSR 6B), effective the first day  
4 of July, one thousand nine hundred ninety-three, is  
5 reauthorized with the following amendments:

6 "On page 1, subsection 1.2, by striking out the code  
7 reference '§20-5M-5-c' and inserting in lieu thereof the  
8 code reference '§22-12-5(c)';

9 On page 3, subsection 4.1.8, by striking out the code  
10 reference '§20-5M-10' and inserting in lieu thereof the  
11 code reference '§22-12-10';

12 On page 12, subsection 13.1, by striking out the code  
13 references '§§20-5M-10 and 20-5M-11' and inserting in  
14 lieu thereof the code references '§22-12-10 and  
15 §22-12-11';

16 On page 12, subsection 14.1, by striking out the code  
17 reference '§20-5M-10a' and inserting in lieu thereof the  
18 code reference '§22-12-10a';

19 On page 12, subsection 14.1, by striking out the code  
20 reference '§20-5M-10c' and inserting in lieu thereof the  
21 code reference '§22-12-10c';

22 And,

23 On page 12, subsection 14.1, by striking out the code  
24 reference '§20-5M-1 et seq.' and inserting in lieu thereof  
25 the code reference '§22-12-1 et seq.' "

26 (b) The legislative rule relating to the West Virginia  
27 department of agriculture (general groundwater protection  
28 rules for fertilizer and manures, 61 CSR 6C), effective the  
29 first day of July, one thousand nine hundred ninety-three,  
30 is reauthorized with the following amendments:

31 "On page 1, subsection 1.2, by striking out the code  
32 reference '§20-5M-5-c' and inserting in lieu thereof the  
33 code reference '§22-12-5(c)';

34 On page 3, subsection 5.1.8, by striking out the code  
35 reference 'WV Code 20-5M-1 et seq.' and inserting in lieu  
36 thereof the code reference 'W. Va. Code §22-12-1 et seq.';

37 On page 3, subsection 5.1.12, by striking out the code  
38 reference '§20-5M-10' and inserting in lieu thereof the  
39 code reference '§22-12-10';

40 On page 4, subsection 7.1, by striking out the code  
41 reference '§20-5M et seq.' and inserting in lieu thereof the  
42 code reference '§22-12 et seq.';

43 On page 4, subsection 7.1, by striking out the code  
44 reference '§20-5M-10' and inserting in lieu thereof the  
45 code reference '§22-12-10';

46 On page 4, subsection 8.1, by striking out the code  
47 references '§§20-5M-10 and 20-5M-11' and inserting in  
48 lieu thereof the code reference '§22-12-10 and  
49 §22-12-11';

50 And,

51 On page 4, subsection 8.2, by striking out the code  
52 reference '§20-5M et seq.' and inserting in lieu thereof the  
53 code reference '§22-12 et seq.' "

54 (c) The legislative rule relating to the West Virginia  
55 department of agriculture (general groundwater protection  
56 rules for pesticides, 61 CSR 12G), effective the first day of  
57 July, one thousand nine hundred ninety-three, is  
58 reauthorized with the following amendments:

59 "Beginning on page 3, subsection 5.1.14, and continu-  
60 ing throughout the text of the rule, by striking out the  
61 code reference '§20-5M-10' and inserting in lieu thereof  
62 the code reference '§22-12-10';

63 On page 1, subsection 1.2, by striking out the code  
64 references '§§19-16A-4-6(N) and 20-5M-5-c' and insert-  
65 ing in lieu thereof the code references '§19-16A-4(6)(N)  
66 and §22-12-5(c)';

67 And,

68 On page 3, subsection 5.1.9, by striking out the code  
69 reference '§20-5M-1 et seq.' and inserting in lieu thereof  
70 the code reference '§22-12-1 et seq.' "

71 (d) The legislative rule relating to the West Virginia  
72 department of agriculture (non-bulk pesticide rules for  
73 permanent operational areas, 61 CSR 12I), effective the

74 first day of July, one thousand nine hundred ninety-three,  
75 is reauthorized with the following amendment:

76 "On page 3, subsection 5.1, by striking out the code  
77 reference '§20-5M-1 et seq.' and inserting in lieu thereof  
78 the code reference '§22-12-1 et seq.' "

79 (e) The legislative rule relating to the West Virginia  
80 department of agriculture (generic state management plan  
81 for pesticides and fertilizers in groundwater, 61 CSR 22),  
82 effective the first day of November, one thousand nine  
83 hundred ninety-two, is reauthorized with the following  
84 amendments:

85 "Beginning on page 2, subsection 4.1.a, and continu-  
86 ing throughout the text of the rule, by striking out the  
87 words 'Division of Natural Resources' and inserting in lieu  
88 thereof the words 'Department of Environmental Protec-  
89 tion';

90 On page 1, subsection 1.2, by striking out the code  
91 references '§§19-16A-4 and 20-5M-5' and inserting in  
92 lieu thereof the code references '§19-16A-4 and  
93 §22-12-5';

94 On page 2, subsection 4.1.a, by striking out the code  
95 reference '§20-5M-1 et seq.' and inserting in lieu thereof  
96 the code reference '§22-12-1 et seq.';

97 On page 2, subsection 4.3.a, by striking out the words  
98 'Water Resources Section' and inserting in lieu thereof the  
99 words 'Office of Water Resources';

100 On page 3, subsection 4.6, by striking out the words  
101 'State Department of Natural Resources' and inserting in  
102 lieu thereof the words 'State Department of Environmental  
103 Protection';

104 On page 4, subsection 5.1.b.A., by striking out the  
105 code reference '§20-5M-1 et seq.' and inserting in lieu  
106 thereof the code reference '§22-12-1 et seq.';

107 On page 4, subsection 5.1.b.D., by striking out the  
108 code reference '§20-5F-1 et seq.' and inserting in lieu  
109 thereof the code reference '§22-15-1 et seq.';

110 On page 5, subsection 7.5, by striking out the words  
111 'Department of Natural Resources' and inserting in lieu  
112 thereof the words 'Department of Environmental Protec-  
113 tion';

114 On page 5, subsection 7.5, by striking out the words  
115 'Soil Conservation Service, Agricultural Stabilization and  
116 Conservation Service' and inserting in lieu thereof the  
117 words 'Environmental Resource Conservation Service,  
118 Consolidated Farm Service Agency';

119 On page 6, subsection 8.2.b., by striking out the word  
120 'SCS' and inserting in lieu thereof the words 'Environmen-  
121 tal Resource Conservation Service';

122 And,

123 On page 7, subsection 9.5.b.A., by striking out the  
124 word 'SCS' and inserting in lieu thereof the words 'Envi-  
125 ronmental Resource Conservation Service'."

126 (f) The legislative rule relating to the West Virginia  
127 department of agriculture (best management practices for  
128 fertilizers and manures, 61 CSR 22B), effective the sixth  
129 day of December, one thousand nine hundred ninety-two,  
130 is reauthorized with the following amendment:

131 "On page 1, subsection 1.2, by striking out the code  
132 reference '§20-5M-5-c' and inserting in lieu thereof the  
133 code reference '§22-12-5(c)."

#### **§64-11-9. Division of banking.**

1 (a) The legislative rule relating to the division of bank-  
2 ing (regulations pertaining to the West Virginia consumer  
3 credit and protection act and the money and interest arti-  
4 cle of chapter forty-seven, 106 CSR 1), effective the  
5 twenty-fourth day of April, one thousand nine hundred  
6 ninety-two, is reauthorized with the following amend-  
7 ments:

8 "On page 2, subsection 2.3(e), by striking out the code  
9 reference '§46A-1-102(24)(a)' and inserting in lieu there-  
10 of the code reference '§46A-1-102(26)(a)', and by strik-  
11 ing out the code reference '§46A-1-102(40)' and inserting  
12 in lieu thereof the code reference '§46A-1-102(42)';

13 And,

14 On page 2, subsection 2.10(a)(2), by striking out the  
15 code reference 'U.S.C. Title 29' and inserting in lieu there-  
16 of the code reference 'U.S.C. Title 19'."

17 (b) The legislative rule relating to the division of  
18 banking (legislative rule pertaining to the installation,  
19 operation and sharing of customer bank communication  
20 terminals and the utilization of nonexclusive access inter-  
21 change system, 106 CSR 7), effective the eleventh day of  
22 May, one thousand nine hundred eighty-three, is  
23 reauthorized with the following amendments:

24 "On page 2, subsection 2.4, in the heading, by striking  
25 out the word 'Bankin', and inserting in lieu thereof the  
26 word 'Banking';

27 And,

28 On page 2, subsection 3.4, in the heading, by striking  
29 out the word 'Bankin', and inserting in lieu thereof the  
30 word 'Banking'."

31 (c) The legislative rule relating to the division of bank-  
32 ing (regulations pertaining to the West Virginia consumer  
33 credit and protection act, 106 CSR 8), effective the  
34 twenty-third day of April, one thousand nine hundred  
35 eighty-two, is reauthorized with the following amend-  
36 ments:

37 "On page 1, subsection 1.2, by striking out the code  
38 reference '§31A-3-4(c)(12)' and inserting in lieu thereof  
39 the code reference '§31A-2-4(c)(12)';

40 On page 1, subsection 2.1, by striking out the code  
41 reference 'West Virginia Code subsection (23), section one  
42 hundred two, article one, chapter forty-six-a' and inserting  
43 in lieu thereof the code reference 'W. Va. Code  
44 §46A-1-102(26)';

45 On page 1, subsection 2.1, by striking out the code  
46 reference 'West Virginia Code subsection (39), section one  
47 hundred two, article one, chapter forty-six-a' and inserting  
48 in lieu thereof the code reference 'W. Va. Code  
49 §46A-1-102(42)';

50 On page 1, subsection 2.1, by striking out the code  
51 reference 'West Virginia Code subsection (14), section one  
52 hundred two, article one, chapter forty-six-a' and inserting  
53 in lieu thereof the code reference 'W. Va. Code  
54 §46A-1-102(15)';

55 And,

56 On page 1, subsection 2.1, by striking out the code  
57 reference 'West Virginia Code subsection (12), section one  
58 hundred two, article one, chapter forty-six-a' and inserting  
59 in lieu thereof the code reference 'W. Va. Code  
60 §46A-1-102(13)'."

**§64-11-10. Insurance commissioner.**

1 The legislative rule relating to the insurance commis-  
2 sioner (insurance holding company systems reporting  
3 forms, 114 CSR 35), effective the thirteenth day of April,  
4 one thousand nine hundred ninety-four, is reauthorized  
5 with the following amendment:

6 "On page 5, subsection 7.1, by striking out the words  
7 'Section 2(b) of Article 27, Chapter 33 of the Code' and  
8 inserting in lieu thereof the code reference 'W. Va. Code  
9 §33-27-2a'."

**§64-11-11. Criminal justice and highway safety division, Gov-  
ernor's committee on crime, delinquency and  
correction.**

1 The legislative rule relating to the criminal justice and  
2 highway safety division, Governor's committee on crime,  
3 delinquency and correction (police response to domestic  
4 violence, 149 CSR 3), effective the fourteenth day of  
5 April, one thousand nine hundred ninety-five, is  
6 reauthorized with the following amendments:

7 "On page 1, subsection 3.1, by striking out the words  
8 'Division of Public Safety' and inserting in lieu thereof the  
9 words 'State Police';

10 And,

11 On page 5, subsection 5.4.10, by striking out the code  
12 reference '§61-1C-17c' and inserting in lieu thereof the  
13 code reference '§62-1C-17c.' "

**§64-11-12. Division of highways.**

1 The legislative rule relating to the division of highways  
 2 (transportation of hazardous wastes upon the roads and  
 3 highways, 157 CSR 7), effective the twenty-second day of  
 4 April, one thousand nine hundred eighty-eight, is  
 5 reauthorized with the following amendment:

6 "Beginning on page 1, in the title, and continuing  
 7 throughout the text of the rule, by striking out the words  
 8 'Department of Highways' and inserting in lieu thereof the  
 9 words 'Division of Highways';

10 Beginning on page 1, subsection 1.1, and continuing  
 11 throughout the text of the rule, by striking out the words  
 12 'Department of Natural Resources' and inserting in lieu  
 13 thereof the words 'Division of Environmental Protection';

14 On page 1, subsection 1.5, by striking out the words  
 15 'Highway Services' and inserting in lieu thereof the word  
 16 'Enforcement';

17 On page 4, subsection 6.3.1, by striking out the words  
 18 'Washington Street' and inserting in lieu thereof the words  
 19 'Kanawha Boulevard', and by striking out the telephone  
 20 number '348-3028' and inserting in lieu thereof the tele-  
 21 phone number '558-3028';

22 And,

23 On page 4, subsection 6.3.2, by striking out the words  
 24 'Division of Waste Management' and inserting in lieu  
 25 thereof the words 'Office of Waste Management'."

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## CHAPTER 172

(S. B. 595—By Senators Wooton, Bowman, Buckalew, Schoonover, Wagner,  
 White and Yoder)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact section five, article one, chapter four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to authority to subpoena witnesses; applicability of whistle-blower law; and penalty.

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

That section five, article one, chapter four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 1. OFFICERS, MEMBERS AND EMPLOYEES; APPROPRIATIONS; INVESTIGATIONS; DISPLAY OF FLAGS; RECORDS; USE OF CAPITOL BUILDING; PREFILING OF BILLS AND RESOLUTIONS; STANDING COMMITTEES; INTERIM MEETINGS; NEXT MEETING OF THE SENATE.**

**§4-1-5. Authority to subpoena witnesses and documents; penalty for refusal to comply; applicability of whistle-blower law.**

1 (a) When the Senate or House of Delegates, or a committee  
2 of either house, authorized to examine witnesses, by  
3 resolution or by rules of the Senate or of the House of  
4 Delegates, shall order the attendance of any witness, or the  
5 production of any books, papers, documents or records  
6 necessary for the Senate, House of Delegates or a committee  
7 thereof to perform its duties, a summons shall be issued  
8 accordingly, signed by the presiding officer or clerk  
9 of such house, or the chairman of such committee, directed  
10 to the sheriff or other proper officer of any county, or  
11 to the sergeant at arms of such house, or any person deputed  
12 by him. When a committee is appointed by each  
13 house under any joint or concurrent resolution, and directed  
14 to sit jointly, with authority to examine witnesses or  
15 send for persons or documents, the subpoena aforesaid  
16 may be signed by the chairman of the committee on the  
17 part of the Senate or the chairman of the committee on the  
18 part of the House of Delegates.

19 (b) If any witness subpoenaed to appear at any hearing  
20 or meeting pursuant to subsection (a) of this section shall  
21 refuse to appear or to answer inquiries there propounded,  
22 or shall fail or refuse to produce books, papers, documents  
23 or records within his or her control when the same are  
24 subpoenaed, the Senate, House of Delegates or a committee  
25 thereof, in its discretion may enforce obedience to its  
26 subpoena by attachment, fine or imprisonment, or it may



27 report the facts to the circuit court of Kanawha County or  
28 any other court of competent jurisdiction and such court  
29 shall compel obedience to the subpoena as though such  
30 subpoena had been issued by such court in the first  
31 instance.

32 Witnesses subpoenaed to attend such hearings or  
33 meetings, except officers or employees of the state, shall  
34 be allowed the same mileage and per diem as is allowed  
35 witnesses before any petit jury in this state.

36 (c) The provisions of article one, chapter six-c of this  
37 code are expressly applicable to persons testifying  
38 pursuant to the provisions of subsection (a) of this section.

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## CHAPTER 173

(H. B. 4851—By Delegates J. Martin, Varner, Love, Nesbitt,  
Stalnaker, Osborne and Harrison)

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[Passed March 9, 1996; in effect July 1, 1996. Approved by the Governor.]

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AN ACT to amend and reenact sections two, five and nine, article two, chapter four of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section three-c, article three of said chapter; and to amend and reenact article ten of said chapter, all relating to the West Virginia sunset law; providing employees conducting full performance evaluations and preliminary performance reviews the same work space allocations as other employees of the office of the legislative auditor; revising terms agency, full performance evaluation and preliminary performance review; deleting references to financial audits; changing termination dates for agencies scheduled for full performance evaluations and preliminary performance reviews; modifying composition of joint committee on government operations; requiring information to be furnished in requested format; deleting prohibition of legislation affecting more than one agency; and making technical corrections.

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

That sections two, five and nine, article two, chapter four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that section three-c, article three of said chapter be amended and reenacted; and that article ten of said chapter be amended and reenacted, all to read as follows:

**Article**

- 2. Legislative Auditor; Powers; Functions; Duties; Compensation.**
- 3. Joint Committee on Government and Finance.**
- 10. The West Virginia Sunset Law.**

**ARTICLE 2. LEGISLATIVE AUDITOR; POWERS; FUNCTIONS;  
DUTIES; COMPENSATION.**

- §4-2-2. Definitions.  
§4-2-5. Powers of auditor.  
§4-2-9. Offices; working space.

**§4-2-2. Definitions.**

1 For the purposes of this article: "Committee" means  
2 the joint committee on government and finance of the  
3 Senate and House of Delegates.

4 "Full performance evaluation" means to determine for  
5 an agency whether or not the agency is operating in an  
6 efficient and effective manner and to determine whether  
7 or not there is a demonstrable need for the continuation of  
8 the agency, pursuant to the provisions of section ten, arti-  
9 cle ten of this chapter.

10 "Post audit" is the audit or review of governmental  
11 finances after they have been completed. The scope of a  
12 post audit includes audit or review of transactions pertain-  
13 ing to the financial operations of the various agencies of  
14 government on the state level, with verification of state  
15 revenues at the source and audit of expenditures all the  
16 way through the work to the recipient or beneficiary of  
17 the service.

18 "Preliminary performance review" means to determine  
19 for an agency whether or not the agency is performing in  
20 an efficient and effective manner and to determine wheth-  
21 er or not there is a demonstrable need for the continuation  
22 of the agency pursuant to the provisions of section eleven,  
23 article ten of this chapter.

24 "Spending unit" means any department, agency, board,  
25 commission, officer, authority, subdivision or institution of  
26 the state government for or to which an appropriation has  
27 been made, or is to be made by the Legislature.

#### **§4-2-5. Powers of auditor.**

1 The legislative auditor shall have the power and au-  
2 thority to examine the revenues, expenditures and perfor-  
3 mance of every spending unit of the state government and  
4 for these purposes shall have the authority, by such means  
5 as are necessary, to require any person holding office in  
6 the state government or employed by the state, to allow  
7 him to inspect the properties, equipment, facilities and  
8 records of the various agencies, departments, subdivisions  
9 or institutions of the state government for which appropri-  
10 ations are to be made or have been made, either before or  
11 after estimates therefor are submitted, and before, during  
12 and after the sessions of the Legislature. Refusal of any  
13 person to allow such inspection shall be reported by the  
14 legislative auditor to the committee.

#### **§4-2-9. Offices; working space.**

1 The office of the legislative auditor shall be located at  
2 the state capitol and shall be open at all reasonable times  
3 for the transaction of business.

4 All state departments, institutions or other agencies of  
5 the state government shall provide necessary comfortable  
6 space for the purpose of occupancy by employees of the  
7 office of the legislative auditor conducting post audits, full  
8 performance evaluations or preliminary performance  
9 reviews in the various departments, institutions or other  
10 agencies of the state, located conveniently at the state capi-

11 tol and at the several institutions or other agencies  
12 throughout the state.

**ARTICLE 3. JOINT COMMITTEE ON GOVERNMENT AND FI-  
NANCE.**

**§4-3-3c. Reorganization of joint legislative agencies.**

1 (a) The joint committee on government and finance  
2 has the authority over and direction of joint legislative  
3 agencies, personnel and services, including, but not limited  
4 to, the following:

5 (1) The commission on special investigations provided  
6 for in article five, chapter four of this code;

7 (2) The court of claims provided for in article two and  
8 crime victims compensation provided for in article two-a,  
9 chapter fourteen of this code;

10 (3) The legislative auditor provided for in article two,  
11 chapter four of this code;

12 (4) The legislative rule-making review committee  
13 provided for in article three, chapter twenty-nine-a of this  
14 code;

15 (5) The legislative reference library provided for in  
16 section three of this article;

17 (6) The legislative automated systems division;

18 (7) Legislative services;

19 (8) Public information; and

20 (9) Joint services provided by one or more of the joint  
21 agencies set forth in this subsection. The following joint  
22 services are included:

23 (A) Bill drafting;

24 (B) Budget analysis;

25 (C) Duplicating;

26 (D) Financial, payroll, personnel and purchasing for  
27 joint agencies and personnel;

28 (E) Fiscal analysis;

29 (F) Post audits, full performance evaluations and pre-  
30 liminary performance reviews;

31 (G) Research; and

32 (H) Joint services to other joint legislative committees  
33 created and authorized by this code, to joint standing  
34 committees of the Senate and House of Delegates, to  
35 standing committees of the Senate and House of Delegates  
36 and to legislative interim committees.

37 (b) Notwithstanding any other provision of this chap-  
38 ter to the contrary, the joint committee on government and  
39 finance has the authority to reorganize and restructure the  
40 joint legislative agencies, personnel and services as provid-  
41 ed in subsection (a) of this section for the purposes of  
42 improving their efficiency and the service they provide to  
43 the Legislature and to improve the management thereof  
44 by the joint committee. To accomplish these purposes, the  
45 joint committee may create divisions as it determines nec-  
46 essary and transfer and assign the joint agencies, personnel  
47 and services to the divisions. The divisions, joint agencies,  
48 personnel and services shall operate under the direction  
49 and policies of the joint committee: *Provided*, That noth-  
50 ing in this section shall be construed to permit the joint  
51 committee to alter or redefine the powers, duties and re-  
52 sponsibilities vested in the commission on special investi-  
53 gations pursuant to article five of this chapter.

#### ARTICLE 10. THE WEST VIRGINIA SUNSET LAW.

§4-10-1. Short title.

§4-10-2. Legislative findings.

§4-10-3. Definitions.

§4-10-4. Termination of agencies following full performance evaluations.

- §4-10-5. Termination of agencies following preliminary performance reviews.
- §4-10-6. Continuation of agency after termination and purpose thereof; continuation of powers and authority after termination; cessation of activities; reestablishment of terminated agency.
- §4-10-7. Continuation or reestablishment of agencies scheduled for termination may not exceed six years; acts creating new agencies shall provide termination language.
- §4-10-8. Joint committee on government operations continued; membership; compensation and expenses; meetings.
- §4-10-9. Powers of the committee; access to records; information to be furnished in requested format; failure of witnesses to appear, testify or produce records; public hearings; allowance of per diem and mileage for witnesses; hiring of necessary employees; permitting committee to collect costs associated with evaluations or reviews.
- §4-10-10. Full performance evaluations of agencies by the committee.
- §4-10-11. Preliminary performance reviews of agencies by the committee.
- §4-10-12. Annual report by the committee.
- §4-10-13. Preservation of rights and claims.
- §4-10-14. Article not to be construed as limiting new legislation.

**§4-10-1. Short title.**

- 1 This article shall be known as and may be cited as the
- 2 "West Virginia Sunset Law."

**§4-10-2. Legislative findings.**

- 1 The Legislature finds that state governmental actions
- 2 have produced substantial increases in the number of
- 3 agencies and programs, proliferation of rules and regula-
- 4 tions, and that the agencies and programs often have
- 5 developed without sufficient legislative oversight, regulato-
- 6 ry accountability or an effective system of checks and
- 7 balances; that agencies and programs have been created
- 8 without demonstrable evidence that their benefits to the
- 9 public clearly justify their creation; that once established,
- 10 agencies and programs tend to acquire permanent status,
- 11 often without regard for the condition that gave rise to
- 12 their establishment; that the personnel of such agencies
- 13 and programs often are beyond the effective control of
- 14 elected officials, and efforts to encourage modernization

15 or even to review performance typically have proven  
16 difficult at best; that too often, agencies and programs  
17 acquire a combination of autonomy and authority incon-  
18 sistent with democratic principles and acquire a capacity  
19 for self-perpetuation incompatible with principles of ac-  
20 countability; and that by establishing a system for the  
21 termination, continuation or reestablishment of such agen-  
22 cies and programs following a thorough review of their  
23 operation and performance, the position of the Legislature  
24 to evaluate the need for the continued existence of agen-  
25 cies and programs will be enhanced.

#### §4-10-3. Definitions.

1 As used in this article, unless the context clearly indi-  
2 cates a different meaning:

3 (1) "Agency" means any bureau, department, division,  
4 commission, agency, committee, office, board, authority,  
5 subdivision, program, council, advisory body, cabinet,  
6 panel, system, task force, fund, compact, institution, survey,  
7 position, coalition or other entity, however designated, in  
8 the state of West Virginia.

9 (2) "Committee" means the joint committee on gov-  
10 ernment operations, hereinafter continued, to perform  
11 duties under this article.

12 (3) "Full performance evaluation" means to determine  
13 for an agency whether or not the agency is operating in an  
14 efficient and effective manner and to determine whether  
15 or not there is a demonstrable need for the continuation of  
16 the agency, pursuant to the provisions of section ten of  
17 this article. References in this code to performance audit  
18 or full performance audit shall be taken as and shall mean  
19 full performance evaluation.

20 (4) "Preliminary performance review" means to deter-  
21 mine for an agency whether or not the agency is perform-  
22 ing in an efficient and effective manner and to determine  
23 whether or not there is a demonstrable need for the con-

24 tinuation of the agency pursuant to the provisions of sec-  
25 tion eleven of this article.

**§4-10-4. Termination of agencies following full performance evaluations.**

1 The following agencies shall be terminated on the date  
2 indicated, but no agency may be terminated under this  
3 section unless a full performance evaluation has been  
4 conducted upon such agency:

5 (1) On the first day of July, one thousand nine hun-  
6 dred ninety-seven: Division of personnel; division of envi-  
7 ronmental protection; division of rehabilitation services;  
8 workers' compensation; office of judges of workers' com-  
9 pensation; department of health and human resources;  
10 school building authority; tourism functions within the  
11 West Virginia development office; purchasing division  
12 within the department of administration; West Virginia  
13 parkways, economic development and tourism authority;  
14 division of culture and history.

15 (2) On the first day of July, two thousand one: Divi-  
16 sion of natural resources.

17 (3) On the first day of July, two thousand: Division of  
18 corrections.

19 (4) On the first day of July, two thousand two: Divi-  
20 sion of highways; division of labor.

**§4-10-5. Termination of agencies following preliminary performance reviews.**

1 The following agencies shall be terminated on the  
2 date indicated, but no agency may be terminated under  
3 this section unless a preliminary performance review has  
4 been conducted upon such agency:

5 (1) On the first day of July, one thousand nine hun-  
6 dred ninety-six: Juvenile facilities review panel.



7           (2) On the first day of July, one thousand nine hun-  
8       dred ninety-seven: Board of investments; state building  
9       commission; parks section and parks functions of the  
10      division of natural resources; emergency medical services  
11      advisory council; office of water resources of the division  
12      of environmental protection; West Virginia state police;  
13      office of environmental advocate of the division of envi-  
14      ronmental protection; human rights commission; board of  
15      examiners in counseling; driver's licensing advisory board;  
16      West Virginia health care cost review authority; governor's  
17      cabinet on children and families; oil and gas conservation  
18      commission; child support enforcement division; West  
19      Virginia commission for national and community service;  
20      West Virginia contractors' licensing board; cable television  
21      advisory board; public employees insurance agency advi-  
22      sory board.

23           (3) On the first day of July, one thousand nine hun-  
24      dred ninety-eight: Women's commission; state lottery  
25      commission; meat inspection program of the department  
26      of agriculture; soil conservation committee of the depart-  
27      ment of agriculture; state board of risk and insurance  
28      management; board of examiners of land surveyors; com-  
29      mission on uniform state laws; council of finance and  
30      administration; West Virginia's membership in the inter-  
31      state commission on the Potomac River Basin; legislative  
32      oversight commission on education accountability; forest  
33      management review commission; family law masters sys-  
34      tem; board of examiners in speech pathology and audiolog-  
35      y; board of social work examiners.

36           (4) On the first day of July, one thousand nine hun-  
37      dred ninety-nine: Public service commission; tree fruit  
38      industry self improvement assessment program; capitol  
39      building commission; board of banking and financial  
40      institutions.

41           (5) On the first day of July, two thousand: Family  
42      protection services board; environmental quality board;  
43      West Virginia's membership in the Ohio river valley water  
44      sanitation commission; ethics commission; oil and gas

45 inspector's examining board; veterans' council; West Vir-  
46 ginia's membership in the southern regional education  
47 board.

48 (6) On the first day of July, two thousand one: Real  
49 estate commission; marketing and development division of  
50 the department of agriculture; board of architects; public  
51 employees insurance agency; public employees insurance  
52 agency finance board; center for professional develop-  
53 ment; rural health advisory panel.

54 (7) On the first day of July, two thousand two:  
55 Whitewater commission within the division of natural re-  
56 sources; state geological and economic survey; unemploy-  
57 ment compensation.

**§4-10-6. Continuation of agency after termination and purpose therefor; continuation of powers and authority after termination; cessation of activities; reestablishment of terminated agency.**

1 Upon termination, each agency shall continue in exist-  
2 tence until the first day of July of the next succeeding  
3 year for the purpose of winding up its affairs. During that  
4 year, the impending termination may not reduce nor oth-  
5 erwise limit the powers or authority of that terminated  
6 agency. Any funds for the agency shall revert to the fund  
7 from which they were appropriated or, if that fund is abol-  
8 ished, to the General Revenue Fund. Upon the expiration  
9 of one year after termination, the agency shall cease all  
10 activities: *Provided*, That an agency that has been termi-  
11 nated pursuant to the provisions of this article may be  
12 reestablished by the Legislature, and if reestablished by  
13 the Legislature during the winding-up period with sub-  
14 stantially the same powers, duties or functions, the agency  
15 shall be deemed to have been continued.

**§4-10-7. Continuation or reestablishment of agencies scheduled for termination may not exceed six years; acts creating new agencies shall provide termination language.**

1 The life of any agency, scheduled for termination  
2 under this section may be continued or reestablished by  
3 the Legislature for a period of time not to exceed six  
4 years.

5 Any act that creates a new agency and is enacted after  
6 the effective date of this article shall provide for termina-  
7 tion and review of the newly-created agency pursuant to  
8 this article within six years after the effective date of the  
9 act that creates the agency.

**§4-10-8. Joint committee on government operations contin-  
ued; membership; compensation and expenses;  
meetings.**

1 The joint committee on government operations, here-  
2 tofore created, is hereby continued. The committee shall  
3 be composed of five members of the Senate, to be ap-  
4 pointed by the president thereof, no more than three of  
5 whom shall be appointed from the same political party;  
6 five members of the House of Delegates, to be appointed  
7 by the speaker thereof, no more than three of whom shall  
8 be appointed from the same political party: *Provided*,  
9 That in the event the membership of a political party is  
10 less than fifteen percent in the House of Delegates or Sen-  
11 ate, that the membership of that political party from the  
12 legislative house with less than fifteen percent membership  
13 may be one from that house; and five citizens of this state  
14 who are not legislators, public officials or public employ-  
15 ees, to be appointed by and to serve at the will and plea-  
16 sure of the governor, not more than three of whom shall  
17 be appointed from the same political party, and at least  
18 one of whom shall reside in each congressional district of  
19 this state: *Provided*, That on the thirty-first day of March,  
20 one thousand nine hundred ninety-seven, the terms of the  
21 five current citizen members of the committee appointed  
22 under prior enactment of this section shall terminate, but  
23 all of those members shall be eligible for reappointment.  
24 On the first day of April, one thousand nine hundred  
25 ninety-seven, the governor shall make five new appoint-  
26 ments. Of the five members appointed following enact-

27 ment of this section, four shall be citizens of this state who  
28 are not legislators nor public officials and one shall be an  
29 elected representative of a political subdivision. Not more  
30 than three of those five members may be from the same  
31 political party, and at least one shall reside in each con-  
32 gressional district of this state. The committee shall be  
33 headed by two cochairpersons, one to be selected by the  
34 president of the Senate from the members appointed from  
35 the Senate, and one to be selected by the speaker of the  
36 House of Delegates from the members appointed from the  
37 House of Delegates. All members of the committee shall  
38 serve until their successors shall have been appointed as  
39 heretofore provided. Members of the committee shall  
40 receive such compensation and reimbursement for ex-  
41 penses in connection with performance of interim duties  
42 between regular sessions of the Legislature as may be  
43 authorized by the citizens legislative compensation com-  
44 mission established by section thirty-three, article six of  
45 the constitution of West Virginia. Each member of the  
46 committee who is not a legislative member shall receive  
47 such compensation as the legislative interim members  
48 receive, in addition to reimbursement for necessary ex-  
49 penses incurred in the performance of duties under this  
50 article, such reimbursement to be subject to the same limi-  
51 tations as govern the expenses of the legislative members  
52 of the committee. Compensation and expenses shall be  
53 paid from an appropriation to be made expressly for the  
54 committee, but if no such appropriation be made or the  
55 total amount appropriated has been expended, such ex-  
56 penses shall be paid from the appropriation under "Ac-  
57 count No. 103 for Joint Expenses," but no expense of any  
58 kind whatever payable under said Account No. 103 for  
59 joint expenses shall be incurred unless first approved by  
60 the joint committee on government and finance. The  
61 committee shall meet upon call of the cochairpersons or  
62 either of them and may meet at any time, both during  
63 sessions of the Legislature and in the interim.

**§4-10-9. Powers of the committee; access to records; informa-  
tion to be furnished in requested format; failure of  
witnesses to appear, testify or produce records;**

**public hearings; allowance of per diem and mileage for witnesses; hiring of necessary employees; permitting committee to collect costs associated with evaluations or reviews.**

1 To carry out the duties set forth in this article, the  
2 committee, any duly authorized employee of the commit-  
3 tee, or any employee of the office of the legislative auditor  
4 working at the direction of the committee, shall have ac-  
5 cess to any and all records of every agency in West Vir-  
6 ginia. When furnishing information, agencies shall pro-  
7 vide information in the format in which it is requested, if  
8 the request is specific as to a preferred format.

9 In addition to its regular and special meetings, the  
10 committee, or any employee duly authorized by the com-  
11 mittee, is empowered to hold public hearings in further-  
12 ance of the purposes of this article, at such times and plac-  
13 es within the state as may be deemed desirable, and any  
14 member of the committee shall have the power to adminis-  
15 ter oaths to persons testifying at such hearings or meet-  
16 ings.

17 By subpoena, issued over the signature of either  
18 cochairpersons of the committee and served in the manner  
19 provided by law, the committee may summon and compel  
20 the attendance of witnesses and their examination under  
21 oath and the production of all books, papers, documents  
22 and records necessary or convenient to be examined and  
23 used by the committee in the performance of its duties. If  
24 any witness subpoenaed to appear at any hearing or meet-  
25 ing shall refuse or fail to appear or to answer questions put  
26 to him or her, or shall refuse or fail to produce books,  
27 papers, documents, or records within his or her control  
28 when the same are demanded, the committee, in its discre-  
29 tion, may enforce obedience to its subpoena by attach-  
30 ment, fine or imprisonment, as provided in section five,  
31 article one of this chapter; or it may report the facts to the  
32 circuit court of Kanawha County or any other court of  
33 competent jurisdiction and such court shall compel obedi-

34 ence to the subpoena as though such subpoena had been  
35 issued by such court in the first instance.

36 Witnesses subpoenaed to attend such hearings or meet-  
37 ings, except officers or employees of the state, shall be  
38 allowed the same mileage and per diem as is allowed wit-  
39 nesses before any petit jury.

40 The joint committee on government operations, sub-  
41 ject to the approval of the joint committee on government  
42 and finance, may employ such persons, skilled in the field  
43 of full performance evaluation, financial audit or prelimi-  
44 nary performance review as it may deem necessary to  
45 carry out its duties and responsibilities under this article,  
46 and may contract for outside expertise in conducting  
47 technical or specialized performance evaluations.

48 The joint committee on government operations may  
49 collect, and the agency shall pay, any or all of the costs  
50 associated with conducting the full performance evalua-  
51 tions or preliminary performance reviews from the agen-  
52 cy being audited or reviewed, when necessary and desir-  
53 able. The joint committee on government operations shall  
54 render to the agency liable for the costs a statement there-  
55 of as soon after the same were incurred as practicable, and  
56 it shall be the duty of such agency to pay promptly in the  
57 manner that other claims and accounts are paid. All mon-  
58 ey received by the joint committee on government opera-  
59 tions from this source shall be expended only for the  
60 purpose of covering the costs associated with such services,  
61 unless otherwise directed by the Legislature.

**§4-10-10. Full performance evaluations of agencies by the committee.**

1 It shall be the duty of the committee to conduct a full  
2 performance evaluation in accordance with generally  
3 accepted government auditing standards as promulgated  
4 by the federal general accounting office of every agency  
5 scheduled for termination following full performance  
6 evaluations under this article to ascertain if there is a de-  
7 monstrable need for the continuation of the agency and if  
8 the agency should be continued.

9        In conducting full performance evaluations, the com-  
10        mittee may determine the following:

11        (1) If the agency was created to resolve a problem or  
12        provide a service.

13        (2) If the problem has been solved or the service has  
14        been provided.

15        (3) The extent to which past agency activities and  
16        accomplishments, current projects and operations, and  
17        planned activities and goals for the future are or have been  
18        effective.

19        (4) If the agency is operating efficiently and effec-  
20        tively in performing its task.

21        (5) The extent to which there would be significant and  
22        discernible adverse effects on the public health, safety or  
23        welfare if the agency were abolished.

24        (6) If the conditions that led to the creation of the  
25        agency have changed.

26        (7) The extent to which the agency operates in the  
27        public interest.

28        (8) Whether or not the operation of the agency is  
29        impeded or enhanced by existing statutes, rules, proce-  
30        dures, practices or any other circumstances bearing upon  
31        the agency's capacity or authority to operate in the public  
32        interest, including budgetary, resource and personnel  
33        matters.

34        (9) The extent to which administrative and/or statutory  
35        changes are necessary to improve agency operations or to  
36        enhance the public interest.

37        (10) Whether or not the benefits derived from the  
38        activities of the agency outweigh the costs.

39        (11) Whether or not the activities of the agency dupli-  
40        cate or overlap with those of other agencies, and if so, how  
41        these activities could be consolidated.

42 (12) Whether or not the agency causes an unnecessary  
43 burden on any citizen or other agency by its decisions and  
44 activities.

45 (13) What the impact will be in terms of federal inter-  
46 vention or loss of federal funds if the agency is abolished.

47 The committee may direct that the full performance  
48 evaluation focus on a specific area of operation within the  
49 agency, and may direct further inquiry, when necessary  
50 and desirable, into other areas of concern, including, but  
51 not limited to:

52 (1) The economic impact resulting from the functions  
53 of the agency.

54 (2) The extent to which complaint, investigation, and/  
55 or disciplinary procedures of the agency adequately pro-  
56 tect the public, and whether or not final dispositions of  
57 complaints serve the public interest.

58 (3) The extent to which the agency issues and enforc-  
59 es rules relating to the potential conflicts of interest of its  
60 employees.

61 (4) Whether or not the agency is in compliance with  
62 federal and state affirmative action requirements.

63 (5) Whether or not the agency encourages participa-  
64 tion by the public in the decision making process.

**§4-10-11. Preliminary performance reviews of agencies by the committee.**

1 It shall be the duty of the committee to conduct a  
2 preliminary performance review of every agency sched-  
3 uled for termination following preliminary performance  
4 reviews under this article. In conducting such preliminary  
5 performance reviews, the committee shall determine the  
6 following:

7 (1) If the agency was created to solve a problem or  
8 provide a service.

9 (2) If the problem has been solved or the service has  
10 been provided.



11 (3) The extent to which past agency activities and  
12 accomplishments, current projects and operations, and  
13 planned activities and goals for the future are or have been  
14 effective.

15 (4) The extent to which there would be significant and  
16 discernible adverse effects on the public health, safety or  
17 welfare if the agency were abolished.

18 (5) Whether or not the agency operates in a sound  
19 fiscal manner.

20 (6) Whether or not the conducting of a full perfor-  
21 mance evaluation on the agency is in the public interest.

22 The committee may direct that the focus of the pre-  
23 liminary performance review be on a specific area of op-  
24 eration and may direct further inquiry, when necessary  
25 and desirable.

#### §4-10-12. Annual report by the committee.

1 The committee shall complete its deliberations with  
2 respect to agencies scheduled for termination and make  
3 an annual report thereon to the Legislature not later than  
4 ten days after the Legislature convenes in regular session  
5 in the year of the scheduled termination for the agency:  
6 *Provided*, That any such annual report required in the  
7 year one thousand nine hundred ninety-seven, and every  
8 fourth year thereafter, shall be made not later than ten  
9 days after the Legislature convenes on the second Wednes-  
10 day in February. The annual report shall consist of an  
11 analysis of the agency including matters as are expressly  
12 mandated to be considered by the committee as set forth  
13 in this article, together with the recommendations of the  
14 committee. The committee shall make one of five recom-  
15 mendations: (1) The agency be terminated as scheduled;  
16 (2) the agency be continued and reestablished; (3) the  
17 agency be continued and reestablished, but the statutes  
18 governing it be amended in specific ways to correct inef-  
19 fective or discriminatory practices and procedures, bur-  
20 densome rules and regulations, lack of protection of the  
21 public interest, overlapping of jurisdiction with other  
22 agencies, unwarranted exercise of authority either in law

23 or in fact or any other deficiencies; (4) a full performance  
24 evaluation be performed on an agency on which a pre-  
25 liminary review has been completed; or (5) the agency be  
26 continued for a period of time not to exceed one year for  
27 the purpose of completing a full performance evaluation,  
28 preliminary performance review, or for monitoring the  
29 agency's compliance with recommendations contained in  
30 the completed full performance evaluation or preliminary  
31 performance review.

32 In the event the committee makes recommendations  
33 concerning the continuation or reestablishment of agen-  
34 cies pursuant to this article, the annual report shall include  
35 draft bills effectuating the recommendations.

36 Copies of the annual reports shall be made available to  
37 all members of the Legislature, to the agency that is the  
38 subject of the report and to the public generally. A copy  
39 of the annual report shall be formally filed immediately  
40 by the committee with the clerk of each house.

**§4-10-13. Preservation of rights and claims.**

1 Nothing in this article may be construed as adversely  
2 affecting any right or claim by any person against an  
3 agency or by any agency against any person. Responsi-  
4 bility for prosecuting or defending any such rights or  
5 claims should the Legislature fail to continue and reestab-  
6 lish an agency within one year after its termination shall  
7 be assumed by the attorney general of the state.

**§4-10-14. Article not to be construed as limiting new legisla-  
tion.**

1 Nothing in this article may be construed as limiting or  
2 interfering with the right of any member of the Legisla-  
3 ture to introduce or of the Legislature to consider any bill  
4 that would create a new agency or to amend the law with  
5 respect to an existing one.

## CHAPTER 174

(S. B. 325—By Senators Ross, Anderson, Buckalew and Sharpe)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections one and six, article one, chapter forty-seven-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections six, seven and eight, article three of said chapter; to amend and reenact section one, article four of said chapter; to amend and reenact section three, article seven of said chapter; to amend and reenact sections six and seven, article eight of said chapter; to amend and reenact sections two and three, article nine of said chapter; to amend and reenact article ten of said chapter; and to further amend said chapter by adding thereto a new article, designated article eleven, all relating to registered limited liability partnerships; defining the terms "registered limited liability partnership" and "foreign registered limited liability partnership" and expanding the definitions of other terms; recognizing that a registered limited liability partnership is a general partnership; establishing governing law; providing for the liability of a partner in a registered limited liability partnership; limiting the right to bring an action and to levy execution against only partners who are personally liable for obligations of the partnership; limiting the liability of a purported partner; setting forth the rights and duties of partners in limited liability partnerships; addressing rights and liabilities of partners upon dissolution or dissolution of a registered limited liability partnership; seeking accounts and contributions among partners; conversions and mergers of partnerships; requiring registered limited liability partnerships to register with the secretary of state; establishing registration and annual renewal fee; setting forth required content of such registration; requiring that the names of such partnerships contain the words "registered limited liability partnership" or the abbreviation "L.L.P." or "LLP" as the last words or letters in the partnership's name; requiring that a registered limited liability partnership carry a minimum of one million dollars in liability insurance or create, in lieu thereof, a segregated fund

consisting of an insurance bond or other specified collateral, either of which shall be used to satisfy judgments against the partnership and its partners; requiring foreign registered limited liability partnerships to file notice together with fee with secretary of state; recognizing that foreign registered limited liability partnership shall be governed by the laws of the state of its formation; providing for miscellaneous provisions; and making certain technical revisions.

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

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

**Article**

1. **General Provisions.**
3. **Relations of Partners to Persons Dealing With Partnership.**
4. **Relations of Partners to Each Other and to Partnership.**
7. **Partner's Dissociation When Business Not Wound Up.**
8. **Winding Up Partnership Business.**
9. **Conversions and Mergers.**
10. **Limited Liability Partnerships.**
11. **Miscellaneous Provisions.**

**ARTICLE 1. GENERAL PROVISIONS.**

§47B-1-1. Definitions.

§47B-1-6. Law governing internal relations.

**§47B-1-1. Definitions.**

1 In this chapter:

- 2 (1) "Business" includes every trade, occupation and
- 3 profession.

4       (2) "Debtor in bankruptcy" means a person who is the  
5 subject of:

6       (I) In order for relief under Title 11 of the United  
7 States Code or a comparable order under a successor stat-  
8 ute of general application; or

9       (ii) A comparable order under federal, state or foreign  
10 law governing insolvency.

11       (3) "Distribution" means a transfer of money or other  
12 property from a partnership to a partner in the partner's  
13 capacity as a partner or to the partner's transferee.

14       (4) "Foreign limited liability partnership" means a  
15 partnership or association formed under or pursuant to an  
16 agreement governed by the laws of any state or jurisdic-  
17 tion other than this state that is denominated as a regis-  
18 tered limited liability partnership or limited liability part-  
19 nership under the laws of such other jurisdiction.

20       (5) "Partnership" means an association of two or more  
21 persons to carry on as co-owners a business for profit  
22 formed under section two, article two of this chapter, pre-  
23 decessor law, or comparable law of another jurisdiction  
24 and includes, for all purposes of the laws of this state, a  
25 registered limited liability partnership.

26       (6) "Partnership agreement" means the agreement,  
27 whether written, oral or implied, among the partners con-  
28 cerning the partnership, including amendments to the  
29 partnership agreement.

30       (7) "Partnership at will" means a partnership in which  
31 the partners have not agreed to remain partners until the  
32 expiration of a definite term or the completion of a partic-  
33 ular undertaking.

34       (8) "Partnership interest" or "partner's interest in the  
35 partnership" means all of a partner's interests in the part-  
36 nership, including the partner's transferable interest and all  
37 management and other rights.

38       (9) "Person" means an individual, corporation, busi-  
39 ness trust, estate, trust, partnership, association, joint ven-

40 ture, government, governmental subdivision, agency or  
41 instrumentality, or any other legal or commercial entity.

42 (10) "Property" means all property, real, personal or  
43 mixed, tangible or intangible, or any interest therein.

44 (11) "Registered limited liability partnership" means a  
45 partnership formed pursuant to an agreement governed by  
46 the laws of this state, registered under section one, article  
47 ten of this chapter.

48 (12) "State" means a state of the United States, the  
49 District of Columbia, the Commonwealth of Puerto Rico,  
50 or any territory or insular possession subject to the juris-  
51 diction of the United States.

52 (13) "Statement" means a statement of partnership  
53 authority under section three, article three of this chapter,  
54 a statement of denial under section four of said article, a  
55 statement of dissociation under section four, article seven  
56 of this chapter, a statement of dissolution under section  
57 five, article eight of this chapter, a statement of merger  
58 under section seven, article nine of this chapter, a state-  
59 ment of registration and a statement of withdrawal under  
60 section one, article ten of this chapter, or an amendment or  
61 cancellation of any of the foregoing.

62 (14) "Transfer" includes an assignment, conveyance,  
63 lease, mortgage, deed and encumbrance.

#### **§47B-1-6. Law governing internal relations.**

1 Except as provided otherwise in section four, article  
2 ten of this chapter, the law of the jurisdiction in which a  
3 partnership has its chief executive office, governs the rela-  
4 tions among the partners and between the partners and the  
5 partnership.

### **ARTICLE 3. RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP.**

§47B-3-6. Partner's liability.

§47B-3-7. Actions by and against partnership and partners.

§47B-3-8. Liability of purported partner.

#### **§47B-3-6. Partner's liability.**

1 (a) Except as otherwise provided in subsections (b)  
2 and (c) of this section, all partners are liable jointly and  
3 severally for all obligations of the partnership unless oth-  
4 erwise agreed by the claimant or provided by law.

5 (b) A person admitted as a partner into an existing  
6 partnership, including a registered limited liability partner-  
7 ship, is not personally liable for any partnership obligation  
8 incurred before the person's admission as a partner.

9 (c) Subject to the provisions of subsection (d) of this  
10 section, a partner in a registered limited liability partner-  
11 ship is not personally liable directly or indirectly (includ-  
12 ing by way of indemnification, contribution or otherwise)  
13 for debts, obligations and liabilities of or chargeable to the  
14 partnership, whether in tort, contract or otherwise, arising  
15 from omissions, negligence, wrongful acts, misconduct or  
16 malpractice committed while the partnership is a registered  
17 limited liability partnership and in the course of partner-  
18 ship business by another partner or by an employee, agent  
19 or representative of the partnership.

20 (d) Subsection (c) of this section does not affect the  
21 liability of a partner in a registered limited liability part-  
22 nership for the partner's own omissions, negligence,  
23 wrongful acts, misconduct or malpractice, or that of any  
24 person under the partner's direct supervision and control.

#### **§47B-3-7. Actions by and against partnership and partners.**

1 (a) A partnership may sue and be sued in the name of  
2 the partnership.

3 (b) An action may be brought against the partnership  
4 and any or all of the partners who are personally liable for  
5 obligations of the partnership under section six of this  
6 article in the same action or in separate actions.

7 (c) A judgment against a partnership is not by itself a  
8 judgment against a partner. A judgment against a partner-  
9 ship may not be satisfied from a partner's assets unless  
10 there is also a judgment against the partner.

11 (d) A judgment creditor of a partner may not levy  
12 execution against the assets of a partner who is personally

13 liable for obligations of the partnership under section six  
14 of this article to satisfy a judgment based on a claim  
15 against the partnership unless:

16 (1) A judgment based on the same claim has been  
17 obtained against the partnership and a writ of execution  
18 on the judgment has been returned unsatisfied, in whole or  
19 in part;

20 (2) The partnership is a debtor in bankruptcy;

21 (3) The partner has agreed that the creditor need not  
22 exhaust partnership assets;

23 (4) A court grants permission to the judgment creditor  
24 to levy execution against the assets of a partner based on a  
25 finding that partnership assets subject to execution are  
26 clearly insufficient to satisfy the judgment, that exhaustion  
27 of partnership assets is excessively burdensome, or that the  
28 grant of permission is an appropriate exercise of the  
29 court's equitable powers; or

30 (5) Liability is imposed on the partner by law or con-  
31 tract independent of the existence of the partnership.

32 (e) This section applies to any partnership liability or  
33 obligation resulting from a representation by a partner or  
34 purported partner under section eight of this article.

**§47B-3-8. Liability of purported partner.**

1 (a) If a person, by words or conduct, purports to be a  
2 partner, or consents to being represented by another as a  
3 partner, in a partnership or with one or more persons not  
4 partners, the purported partner is liable to a person to  
5 whom the representation is made:

6 (1) If that person, relying on the representation, enters  
7 into a transaction with the actual or purported partnership;  
8 and

9 (2) The purported partner would have been personally  
10 liable for obligations of the partnership under section six  
11 of this article if the purported partner had actually been a  
12 partner.



13       (b) Subject to subsection (a) of this section, if the  
14 representation, either by the purported partner or by a  
15 person with the purported partner's consent, is made in a  
16 public manner, the purported partner is liable to a person  
17 who relies upon the purported partnership even if the  
18 purported partner is not aware of being held out as a part-  
19 ner to the claimant. If partnership liability results, the  
20 purported partner is liable with respect to that liability as if  
21 the purported partner were a partner. If no partnership  
22 liability results, the purported partner is liable with respect  
23 to that liability jointly and severally with any other person  
24 consenting to the representation.

25       (c) If a person is thus represented to be a partner in an  
26 existing partnership, or with one or more persons not  
27 partners, the purported partner is an agent of persons  
28 consenting to the representation to bind them to the same  
29 extent and in the same manner as if the purported partner  
30 were a partner, with respect to persons who enter into  
31 transactions in reliance upon the representation. If all of  
32 the partners of the existing partnership consent to the  
33 representation, a partnership act or obligation results. If  
34 fewer than all of the partners of the existing partnership  
35 consent to the representation, the person acting and the  
36 partners consenting to the representation are jointly and  
37 severally liable as if such person had actually been a part-  
38 ner.

39       (d) A person is not liable as a partner merely because  
40 the person is named by another in a statement of partner-  
41 ship authority.

42       (e) A person does not continue to be liable as a part-  
43 ner merely because of a failure to file a statement of disso-  
44 ciation or to amend a statement of partnership authority to  
45 indicate the partner's dissociation from the partnership.

46       (f) Except as provided in subsections (a), (b) and (c)  
47 of this section, persons who are not partners as to each  
48 other are not liable as partners to other persons.

**ARTICLE 4. RELATIONS OF PARTNERS TO EACH OTHER AND  
TO PARTNERSHIP.**

**§47B-4-1. Partner's rights and duties.**

1 (a) Each partner is deemed to have an account that is:

2 (1) Credited with an amount equal to the money plus  
3 the value of any other property, net of the amount of any  
4 liabilities as provided in section six, article three of this  
5 chapter, the partner contributes to the partnership and the  
6 partner's share of the partnership profits; and

7 (2) Charged with an amount equal to the money plus  
8 the value of any other property, net of the amount of any  
9 liabilities, distributed by the partnership to the partner and  
10 the partner's share of the partnership losses: *Provided*,  
11 That a partner shall be personally liable on account of  
12 such charges only as provided in section six, article three  
13 and section seven, article eight, both of this chapter.

14 (b) Each partner: (i) Shall share equally in partnership  
15 profits; and (ii) shall share in partnership losses as provid-  
16 ed in section seven, article eight of this chapter in propor-  
17 tion to the partner's share of the profits.

18 (c) A partnership shall reimburse a partner for pay-  
19 ments made and indemnify a partner for liabilities in-  
20 curred by the partner in the ordinary course of the busi-  
21 ness of the partnership or for the preservation of its busi-  
22 ness or property: *Provided*, That no other partner shall be  
23 required to make any payment, except as provided in  
24 section seven, article eight of this chapter, including any  
25 payments attributable all or in part to partnership liabilities  
26 for reimbursement or indemnification.

27 (d) A partnership shall reimburse a partner for an  
28 advance to the partnership beyond the amount of capital  
29 the partner agreed to contribute.

30 (e) A payment or advance made by a partner which  
31 gives rise to a partnership obligation under subsection (c)  
32 or (d) of this section constitutes a loan to the partnership  
33 which accrues interest from the date of the payment or  
34 advance.

35 (f) Each partner has equal rights in the management  
36 and conduct of the partnership business.

37 (g) A partner may use or possess partnership property  
38 only on behalf of the partnership.

39 (h) A partner is not entitled to remuneration for ser-  
40 vices performed for the partnership, except for reasonable  
41 compensation for services rendered in winding up the  
42 business of the partnership.

43 (i) A person may become a partner only with the  
44 consent of all of the partners.

45 (j) A difference arising as to a matter in the ordinary  
46 course of business of a partnership may be decided by a  
47 majority of the partners. An act outside the ordinary  
48 course of business of a partnership and an amendment to  
49 the partnership agreement may be undertaken only with  
50 the consent of all of the partners.

51 (k) This section does not affect the obligations of a  
52 partnership to other persons under section one, article  
53 three of this chapter.

#### ARTICLE 7. PARTNER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP.

##### §47B-7-3. Dissociated partner's liability to other persons.

1 (a) A partner's dissociation does not of itself dis-  
2 charge the partner's liability for a partnership obligation  
3 incurred before dissociation. A dissociated partner is not  
4 liable for a partnership obligation incurred after dissocia-  
5 tion, except as otherwise provided in subsection (b) of this  
6 section.

7 (b) A partner who dissociates without resulting in a  
8 dissolution and winding up of the partnership business is  
9 personally liable as a partner to the other party on account  
10 of a partnership obligation incurred in connection with a  
11 transaction entered into by the partnership, or a surviving  
12 partnership under article nine of this chapter, within two  
13 years after the partner's dissociation, only if at the time of  
14 entering into the transaction the other party:

15 (1) Reasonably believed that the dissociated partner  
16 was then a partner;

17 (2) Did not have notice of the partner's dissociation;

18 (3) Is not deemed to have had knowledge under sub-  
19 section (e), section three, article three of this chapter or  
20 notice under subsection (c), section four of this article;  
21 and

22 (4) The obligation is one on account of which the  
23 partner would be personally liable under section six, arti-  
24 cle three of this chapter if the partner had not dissociated  
25 from the partnership.

26 (c) By agreement with the partnership creditor and the  
27 partners continuing the business, a dissociated partner may  
28 be released from liability for a partnership obligation.

29 (d) A dissociated partner is released from liability for  
30 a partnership obligation if a partnership creditor, with  
31 notice of the partner's dissociation but without the part-  
32 ner's consent, agrees to a material alteration in the nature  
33 or time of payment of a partnership obligation.

#### **ARTICLE 8. WINDING UP PARTNERSHIP BUSINESS.**

§47B-8-6. Partner's liability to other partners after dissolution.

§47B-8-7. Settlement of accounts and contributions among partners.

#### **§47B-8-6. Partner's liability to other partners after dissolution.**

1 (a) Except as otherwise provided in subsection (b) of  
2 this section, after dissolution a partner is liable to the other  
3 partners for the partner's share of any partnership liability  
4 incurred under section four of this article for which such  
5 partner is personally liable under section six, article three  
6 of this chapter.

7 (b) A partner who, with knowledge of the dissolution,  
8 incurs a partnership liability under subsection (2), section  
9 four of this article by an act that is not appropriate for  
10 winding up the partnership business is liable to the part-  
11 nership for any damage caused to the partnership arising  
12 from the liability.

#### **§47B-8-7. Settlement of accounts and contributions among partners.**

1 (a) In winding up a partnership's business, the assets  
2 of the partnership, including the contributions of the part-  
3 ners required by this section, must be applied to discharge  
4 its obligations to creditors, including, to the extent permit-  
5 ted by law, partners who are creditors. Any surplus must  
6 be applied to pay in cash the net amount distributable to  
7 partners in accordance with their right to distributions  
8 under subsection (b) of this section.

9 (b) Each partner is entitled to a settlement of all part-  
10 nership accounts upon winding up the partnership busi-  
11 ness. In settling accounts among the partners, the profits  
12 and losses that result from the liquidation of the partner-  
13 ship assets must be credited and charged to the partners'  
14 accounts. The partnership shall make a distribution to a  
15 partner in an amount equal to any excess of the credits  
16 over the charges in the partner's account. A partner shall  
17 contribute to the partnership an amount equal to any ex-  
18 cess of the charges over the credits in the partner's account  
19 that is attributable to an obligation for which such partner  
20 is personally liable under section six, article three of this  
21 chapter.

22 (c) If a partner fails or is not obligated to contribute,  
23 all of the other partners shall contribute, in the proportions  
24 in which those partners share partnership losses, the addi-  
25 tional amount necessary to satisfy any partnership obliga-  
26 tions for which such partner is personally liable under  
27 section six, article three of this chapter. A partner or part-  
28 ner's legal representative may recover from the other part-  
29 ners any contributions the partner makes to the extent the  
30 amount contributed exceeds that partner's share of the  
31 partnership obligations, to the extent such contributions  
32 are made on account of obligations for which the other  
33 partners are liable under said section.

34 (d) After the settlement of accounts, each partner shall  
35 contribute, in the proportion in which the partner shares  
36 partnership losses, the amount necessary to satisfy partner-  
37 ship obligations for which such partner is personally liable  
38 under section six, article three of this chapter and that were  
39 not known at the time of settlement.

40 (e) The estate of a deceased partner is liable for the  
41 partner's obligation to contribute to the partnership under  
42 subsection (b) of this section.

43 (f) An assignee for the benefit of creditors of a part-  
44 nership or a partner, or a person appointed by a court to  
45 represent creditors of a partnership or a partner, may en-  
46 force a partner's obligation to contribute to the partnership  
47 under subsection (b) of this section.

#### ARTICLE 9. CONVERSIONS AND MERGERS.

§47B-9-2. Conversion of partnership to limited partnership.

§47B-9-3. Conversion of limited partnership to partnership.

##### §47B-9-2. Conversion of partnership to limited partnership.

1 (a) A partnership may be converted to a limited part-  
2 nership pursuant to this section.

3 (b) The terms and conditions of a conversion of a  
4 partnership to a limited partnership must be approved by  
5 all of the partners or by a number or percentage specified  
6 for conversion in the partnership agreement.

7 (c) After the conversion is approved by the partners,  
8 the partnership shall file a certificate of limited partnership  
9 in the jurisdiction in which the limited partnership is to be  
10 formed. The certificate must include:

11 (1) A statement that the partnership was converted to  
12 a limited partnership from a partnership;

13 (2) Its former name; and

14 (3) A statement of the number of votes cast by the  
15 partners for and against the conversion and, if the vote is  
16 less than unanimous, the number or percentage required  
17 to approve the conversion under the partnership agree-  
18 ment.

19 (d) The conversion takes effect when the certificate of  
20 limited partnership is filed or at any later date specified in  
21 the certificate.

22 (e) A general partner who becomes a limited partner  
23 as a result of the conversion remains liable as a general

24 partner for an obligation incurred by the partnership be-  
25 fore the conversion takes effect for which the partner is  
26 personally liable under section six, article three of this  
27 chapter. If the other party to a transaction with the limited  
28 partnership reasonably believes when entering the transac-  
29 tion that the limited partner is a general partner, the limit-  
30 ed partner is liable for an obligation incurred by the limit-  
31 ed partnership within ninety days after the conversion  
32 takes effect for which a general partner would be person-  
33 ally liable under said section. The limited partner's liabili-  
34 ty for all other obligations of the limited partnership in-  
35 curred after the conversion takes effect is that of a limited  
36 partner as provided in sections one et seq., article nine,  
37 chapter forty-seven of this code.

### §47B-9-3. Conversion of limited partnership to partnership.

1 (a) A limited partnership may be converted to a part-  
2 nership pursuant to this section.

3 (b) Notwithstanding a provision to the contrary in a  
4 limited partnership agreement, the terms and conditions of  
5 a conversion of a limited partnership to a partnership must  
6 be approved by all of the partners.

7 (c) After the conversion is approved by the partners,  
8 the limited partnership shall cancel its certificate of limited  
9 partnership.

10 (d) The conversion takes effect when the certificate of  
11 limited partnership is canceled.

12 (e) A limited partner who becomes a general partner  
13 as a result of the conversion remains liable only as a limit-  
14 ed partner for an obligation incurred by the limited part-  
15 nership before the conversion takes effect. The partner is  
16 liable as a general partner for an obligation of the partner-  
17 ship for which the partner is personally liable under sec-  
18 tion six, article three of this chapter incurred after the  
19 conversion takes effect.

## ARTICLE 10. LIMITED LIABILITY PARTNERSHIPS.

§47B-10-1. Registered limited liability partnerships.

§47B-10-2. Effect of registration; entity unchanged.

§47B-10-3. Name of registered limited liability partnership.

§47B-10-4. Applicability of article to foreign and interstate commerce.

§47B-10-5. Insurance or financial responsibility of registered limited liability partnerships.

**§47B-10-1. Registered limited liability partnerships.**

1 (a) To become a registered limited liability partner-  
2 ship, a partnership shall file with the secretary of state a  
3 statement of registration stating the name of the partner-  
4 ship; the address of its principal office; if the partnership's  
5 principal office is not located in this state, the address of a  
6 registered office and the name and address of a registered  
7 agent for service of process in this state, which the partner-  
8 ship will be required to maintain; a brief statement of the  
9 business in which the partnership engages; any other mat-  
10 ters that the partnership determines to include; and that the  
11 partnership thereby registers as a registered limited liabili-  
12 ty partnership.

13 (b) The registration shall be executed by one or more  
14 partners authorized to execute a registration.

15 (c) The registration shall be accompanied by a fee of  
16 two hundred fifty dollars.

17 (d) The secretary of state shall register as a registered  
18 limited liability partnership any partnership that submits a  
19 completed registration with the required fee.

20 (e) A partnership registered under this section shall  
21 pay, in each year following the year in which its registra-  
22 tion is filed, on a date specified by the secretary of state,  
23 an annual fee of five hundred dollars. The fee must be  
24 accompanied by a notice, on a form provided by the sec-  
25 retary of state, of any material changes in the information  
26 contained in the partnership's registration.

27 (f) Registration is effective:

28 (1) Immediately after the date a registration is filed; or

29 (2) On a date specified in the statement of registration,  
30 which date shall not be more than sixty days after the date  
31 of filing.



32 (g) Registration remains effective until:

33 (1) It is voluntarily withdrawn by filing with the secre-  
34 tary of state a statement of withdrawal; or

35 (2) Thirty days after receipt by the partnership of a  
36 notice from the secretary of state, which notice shall be  
37 sent by certified mail, return receipt requested, that the  
38 partnership has failed to make timely payment of the  
39 annual fee specified in subsection (e) of this section, un-  
40 less the fee is paid within such a thirty-day period.

41 (h) The status of a partnership as a registered limited  
42 liability partnership and the liability of the partners there-  
43 of shall not be affected by:

44 (1) Errors in the information contained in a statement  
45 of registration under subsection (a) of this section or no-  
46 tice under subsection (e) of this section; or

47 (2) Changes after the filing of such statement of regis-  
48 tration or notice in the information stated in the registra-  
49 tion or notice.

50 (i) The secretary of state shall provide forms for the  
51 statement of registration under subsection (a) of this sec-  
52 tion or a notice under subsection (e) of this section.

**§47B-10-2. Effect of registration; entity unchanged.**

1 (a) A partnership that has registered pursuant to this  
2 article is for all purposes the same partnership that existed  
3 before the registration.

4 (b) When registration takes effect:

5 (1) All property owned by the registering partnership  
6 remains vested in the registered partnership;

7 (2) All obligations of the registering partnership con-  
8 tinue as obligations of the registered partnership; and

9 (3) An action or proceeding pending against the reg-  
10 istering partnership may be continued as if the registration  
11 had not occurred.

**§47B-10-3. Name of registered limited liability partnership.**

1       The name of a registered limited liability partnership  
2 shall contain the words "Registered Limited Liability Part-  
3 nership" or the abbreviation "L.L.P." or "LLP" as the last  
4 words or letters of its name.

**§47B-10-4. Applicability of article to foreign and interstate commerce.**

1       (a) A registered limited liability partnership formed  
2 under this article may conduct its business, carry on its  
3 operations, and have and exercise the powers granted by  
4 this chapter in any state, territory, district or possession of  
5 the United States or in any foreign country.

6       (b) It is the intent of the Legislature that the legal  
7 existence of registered limited liability partnerships  
8 formed under this article be recognized outside the  
9 boundaries of this state and that the laws of this state gov-  
10 erning such registered limited liability partnerships doing  
11 business outside this state be granted the protection of full  
12 faith and credit under the Constitution of the United  
13 States.

14       (c) Notwithstanding section six, article one of this  
15 chapter, the internal affairs of registered limited liability  
16 partnerships formed under this article, including the liabil-  
17 ity of partners for debts, obligations and liabilities of or  
18 chargeable to the partnership, shall be subject to and gov-  
19 erned by the laws of this state.

20       (d) Before transacting business in this state, a foreign  
21 registered limited liability partnership shall:

22       (i) Comply with any statutory or administrative regis-  
23 tration or filing requirements governing the specific type  
24 of business in which the partnership is engaged; and

25       (ii) File a notice with the secretary of state, on such  
26 forms as the secretary of state shall provide, stating the  
27 name of the partnership; the address of its principal office;  
28 if the partnership's principal office is not located in this  
29 state, the address of a registered office and the name and  
30 address of a registered agent for service of process in this  
31 state, which the partnership will be required to maintain;  
32 any other matters that the partnership determines to in-

33 clude; and a brief statement of the business in which the  
34 partnership engages. Such notice shall be effective for  
35 two years from the date of filing, after which time the  
36 partnership shall file a new notice.

37 (e) The name of a foreign registered limited liability  
38 partnership doing business in this state shall contain the  
39 words "Registered Limited Liability Partnership" or the  
40 abbreviation "L.L.P." or "LLP" as the last words or letters  
41 of its name.

42 (f) Notwithstanding section six, article one of this  
43 chapter, the internal affairs of foreign registered limited  
44 liability partnerships, including the liability of partners for  
45 debts, obligations and liabilities of or chargeable to the  
46 partnership, shall be subject to and governed by the laws  
47 of the jurisdiction in which the foreign registered limited  
48 liability partnership is registered.

**§47B-10-5. Insurance or financial responsibility of registered  
limited liability partnerships.**

1 (a) A registered limited liability partnership, and any  
2 foreign limited liability partnership transacting business in  
3 this state, shall carry at all times at least one million dollars  
4 of liability insurance of a kind that is designed to cover  
5 the kinds of omissions, negligence, wrongful acts, miscon-  
6 duct and malpractice for which liability is limited by sub-  
7 section (c), section six, article three of this chapter and  
8 which insures the partnership and its partners.

9 (b) If, in any proceeding, compliance by a partnership  
10 with the requirements of subsection (a) of this section is  
11 disputed, that issue shall be determined by the court, and  
12 the burden of proof of compliance shall be on the person  
13 who claims the limitation of liability in subsection (c),  
14 section six, article three of this chapter.

15 (c) If a registered limited liability partnership is in  
16 compliance with the requirements of subsection (a) of this  
17 section, the requirements of this section shall not be ad-  
18 missible or in any way be made known to a jury in deter-  
19 mining an issue of liability for or extent of the obligation  
20 or damages in question.

21 (d) A registered limited liability partnership is consid-  
22 ered to be in compliance with subsection (a) of this section

23 if the partnership provides one million dollars of funds  
 24 specifically designated and segregated for the satisfaction  
 25 of judgments against the partnership or its partners based  
 26 on the kinds of omissions, negligence, wrongful acts, mis-  
 27 conduct and malpractice for which liability is limited by  
 28 subsection (c), section six, article three of this chapter, by:

29 (1) Deposit in trust or in bank escrow of cash, bank  
 30 certificates of deposit or United States Treasury obliga-  
 31 tions; or

32 (2) A bank letter of credit or insurance company  
 33 bond.

34 (e) Any policy or contract of liability insurance pro-  
 35 viding coverage for liability as described in this section  
 36 shall be read so as to contain a provision or endorsement  
 37 whereby the company issuing such policy waives or agrees  
 38 not to assert as a defense on behalf of the policyholder or  
 39 any beneficiary thereof, to any claim covered by the terms  
 40 of such policy within the policy limits, the immunity from  
 41 liability of the insured granted by the provisions of this  
 42 chapter.

#### **ARTICLE 11. MISCELLANEOUS PROVISIONS.**

§47B-11-1. Uniformity of application and construction.

§47B-11-2. Short title.

§47B-11-3. Severability clause.

§47B-11-4. Applicability.

§47B-11-5. Savings clause.

#### **§47B-11-1. Uniformity of application and construction.**

1 This chapter shall be applied and construed to effectu-  
 2 ate its general purpose to make uniform the law with re-  
 3 spect to the subject of this chapter among states enacting  
 4 it.

#### **§47B-11-2. Short title.**

1 This chapter may be cited as the Uniform Partnership  
 2 Act.

#### **§47B-11-3. Severability clause.**

1 If any provision of this chapter or its application to  
 2 any person or circumstance is held invalid, the invalidity

3 does not affect other provisions or applications of this  
4 chapter which can be given effect without the invalid pro-  
5 vision or application, and to this end the provisions of this  
6 chapter are severable.

**§47B-11-4. Applicability.**

1 (a) Before the first day of July, one thousand nine  
2 hundred ninety-five, this chapter governs only a partner-  
3 ship formed:

4 (1) After the effective date of this chapter, unless that  
5 partnership is continuing the business of a dissolved part-  
6 nership under section forty-one, article eight-a, chapter  
7 forty-seven of this code; and

8 (2) Before the effective date of this chapter, that  
9 elects, as provided by subsection (c) of this section, to be  
10 governed by this chapter.

11 (b) After the first day of July, one thousand nine  
12 hundred ninety-five, this chapter governs all partnerships.

13 (c) Before the first day of July, one thousand nine  
14 hundred ninety-five, a partnership voluntarily may elect,  
15 in the manner provided in its partnership agreement or by  
16 law for amending the partnership agreement, to be gov-  
17 erned by this chapter. The provisions of this chapter relat-  
18 ing to the liability of the partnership's partners to third  
19 parties apply to limit those partners' liability to a third  
20 party who had done business with the partnership within  
21 one year preceding the partnership's election to be gov-  
22 erned by this chapter, only if the third party knows or has  
23 received a notification of the partnership's election to be  
24 governed by this chapter.

**§47B-11-5. Savings clause.**

1 This chapter does not affect an action or proceeding  
2 commenced or right accrued before this chapter takes  
3 effect.

## CHAPTER 175

(H. B. 4144—By Delegates Staton, Frederick, Linch, Osborne,  
Ball and Browning)

[Passed January 31, 1996; in effect from passage. Approved by the Governor.]

AN ACT to amend and reenact section two, article one, chapter fifty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to magistrate courts; and providing one additional magistrate for Harrison County and allowing Mercer County to retain one magistrate.

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

That section two, article one, chapter fifty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 1. COURTS AND OFFICERS.

#### §50-1-2. Number of magistrates.

1 (a) The number of magistrates to be elected in each  
2 county of this state shall be determined in accordance with  
3 the provisions of this section.

4 (b) On or before the thirty-first day of January, one  
5 thousand nine hundred ninety-six, and on or before the  
6 first day of January in every fourth year thereafter, the  
7 supreme court of appeals shall certify to the board of  
8 ballot commissioners of each county the number of  
9 magistrates to be elected in that county for the term of  
10 office commencing on the first day of January of the  
11 succeeding year. The number of magistrates so certified  
12 shall be determined in accordance with the following:

13 (1) The court shall not provide:

14 (A) For the total number of magistrates in the state to  
15 exceed one hundred fifty-six in number;

16 (B) For the number of magistrates in any one county  
17 to exceed ten in number; or

18 (C) For the number of magistrates in any one county  
19 to be less than two in number.

20 (2) The court shall determine the number of  
21 magistrates that would be apportioned for each county by  
22 the application of an equal proportions formula, as  
23 follows:

24 (A) Two magistrates shall be allocated to each county;

25 (B) The population of the county shall be divided by  
26 a mathematical factor, as established by the equal  
27 proportion method, to establish each county's priority  
28 claim to additional magistrates above the two magistrates  
29 provided for by paragraph (A) of this subdivision; and

30 (C) Additional numbers of magistrates shall be  
31 allocated to the several counties in order of priority claims,  
32 beginning with the largest claim, until magistrates have  
33 been assigned within the limits of this section.

34 For purposes of this article, a determination made in  
35 accordance with the provisions of this subdivision is the  
36 "equal proportion number".

37 (3) The court shall determine the number of  
38 magistrates elected in each county at the last general  
39 election in which magistrates were regularly elected next  
40 prior to the preceding census taken under the authority of  
41 the United States government. For purposes of this article,  
42 that number shall be referred to as the "election number".

43 (4) The court shall determine the number of case  
44 filings per magistrate in each magistrate court for the most  
45 recent fiscal year preceding the date of certification, and  
46 shall rank the magistrate courts from one through  
47 fifty-five, in the order of their case filings per magistrate,  
48 with the court having the most filings per magistrate being  
49 ranked number one, and the court with the least filings per  
50 magistrate being ranked number fifty-five.

51 (5) If the court determines that the equal proportion  
52 number for a county is the same as the election number  
53 for such county, the court shall certify that number as the  
54 number of magistrates to be elected in that county at the  
55 next election.

56 (6) If the court determines that the equal proportion  
57 number for a county is different from the election number  
58 for such county, the court shall apply the ranking  
59 established by subdivision (4) of this subsection and  
60 determine the number of magistrates for such county, as  
61 follows:

62 (A) If the equal proportion number exceeds the elec-  
63 tion number, the number of magistrates to be elected in  
64 that county at the next election shall be the election num-  
65 ber: *Provided*, That if the county is ranked as one  
66 through ten, inclusive, in accordance with subdivision (4)  
67 of this subsection, the court shall certify the equal propor-  
68 tion number as the number of magistrates to be elected in  
69 that county at the next election.

70 (B) If the equal proportion number is less than the  
71 election number, the number of magistrates to be elected  
72 in that county at the next election shall be the equal pro-  
73 portion number: *Provided*, That if the county is ranked as  
74 one through ten, inclusive, in accordance with subdivision  
75 (4) of this subsection, the court shall certify the election  
76 number as the number of magistrates to be elected in that  
77 county at the next election.

78 (c) Any magistrate in office at the time of the effec-  
79 tive date of this section shall continue as a magistrate,  
80 unless sooner removed or retired as provided by law, until  
81 the first day of January, one thousand nine hundred  
82 ninety-three.

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## CHAPTER 176

(S. B. 261—By Senators Tomblin, Mr. President, Schoonover, Chafin, Jackson, Wooton, Walker, Wagner, Whitlow, Bailey, Anderson, Dittmar, Bowman, Plymale, Macnaughtan, Manchin, Sharpe, Minear, Love, Oliverio, Ross, Grubb, Kimble, Yoder, Dugan, Boley, Helmick, Craigo, Scott, Buckalew, Wiedebusch and Blatnik)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section three, article one, chapter fifty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to increasing the salaries of magistrates.

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



That section three, article one, chapter fifty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 1. COURTS AND OFFICERS.**

**§50-1-3. Salaries of magistrates.**

1 (a) The Legislature finds and declares that:

2 (1) The West Virginia supreme court of appeals has  
3 held that a salary system for magistrates which is based  
4 upon the population that each magistrate serves does not  
5 violate the equal protection clause of the Constitution of  
6 the United States;

7 (2) The West Virginia supreme court of appeals has  
8 held that a salary system for magistrates which is based  
9 upon the population that each magistrate serves does not  
10 violate article VI, section 39 of the Constitution of West  
11 Virginia;

12 (3) The utilization of a two-tiered salary schedule for  
13 magistrates is an equitable and rational manner by which  
14 magistrates should be compensated for work performed;

15 (4) Organizing the two tiers of the salary schedule into  
16 one tier for magistrates serving less than eight thousand  
17 five hundred in population and the second tier for magis-  
18 trates serving eight thousand five hundred or more in  
19 population is rational and equitable given current statisti-  
20 cal information relating to population and caseload; and

21 (5) That all magistrates who fall under the same tier  
22 should be compensated equally.

23 (b) The salary of each magistrate shall be paid by the  
24 state. Magistrates who serve less than ten thousand in  
25 population shall be paid annual salaries of twenty thou-  
26 sand six hundred twenty-five dollars and magistrates who  
27 serve ten thousand or more in population shall be paid  
28 annual salaries of twenty-seven thousand dollars: *Provid-*  
29 *ed*, That on and after the first day of January, one thou-  
30 sand nine hundred ninety-two, magistrates who serve less  
31 than ten thousand in population shall be paid annual sala-  
32 ries of twenty-one thousand six hundred twenty-five dol-

33 lars and magistrates who serve ten thousand or more in  
34 population shall be paid annual salaries of twenty-eight  
35 thousand dollars: *Provided, however,* That on and after  
36 the first day of January, one thousand nine hundred  
37 ninety-three, magistrates who serve less than eight thou-  
38 sand five hundred in population shall be paid annual sala-  
39 ries of twenty-three thousand six hundred twenty-five  
40 dollars and magistrates who serve eight thousand five  
41 hundred or more in population shall be paid annual sala-  
42 ries of thirty thousand dollars: *Provided further,* That on  
43 and after the first day of January, one thousand nine hun-  
44 dred ninety-seven, magistrates who serve less than eight  
45 thousand five hundred in population shall be paid annual  
46 salaries of twenty-six thousand six hundred twenty-five  
47 dollars and magistrates who serve eight thousand five  
48 hundred or more in population shall be paid annual sala-  
49 ries of thirty-three thousand dollars.

50 (c) For the purpose of determining the population  
51 served by each magistrate, the number of magistrates au-  
52 thorized for each county shall be divided into the popula-  
53 tion of each county. For the purpose of this article, the  
54 population of each county is the population as determined  
55 by the last preceding decennial census taken under the  
56 authority of the United States government.

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## CHAPTER 177

(Com. Sub. for S. B. 255—By Senators Miller, Sharpe, Ross and Helmick)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section eleven, article four, chap-  
ter twenty-two of the code of West Virginia, one thousand  
nine hundred thirty-one, as amended, relating to surface  
mining and reclamation of minerals other than coal; blasting  
restrictions; formula; filing preplan; penalties; notice; permit-  
ting seismograph measurement to be used in place of  
scaled-distance formula; modifying scaled-distance formula;  
modifying requirements relating to blasting; and requiring

that legislative rules be promulgated relating notification of impending blasting activities.

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

That section eleven, article four, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 4. SURFACE MINING AND RECLAMATION OF MINERALS OTHER THAN COAL.**

**§22-4-11. Blasting restriction; formula; filing preplan; penalties; notice.**

1 Where blasting of overburden or mineral is necessary,  
2 the blasting shall be done in accordance with established  
3 principles for preventing injury to persons and damage to  
4 residences, buildings and communities. The blasting is in  
5 compliance with provisions of this article if the following  
6 measures are adhered to:

7 (1) The weight in pounds of explosives to be detonat-  
8 ed in any period less than an eight millisecond period  
9 without seismic monitoring shall conform to the following  
10 scaled distance formula:  $W = (D/50)$ (to the second pow-  
11 er). Where W equals weight in pounds of explosives deto-  
12 nated at any one instant time, then D equals distance in  
13 feet from nearest point of blast to nearest residence, build-  
14 ing or structure, other than operation facilities of the mine:  
15 *Provided*, That the scaled distance formulas need not be  
16 used if a seismograph measurement at or between the blast  
17 site and the nearest protected structure (residence, building  
18 or structure) is recorded and maintained for every blast.  
19 The peak particle velocity in inches per second in any one  
20 of the three mutually perpendicular directions shall not  
21 exceed the following values at any protected structure:

22	<b>Seismograph Measurement</b>	<b>Distance to the Nearest</b>
23		<b>Protected Structure</b>
24	1.25	0 - 300 feet
25	1.00	301 - 5,000 feet
26	0.75	5,001 feet or greater

27 The maximum ground vibration standards do not  
 28 apply to the structures owned by the permittee and not  
 29 leased to another person and structures owned by the  
 30 permittee and leased to another person, if a written waiver  
 31 by the lessee is submitted to the director before blasting.

32 (2) Airblast shall not exceed the maximum limits listed  
 33 below at the location of any dwelling, public buildings,  
 34 school or community or institutional building outside the  
 35 permit area:

36 Lower frequency limit of measuring	Maximum level in db
37 system in Hz(+3dB)	
38 1Hz or lower-flat response*	134 peak
39 2Hz or lower-flat response	133 peak
40 6Hz or lower-flat response	129 peak
41 c-weighted-slow response*	105 peak dBC

42 \* only when approved by the director.

43 (3) Access to the blast area shall be controlled against  
 44 the entrance of unauthorized personnel during blasting  
 45 for a period thereafter until an authorized person has  
 46 reasonably determined that:

47 (A) No unusual circumstances exist such as imminent  
 48 slides or undetonated charges, etc.; and

49 (B) Access to and travel in or through the area can be  
 50 safely resumed.

51 (4) A plan of each operation's methods for compli-  
 52 ance with this section (blast delay design) for typical blasts  
 53 which shall be adhered to in all blasting at each operation,  
 54 shall be submitted to the division of environmental protec-  
 55 tion with the application for a permit. It shall be accepted  
 56 if it meets the scaled distance formula established in subdi-  
 57 vision (1) of this section.

58 (5) Records of each blast shall be kept in a log to be  
 59 maintained for at least three years, which will show for  
 60 each blast the following information:

- 61 (A) Date and time of blast;
- 62 (B) Number of holes;
- 63 (C) Typical explosive weight per delay period;
- 64 (D) Total explosives in blast at any one time;
- 65 (E) Number of delays used;
- 66 (F) Weather conditions;
- 67 (G) Signature of operator employee in charge of the  
68 blast;
- 69 (H) Seismograph data; and
- 70 (I) Date of seismograph calibration.
- 71 (6) Where inspection by the division of environmental  
72 protection establishes that the scaled distance formula or  
73 the seismograph results or the approved preplan are not  
74 being adhered to, the following penalties shall be imposed:
- 75 (A) For the first offense in any one permit year under  
76 this section, the permit holder shall be assessed not less  
77 than five hundred dollars nor more than one thousand  
78 dollars;
- 79 (B) For the second offense in any one permit year  
80 under this section, the permit holder shall be assessed not  
81 less than one thousand dollars nor more than five thou-  
82 sand dollars;
- 83 (C) For the third offense in any one permit year un-  
84 der this section or for the failure to pay any assessment  
85 hereinabove set forth within a reasonable time established  
86 by the commissioner, the permit shall be revoked.
- 87 All assessments as set forth in this section shall be  
88 assessed by the director, collected by the director and  
89 deposited with the treasurer of the state of West Virginia,  
90 to the credit of the operating permit fees fund.
- 91 The director shall propose legislative rules pursuant to  
92 article three, chapter twenty-nine-a of this code which shall  
93 provide for a warning of impending blasting to the own-  
94 ers, residents or other persons who may be present on  
95 property adjacent to the blasting area.

# CHAPTER 178

(S. B. 469—By Senator Chafin)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section two, article one, chapter twenty-two-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to miners' health, safety and training; and providing that persons qualified as mine electricians in any state that recognizes certified electricians licensed in West Virginia are to be recognized in this state.

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

That section two, article one, chapter twenty-two-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 1. OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING; ADMINISTRATION; ENFORCEMENT.**

**§22A-1-2. Definitions.**

1 Unless the context in which used clearly requires a  
2 different meaning, the following definitions apply to this  
3 chapter:

4 (a) *General.*

5 (1) Accident: The term "accident" means any mine  
6 explosion, mine ignition, mine fire, or mine inundation, or  
7 injury to, or death of any person.

8 (2) Agent: The term "agent" means any person  
9 charged with responsibility for the operation of all or a  
10 part of a mine or the supervision of the miners in a mine.

11 (3) Approved: The term "approved" means in strict  
12 compliance with mining law, or, in the absence of law,  
13 accepted by a recognized standardizing body or organiza-

14 tion whose approval is generally recognized as authorita-  
15 tive on the subject.

16 (4) Face equipment: The term "face equipment"  
17 means mobile or portable mining machinery having elec-  
18 tric motors or accessory equipment normally installed or  
19 operated in by the last open crosscut in an entry or room.

20 (5) Imminent danger: The term "imminent danger"  
21 means the existence of any condition or practice in a coal  
22 mine which could reasonably be expected to cause death  
23 or serious physical harm before such condition or practice  
24 can be abated.

25 (6) Mine: The term "mine" includes the shafts, slopes,  
26 drifts or inclines connected with, or intended in the future  
27 to be connected with, excavations penetrating coal seams  
28 or strata, which excavations are ventilated by one general  
29 air current or divisions thereof, and connected by one  
30 general system of mine haulage over which coal may be  
31 delivered to one or more points outside the mine, and the  
32 surface structures or equipment connected or associated  
33 therewith which contribute directly or indirectly to the  
34 mining, preparation or handling of coal, or construction  
35 thereof.

36 (7) Miner: The term "miner" means any individual  
37 working in a coal mine.

38 (8) Operator: The term "operator" means any firm,  
39 corporation, partnership or individual operating any coal  
40 mine, or part thereof, or engaged in the construction of  
41 any facility associated with a coal mine.

42 (9) Permissible: The term "permissible" means any  
43 equipment, device or explosive that has been approved as  
44 permissible by the federal mine safety and health adminis-  
45 tration and/or the United States bureau of mines and meets  
46 all requirements, restrictions, exceptions, limitations and  
47 conditions attached to such classification by that agency  
48 or the bureau.

49 (10) Person: The term "person" means any individu-  
50 al, partnership, association, corporation, firm, subsidiary of  
51 a corporation or other organization.

52 (11) Work of preparing the coal: The term "work of  
53 preparing the coal" means the breaking, crushing, sizing,  
54 cleaning, washing, drying, mixing, storing and loading of  
55 bituminous coal or lignite and such other work of prepar-  
56 ing such coal as is usually done by the operator of the  
57 coal mine.

58 (b) *Office of miners' health, safety and training.*

59 (1) Board of appeals: The term "board of appeals"  
60 means as provided for in article five of this chapter.

61 (2) Director: The term "director" means the director  
62 of the office of miners' health, safety and training provid-  
63 ed for in section three of this article.

64 (3) Mine inspector: The term "mine inspector" means  
65 a state mine inspector provided for in section eight of this  
66 article.

67 (4) Mine inspectors' examining board: The term  
68 "mine inspectors' examining board" shall mean the mine  
69 inspectors' examining board provided for in article nine of  
70 this chapter.

71 (5) Office: The term "office" means, when referring  
72 to a specific office, the office of miners' health, safety and  
73 training provided for in this article. The term "office",  
74 when used generically, includes any office, board, agency,  
75 unit, organizational entity or component thereof.

76 (c) *Mine areas.*

77 (1) Abandoned workings: The term "abandoned  
78 workings" means excavation, either caved or sealed, that is  
79 deserted and in which further mining is not intended, or  
80 open workings which are ventilated and not inspected  
81 regularly.

82 (2) Active workings: The term "active workings"  
83 means all places in a mine that are ventilated and inspected  
84 regularly.

85 (3) Drift: The term "drift" means a horizontal or  
86 approximately horizontal opening through the strata or in  
87 a coal seam and used for the same purposes as a shaft.



88 (4) Excavations and workings: The term "excavations  
89 and workings" means any or all parts of a mine excavated  
90 or being excavated, including shafts, slopes, drifts, tunnels,  
91 entries, rooms and working places, whether abandoned or  
92 in use.

93 (5) Inactive workings: The term "inactive workings"  
94 includes all portions of a mine in which operations have  
95 been suspended for an indefinite period, but have not  
96 been abandoned.

97 (6) Mechanical working section: The term "mechani-  
98 cal working section" means an area of a mine: (A) In  
99 which coal is loaded mechanically; (B) which is comprised  
100 of a number of working places that are generally contigu-  
101 ous; and (C) which is of such size to permit necessary  
102 supervision during shift operation, including pre-shift and  
103 on-shift examinations and tests required by law.

104 (7) Panel: The term "panel" means workings that are  
105 or have been developed off of submain entries which do  
106 not exceed three thousand feet in length.

107 (8) Return air: The term "return air" means a volume  
108 of air that has passed through and ventilated all the work-  
109 ing places in a mine section.

110 (9) Shaft: The term "shaft" means a vertical opening  
111 through the strata that is or may be used for the purpose  
112 of ventilation, drainage, and the hoisting and transporta-  
113 tion of individuals and material, in connection with the  
114 mining of coal.

115 (10) Slope: The term "slope" means a plane or in-  
116 cline roadway, usually driven to a coal seam from the  
117 surface and used for the same purposes as a shaft.

118 (11) Working face: The term "working face" means  
119 any place in a coal mine in which work of extracting coal  
120 from its natural deposit in the earth is performed during  
121 the mining cycle.

122 (12) Working place: The term "working place" means  
123 the area of a coal mine in by the last open crosscut.

124           (13) Working section: The term "working section"  
125 means all areas of the coal mine from the loading point of  
126 the section to and including the working faces.

127           (14) Working unit: The term "working unit" means  
128 an area of a mine in which coal is mined with a set of  
129 production equipment; a conventional mining unit by a  
130 single loading machine; a continuous mining unit by a  
131 single continuous mining machine, which is comprised of  
132 a number of working places.

133           (d) *Mine personnel.*

134           (1) Assistant mine foreman: The term "assistant mine  
135 foreman" means a certified person designated to assist the  
136 mine foreman in the supervision of a portion or the whole  
137 of a mine or of the persons employed therein.

138           (2) Certified electrician: The term "certified electri-  
139 cian" means any person who is qualified as a mine electri-  
140 cian and who has passed an examination given by the  
141 office, or has at least three years of experience in perform-  
142 ing electrical work underground in a coal mine, in the  
143 surface work areas of an underground coal mine, in a  
144 surface coal mine, in a noncoal mine, in the mine equip-  
145 ment manufacturing industry or in any other industry  
146 using or manufacturing similar equipment, and has satis-  
147 factorily completed a coal mine electrical training pro-  
148 gram approved by the office or any person who is quali-  
149 fied as a mine electrician in any state that recognizes certi-  
150 fied electricians licensed in West Virginia.

151           (3) Certified person: The term "certified person",  
152 when used to designate the kind of person to whom the  
153 performance of a duty in connection with the operation of  
154 a mine shall be assigned, means a person who is qualified  
155 under the provisions of this law to perform such duty.

156           (4) Interested persons: The term "interested persons"  
157 includes the operator, members of any mine safety com-  
158 mittee at the mine affected and other duly authorized  
159 representatives of the mine workers and the office.

160           (5) Mine foreman: The term "mine foreman" means  
161 the certified person whom the operator or superintendent

162 shall place in charge of the inside workings of the mine  
163 and of the persons employed therein.

164 (6) Qualified person: The term "qualified person"  
165 means a person who has completed an examination and is  
166 considered qualified on record by the office.

167 (7) Shot firer: The term "shot firer" means any per-  
168 son having had at least two years of practical experience in  
169 coal mines, who has a knowledge of ventilation, mine roof  
170 and timbering, and who has demonstrated his or her  
171 knowledge of mine gases, the use of a flame safety lamp,  
172 and other approved detecting devices by examination and  
173 certification given him or her by the office.

174 (8) Superintendent: The term "superintendent" means  
175 the person who has, on behalf of the operator, immediate  
176 supervision of one or more mines.

177 (9) Supervisor: The term "supervisor" means a super-  
178 intendent, mine foreman, assistant mine foreman or any  
179 person specifically designated by the superintendent or  
180 mine foreman to supervise work or employees and who is  
181 acting pursuant to such specific designation and instruc-  
182 tions.

183 (e) *Electrical.*

184 (1) Armored cable: The term "armored cable" means  
185 a cable provided with a wrapping of metal, usually steel  
186 wires or tapes, primarily for the purpose of mechanical  
187 protection.

188 (2) Borehole cable: The term "borehole cable" means  
189 a cable designed for vertical suspension in a borehole or  
190 shaft and used for power circuits in the mine.

191 (3) Branch circuit: The term "branch circuit" means  
192 any circuit, alternating current or direct current, connected  
193 to and leading from the main power lines.

194 (4) Cable: The term "cable" means a standard con-  
195 ductor (single conductor cable) or a combination of con-  
196 ductors insulated from one another (multiple conductor  
197 cable).

198           (5) Circuit breaker: The term "circuit breaker" means  
199 a device for interrupting a circuit between separable con-  
200 tacts under normal or abnormal conditions.

201           (6) Delta connected: The term "delta connected"  
202 means a power system in which the windings or transform-  
203 ers or a.c. generators are connected to form a triangular  
204 phase relationship, and with phase conductors connected  
205 to each point of the triangle.

206           (7) Effectively grounded: The term "effectively  
207 grounded" is an expression which means grounded  
208 through a grounding connection of sufficiently low im-  
209 pedance (inherent or intentionally added or both) so that  
210 fault grounds which may occur cannot build up voltages  
211 in excess of limits established for apparatus, circuits or  
212 systems so grounded.

213           (8) Flame-resistant cable, portable: The term  
214 "flame-resistant cable, portable" means a portable  
215 flame-resistant cable that has passed the flame tests of the  
216 federal mine safety and health administration.

217           (9) Ground or grounding conductor (mining): The  
218 term "ground or grounding conductor (mining)", also  
219 referred to as a safety ground conductor, safety ground  
220 and frame ground, means a metallic conductor used to  
221 connect the metal frame or enclosure of any equipment,  
222 device or wiring system with a mine track or other effec-  
223 tive grounding medium.

224           (10) Grounded (earthed): The term "grounded  
225 (earthed)" means that the system, circuit or apparatus re-  
226 ferred to is provided with a ground.

227           (11) High voltage: The term "high voltage" means  
228 voltages of more than one thousand volts.

229           (12) Lightning arrester: The term "lightning arrester"  
230 means a protective device for limiting surge voltage on  
231 equipment by discharging or by passing surge current; it  
232 prevents continued flow of follow current to ground and is  
233 capable of repeating these functions as specified.

234           (13) Low voltage: The term "low voltage" means up  
235 to and including six hundred sixty volts.

236           (14) Medium voltage: The term "medium voltage"  
237 means voltages from six hundred sixty-one to one thou-  
238 sand volts.

239           (15) Mine power center or distribution center: The  
240 term "mine power center or distribution center" means a  
241 combined transformer or distribution unit, complete with-  
242 in a metal enclosure from which one or more low-voltage  
243 power circuits are taken.

244           (16) Neutral (derived): The term "neutral (derived)"  
245 means a neutral point or connection established by the  
246 addition of a "zig-zag" or grounding transformer to a  
247 normally underground power system.

248           (17) Neutral point: The term "neutral point" means  
249 the connection point of transformer or generator windings  
250 from which the voltage to ground is nominally zero, and is  
251 the point generally used for system groundings in  
252 wye-connected a.c. power system.

253           (18) Portable (trailing) cable: The term "portable  
254 (trailing) cable" means a flexible cable or cord used for  
255 connecting mobile, portable or stationary equipment in  
256 mines to a trolley system or other external source of elec-  
257 tric energy where permanent mine wiring is prohibited or  
258 is impracticable.

259           (19) Wye-connected: The term "wye-connected"  
260 means a power system connection in which one end of  
261 each phase windings or transformers or a.c. generators are  
262 connected together to form a neutral point, and a neutral  
263 conductor may or may not be connected to the neutral  
264 point, and the neutral point may or may not be grounded.

265           (20) Zig-zag transformer (grounding transformer):  
266 The term "zig-zag transformer (grounding transformer)"  
267 means a transformer intended primarily to provide a neu-  
268 tral point for grounding purposes.

## CHAPTER 179

(Com. Sub. for H. B. 4795—By Delegates Browning and Staton)

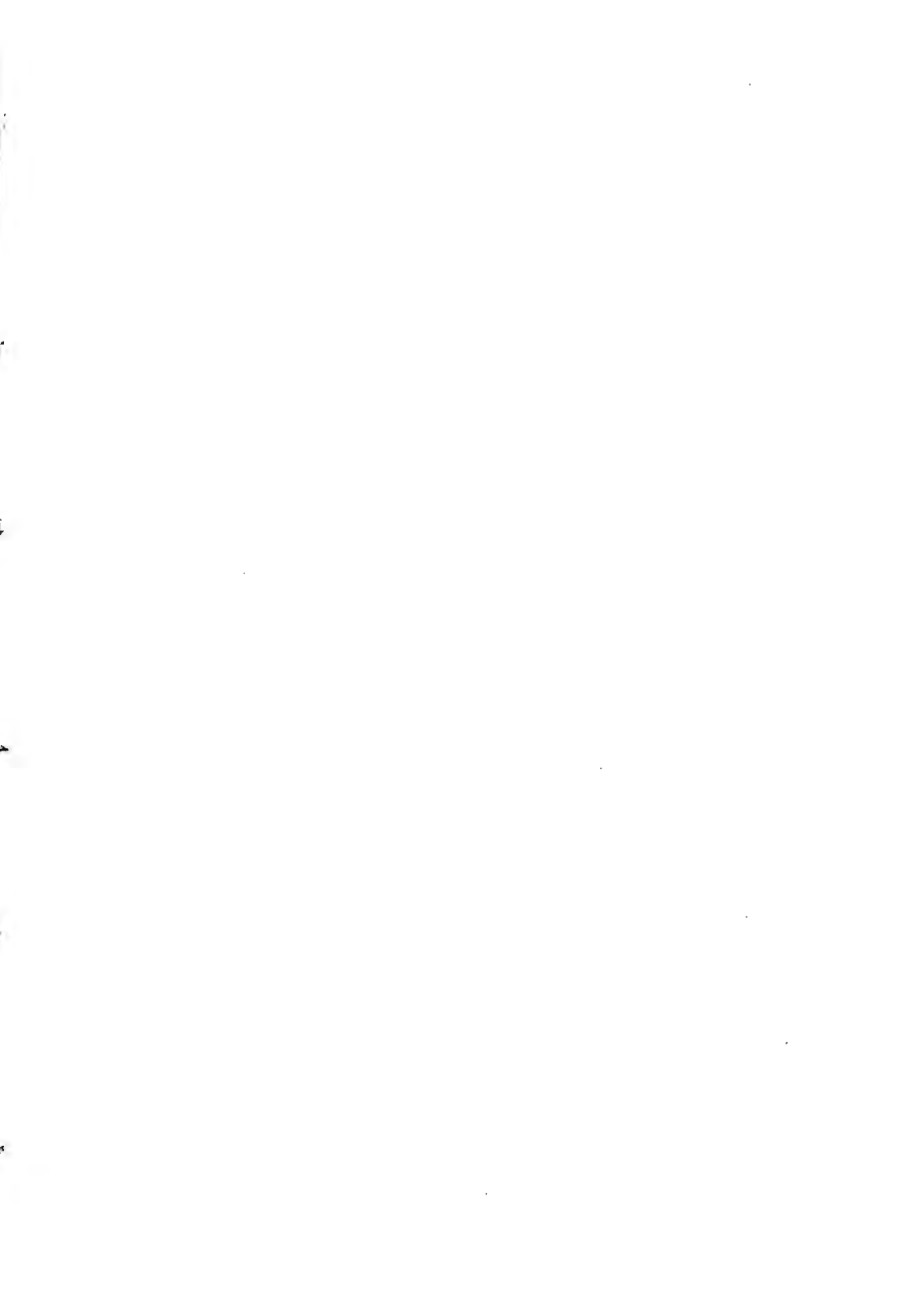
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**Clerk's Note:** It has been determined that Com. Sub. for H. B. 4795, originally styled as Chapter 179, occupying pages 1540 through 1550, was not properly enacted and that the purported bill as presented to the Governor was not passed by both houses in identical form. Therefore, the text of the document has been omitted to avoid confusion on the part of the user of these Acts.

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Page 1541 Blank

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## CHAPTER 180

(H. B. 4855—By Delegates Walters, Douglas, Hall, Kominar,  
Cann, Azinger and Tillis)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article twenty-four, relating to establishing reverse mortgages; and promulgating rules for reverse mortgages.

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

That chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article twenty-four, to read as follows:

### **ARTICLE 24. THE REVERSE MORTGAGE ENABLING ACT.**

- §47-24-1. Short title.
- §47-24-2. Statement of purpose.
- §47-24-3. Definition.
- §47-24-4. General rules for reverse mortgages.
- §47-24-5. Inapplicability of related statutes and law.
- §47-24-6. Treatment of reverse mortgage loan proceeds by public benefit programs.
- §47-24-7. Consumer information and counseling.
- §47-24-8. Regulatory authority and exemptions.



**§47-24-1. Short title.**

1       The article may be cited as the "Reverse Mortgage  
2    Enabling Act."

**§47-24-2. Statement of purpose.**

1       It is the intent of this legislation that elderly homeowners  
2    be permitted to meet their financial needs by accessing  
3    the equity in their homes through a reverse mortgage.

4       The Legislature recognizes that many restrictions and  
5    requirements that exist to govern traditional mortgage  
6    transactions are inapplicable in the context of reverse  
7    mortgages.

8       In order to foster reverse mortgage transactions and  
9    better serve the elderly citizens of this state, the Legislature  
10   authorizes the making of reverse mortgages, and expressly  
11   relieves reverse mortgage lenders and borrowers from  
12   compliance with inappropriate requirements.

**§47-24-3. Definition.**

1       "Reverse mortgage" means a nonrecourse loan secured  
2    by real property which:

3       (1) Provides cash advances to a borrower based on the  
4    equity in a borrower's owner-occupied principal residence;

5       (2) Requires no payment of principal or interest until  
6    the entire loan becomes due and payable; and

7       (3) Is made by any lender authorized to engage in  
8    business as a bank, savings institution, or credit union  
9    under the laws of this state or any other lender, other than  
10   an industrial loan company, affiliated with a  
11   federally-insured depository institution in this state, and  
12   licensed as a financial institution pursuant to chapter  
13   thirty-one-a of this code.

**§47-24-4. General rules for reverse mortgages.**

1 Reverse mortgage loans shall be governed by the fol-  
2 lowing rules, without regard to the requirements set out  
3 elsewhere for other types of mortgage transactions:

4 (a) Interest. A reverse mortgage may provide for an  
5 interest rate which is fixed or adjustable, and may also  
6 provide for interest that is contingent on the value of the  
7 property, including appreciation or shared equity.

8 (b) Intervening liens. All advances made under a  
9 reverse mortgage and all interest on such advances shall  
10 have priority over any lien filed after the closing of a  
11 reverse mortgage.

12 (c) Lender default. Lenders failing to make loan  
13 advances as required in the loan documents, and failing to  
14 cure such default as required in the loan documents, shall  
15 forfeit any right to collect interest. Lenders may also be  
16 subject to the penalty provisions set forth in chapter  
17 thirty-one-a of this code.

18 (d) Mortgage recordation tax. The recordation tax on  
19 reverse mortgages shall not exceed the actual cost of re-  
20 cording the mortgage.

21 (e) Periodic advances. If a reverse mortgage provides  
22 for periodic advances to a borrower, such advances shall  
23 not be reduced in amount or number based on any adjust-  
24 ment in the interest rate.

25 (f) Prepayment. Payment, in whole or in part, shall be  
26 permitted without penalty at any time during the period of  
27 the loan.

28 (g) Repayment.

29 (1) The mortgage may become due and payable upon  
30 the occurrence of any one of the following events:

31 (A) The title to the home securing the loan is sold or  
32 otherwise transferred;

33 (B) All borrowers cease occupying the home as a  
34 principal residence, subject to the additional conditions set

35 forth in paragraph (A) and (B), subdivision (2), subsection  
36 (g) of this section;

37 (C) Any fixed maturity date agreed to by the lender  
38 and the borrower is reached; or

39 (D) An event occurs which is specified in the loan  
40 documents and which jeopardizes the lender's security.

41 (2) The repayment requirement is also expressly subject  
42 to the following additional conditions:

43 (A) Temporary absences from the home not exceed-  
44 ing sixty consecutive days shall not cause the mortgage to  
45 become due and payable;

46 (B) Temporary absences from the home exceeding  
47 sixty consecutive days but less than one year shall not  
48 cause the mortgage to become due and payable so long as  
49 the borrower has taken prior action which secures the  
50 home in a manner satisfactory to the lender;

51 (C) The lender's right to collect reverse mortgage  
52 proceeds shall be subject to the applicable statute of limi-  
53 tations for loan contracts in section six, article two, chapter  
54 fifty-five. Notwithstanding section six, the statute of limi-  
55 tations shall commence on the date that the mortgage  
56 becomes due and payable;

57 (D) The lender must prominently disclose in the loan  
58 document any interest or other fees to be charged during  
59 the period that commences on the date that the mortgage  
60 becomes due and payable, and ends when repayment in  
61 full is made.

**§47-24-5. Inapplicability of related statutes and law.**

1 Reverse mortgage loans may be made or acquired  
2 without regard to the following statutory provisions or  
3 relevant interpretation of law:

4 (a) Limitations on the purpose and use of future ad-  
5 vances or any other mortgage proceeds;

- 6 (b) Limitations on future advances to a term of years,  
7 or limitations on the term of credit line advances;
- 8 (c) Limitations on the term during which future ad-  
9 vances take priority over intervening advances;
- 10 (d) Requirements that a maximum mortgage amount  
11 be stated in the mortgage;
- 12 (e) Limitations on loan-to-value ratios;
- 13 (f) Prohibitions on balloon payments;
- 14 (g) Prohibitions on compounded interest and interest  
15 on interest;
- 16 (h) Interest rate limits under the usury statutes;
- 17 (i) Requirements that a percentage of the loan pro-  
18 ceeds must be advanced prior to loan assignment; and
- 19 (j) Limitations on ongoing administrative and servic-  
20 ing fees.

**§47-24-6. Treatment of reverse mortgage loan proceeds by public benefit programs.**

- 1 Notwithstanding any law relating to payments, allow-  
2 ances, benefits or service provided on a means-tested basis,  
3 including, but not limited to, supplemental security in-  
4 come, low-income energy assistance, property tax relief,  
5 medical assistance and general assistance:
- 6 (a) Reverse mortgage loan payments made to a bor-  
7 rower shall be treated as proceeds from a loan and not as  
8 income for the purpose of determining eligibility and  
9 benefits under means tested programs of aid to individu-  
10 als.
- 11 (b) Undisbursed funds shall be treated as equity in a  
12 borrower's home and not as proceeds from a loan for the  
13 purpose of determining eligibility and benefits under  
14 means-tested programs of aid to individuals.

**§47-24-7. Consumer information and counseling.**

1 (a) No reverse mortgage commitment shall be made  
2 by a lender unless the loan applicant attests, in writing that  
3 the applicant received from the lender at time of initial  
4 inquiry a statement prepared by the commissioner of  
5 banking, in consultation with the board of the West Vir-  
6 ginia housing development fund, regarding the advisabili-  
7 ty and availability of independent information and coun-  
8 seling services on reverse mortgages.

9 (b) The commissioner of banking, in conjunction with  
10 the West Virginia housing development fund, shall be  
11 responsible for:

12 (1) Providing independent consumer information on  
13 reverse mortgages and alternatives; and

14 (2) Referring consumers to independent counseling  
15 services with expertise in reverse mortgages.

**§47-24-8. Regulatory authority and exemptions.**

1 (a) All reverse mortgage loans subject to this article  
2 shall be under the jurisdiction and supervision of the com-  
3 missioner of banking and subject to the regulatory author-  
4 ity and penalties set forth in chapter thirty-one-a of this  
5 code.

6 (b) The commissioner of banking shall have the au-  
7 thority to promulgate rules in order to affect compliance  
8 with the provisions of this article.

9 (c) Persons making reverse mortgage loans through a  
10 program authorized by and under the supervision of a  
11 federal governmental agency or through a federally spon-  
12 sored mortgage enterprise are exempt from the provisions  
13 of this article, and may make reverse mortgages notwith-  
14 standing any provisions to the contrary in this code: *Pro-*  
15 *vided*, That such loans are sold to those agencies or enter-  
16 prises within forty-five days of loan closing and that the  
17 commissioner of banking certifies that the program pro-  
18 vides consumers with protections against abusive practices.

# CHAPTER 181

(H. B. 4078—By Delegates Pino, Johnson, Whitman, Faircloth and Smirl)

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[Passed January 25, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections one and five, article six-c, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the special method for appraising dealer vehicle inventory; making technical revisions to clarify appropriate code reference; and extending date by which the tax commissioner reports to the joint committee on government and finance.

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

That sections one and five, article six-c, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follow:

**ARTICLE 6C. SPECIAL METHOD FOR APPRAISING DEALER  
VEHICLE INVENTORY.**

§11-6C-1. Inventory included within scope of article.

§11-6C-5. Intent of this article; tax commissioner to promulgate rules.

**§11-6C-1. Inventory included within scope of article.**

1       Notwithstanding any other provisions of law,  
2 inventory of vehicles, as that term is defined in section  
3 one, article one, chapter seventeen-b of this code, that is  
4 held for sale or lease by new or used vehicle dealers  
5 licensed under the provisions of article six, chapter  
6 seventeen-a of this code, provided that house trailers and  
7 factory-built homes shall be included within the scope of  
8 this article, consisting of individual units of personal new  
9 or used property, each unit of which, upon its sale to a  
10 retail purchaser, must, as a matter of law, be titled in the  
11 name of the retail purchaser and registered with the  
12 division of motor vehicles, shall be appraised for  
13 assessment purposes, as set forth in this article.

14 This article does not apply to units of inventory which  
15 are included in fleet sales, transactions between dealers or  
16 classified as heavy duty trucks of sixteen thousand pounds  
17 or more gross vehicular weight. For purposes of this  
18 article, inventory subject to the provisions of this article  
19 shall be denoted "dealer vehicle inventory".

**§11-6C-5. Intent of this article; tax commissioner to promulgate rules.**

1 (a) This article is adopted to address the lack of uni-  
2 formity, audit difficulties and business management issues  
3 arising in this state with respect to the assessment of the  
4 personal property held as new and used dealer vehicle  
5 inventory. Accordingly, the Legislature finds and declares  
6 that the adoption of this article will provide a more reliable  
7 and uniform method of determining market value of deal-  
8 er vehicle inventory; minimize audit problems associated  
9 with such property; provide a predictable revenue stream  
10 for levying bodies; maximize the owner's ability to man-  
11 age inventory; and provide clear guidance to local author-  
12 ities by superseding the wide variety of otherwise lawful  
13 appraisal methods now in use in this state.

14 (b) The tax commissioner shall have the power to  
15 promulgate such rules as may be necessary to implement  
16 the provisions of this article: *Provided*, That the tax com-  
17 missioner shall provide to the joint committee on govern-  
18 ment and finance by the first day of March for the next  
19 two fiscal years a report detailing the results of the admin-  
20 istration of this article.

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## CHAPTER 182

(Com. Sub. for S. B. 381—By Senator Miller)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections thirteen and fourteen, article two, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said chapter by adding thereto a new article,

designated article two-a; to amend and reenact section twenty-two, article three of said chapter; to amend and reenact section two, article two, chapter seventeen-d of said code; and to amend and reenact section seventeen, article one, chapter seventeen-e of said code, all relating to disclosure of information contained in motor vehicle records; implementation of the federal Drivers Privacy Protection Act of 1994; prohibitions on disclosure and use of personal information from state motor vehicle records except in accordance with the provisions of the act; provisions regarding resale or redisclosure; fees associated with disclosures; penalties for false representation; and authorizing division of motor vehicles to promulgate rules.

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

That sections thirteen and fourteen, article two, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said chapter be further amended by adding thereto a new article, designated article two-a; that section twenty-two, article three of said chapter be amended and reenacted; that section two, article two, chapter seventeen-d of said code be amended and reenacted; and that section seventeen, article one, chapter seventeen-e of said code be amended and reenacted, all to read as follows:

### **Chapter**

- 17A. Motor Vehicle Administration, Registration, Certificate of Title, and Antitheft Provisions.**
- 17D. Motor Vehicle Safety Responsibility Law.**
- 17E. Uniform Commercial Driver's License Act.**

### **CHAPTER 17A. MOTOR VEHICLE ADMINISTRATION, REGISTRATION, CERTIFICATE OF TITLE, AND ANTITHEFT PROVISIONS.**

#### **Article**

- 2. Department of Motor Vehicles.**
- 2A. Uniform Motor Vehicle Records Disclosure Act.**
- 3. Original and Renewal of Registration; Issuance of Certificates of Titles.**

#### **ARTICLE 2. DEPARTMENT OF MOTOR VEHICLES.**



§17A-2-13. Authority to administer oaths and certify copies of records; information as to registration.

§17A-2-14. Destruction of records.

**§17A-2-13. Authority to administer oaths and certify copies of records; information as to registration.**

1 (a) Officers and employees of the division designated  
2 by the commissioner are, for the purpose of administering  
3 the motor vehicle laws, authorized to administer oaths and  
4 acknowledge signatures, and shall do so without fee.

5 (b) The commissioner and such officers of the divi-  
6 sion as he or she may designate are hereby authorized to  
7 prepare under the seal of the division and deliver upon  
8 request in conformance with article two-a of this chapter a  
9 certified copy of any record of the division, charging a fee  
10 of one dollar for each document so authenticated, and  
11 every such certified copy is admissible in any proceeding  
12 in any court in like manner as the original thereof.

13 (c) Subject to the provisions of article two-a of this  
14 chapter, the commissioner and such officers of the divi-  
15 sion as he or she may designate may furnish the requested  
16 information to any person making a written request for  
17 information regarding the registration of any vehicle at a  
18 fee of one dollar for each registration about which infor-  
19 mation is furnished.

**§17A-2-14. Destruction of records.**

1 The commissioner may destroy any records of the  
2 division which have been maintained on file for three  
3 years which he or she deems obsolete and of no further  
4 service in carrying out the powers and duties of the divi-  
5 sion: *Provided*, That where it is shown that both parties to  
6 an accident have filed valid evidence of insurance, the  
7 records relating thereto may be destroyed after a period of  
8 six months.

**ARTICLE 2A. UNIFORM MOTOR VEHICLE RECORDS DISCLOSURE ACT.**

§17A-2A-1. Short title.

- §17A-2A-2. Statement of intent and purpose.
- §17A-2A-3. Definitions.
- §17A-2A-4. Prohibition on disclosure and use of personal information from motor vehicles records.
- §17A-2A-5. Required disclosures.
- §17A-2A-6. Disclosure with consent.
- §17A-2A-7. Permitted disclosures.
- §17A-2A-8. Disclosure of individual records.
- §17A-2A-9. Fees.
- §17A-2A-10. Additional conditions.
- §17A-2A-11. Resale or redisclosure.
- §17A-2A-12. Rules.
- §17A-2A-13. Penalty for false representation.
- §17A-2A-14. Effective date.

**§17A-2A-1. Short title.**

- 1 This act may be cited as the "Uniform Motor Vehicle
- 2 Records Disclosure Act".

**§17A-2A-2. Statement of intent and purpose.**

- 1 The purpose of this article is to implement the federal
- 2 Driver's Protection Act of 1994 (Title XXX of Public Law
- 3 103-322) in order to protect the interest of individuals in
- 4 their personal privacy by prohibiting the disclosure and
- 5 use of personal information contained in their motor vehi-
- 6 cle record, except as authorized by the individual or by
- 7 law.

**§17A-2A-3. Definitions.**

- 1 As used in this article:
- 2 (a) "Division" means the division of motor vehicles;
- 3 (b) "Disclose" means to make available or make
- 4 known information contained in a motor vehicle record to
- 5 any person, organization or entity;
- 6 (c) "Individual record" is a motor vehicle record
- 7 which contains personal information about a designated
- 8 person who is the subject of the record as identified in a
- 9 request;

10 (d) "Motor vehicle record" means any record that  
11 pertains to a motor vehicle operator's or driver's license or  
12 permit, a motor vehicle registration, a motor vehicle title or  
13 an identification document issued by the division of motor  
14 vehicles or other state or local agency authorized to issue  
15 any such form of credential;

16 (e) "Person" means an individual, organization or  
17 entity, but does not include the state or an agency thereof;

18 (f) "Personal information" means information that  
19 identifies a person, including his or her photograph or  
20 computerized image, social security number, driver identi-  
21 fication number, name, address excluding the five-digit  
22 zip code, telephone number and medical or disability  
23 information. Personal information does not include infor-  
24 mation on vehicle accidents, driving or equipment related  
25 violations and driver's license or registration status;

26 (g) "Record" includes any book, paper, photograph,  
27 photostat, card, film, tape, recording, electronic data, print-  
28 out or other documentary material regardless of physical  
29 form or characteristic.

**§17A-2A-4. Prohibition on disclosure and use of personal information from motor vehicles records.**

1 Notwithstanding any other provision of law to the  
2 contrary, and except as provided in sections five through  
3 eight, both inclusive, of this article, the division, and any  
4 officer, employee, agent or contractor thereof may not  
5 disclose any personal information obtained by the division  
6 in connection with a motor vehicle record. Notwithstand-  
7 ing the provisions of this article or any other provision of  
8 law to the contrary, finger images obtained and stored by  
9 the division of motor vehicles as part of the driver's licens-  
10 ing process may not be disclosed to any person or used  
11 for any purpose other than the processing and issuance of  
12 driver's licenses and associated legal action unless the  
13 disclosure or other use is expressly authorized by this  
14 code.

**§17A-2A-5. Required disclosures.**

1 Personal information as defined in section three of  
2 this article shall be disclosed for use in connection with  
3 matters of motor vehicles or driver safety and theft, motor  
4 vehicle emissions, motor vehicle product alterations, recalls  
5 or advisories, performance monitoring of motor vehicles  
6 and dealers by motor vehicle manufacturers and removal  
7 of nonowner records from the original owner records of  
8 motor vehicle manufacturers to carry out the purposes of  
9 the federal Automobile Information and Disclosure Act,  
10 "Public Law 85-506" (15 U.S.C. 1231 et seq.), the Motor  
11 Vehicle Information and Cost Saving Act, "Public Law  
12 92-513" (15 U.S.C. 1901 et seq.), the National Traffic and  
13 Motor Vehicle Safety Act of 1966, "Public Law 89-563"  
14 (U.S.C. 1381 et seq.), the Anti Car Theft Act of 1992,  
15 "Public Law 102-519" (15 U.S.C. 2021 et seq.) and the  
16 Clean Air Act, "Public Law 88-206" (42 U.S.C. 7401 et  
17 seq.), as amended, and all statutes and agency compliance  
18 with, the said acts of the Congress of the United States.

**§17A-2A-6. Disclosure with consent.**

1 Personal information as defined in section three of  
2 this article shall be disclosed upon request if the person  
3 making the request demonstrates in such form and man-  
4 ner as the department prescribes that he or she has ob-  
5 tained the written consent of the person who is the subject  
6 of the information.

**§17A-2A-7. Permitted disclosures.**

1 The division or its designee shall disclose personal  
2 information as defined in section three of this article to  
3 any person who requests the information if the person:  
4 (a) Has proof of his or her identity; and (b) verifies that  
5 the use of the personal information will be strictly limited  
6 to one or more of the following:

7 (1) For use by any governmental agency, including  
8 any court or law-enforcement agency, in carrying out its  
9 functions, or any private person or entity acting on behalf  
10 of a governmental agency in carrying out its functions;

11           (2) For use in connection with matters of motor vehi-  
12 cle or driver safety and theft, motor vehicle product alter-  
13 ations, recalls or advisories, performance monitoring of  
14 motor vehicles, motor vehicle parts and dealers, motor  
15 vehicle market research activities including survey re-  
16 search and removal of nonowner records from the original  
17 owner records of motor vehicle manufacturers;

18           (3) For use in the normal course of business by a  
19 legitimate business or its agents, employees or contractors:

20           (A) For the purpose of verifying the accuracy of  
21 personal information submitted by the individual to the  
22 business or its agents, employees or contractors; and

23           (B) If the information as submitted is not correct or is  
24 no longer correct, to obtain the correct information, but  
25 only for the purposes of preventing fraud by, pursuing  
26 legal remedies against or recovering on a debt or security  
27 interest against the individual;

28           (4) For use in conjunction with any civil, criminal,  
29 administrative or arbitral proceeding in any court or gov-  
30 ernmental agency or before any self-regulatory body,  
31 including the service of process, investigation in anticipa-  
32 tion of litigation, the execution or enforcement of judg-  
33 ments and orders or pursuant to an order of any court;

34           (5) For use in research and producing statistical re-  
35 ports, so long as the personal information is not published,  
36 redisclosed or used to contact individuals;

37           (6) For use by any insurer or insurance support orga-  
38 nization or by a self-insured entity, its agents, employees  
39 or contractors in connection with claim investigation activ-  
40 ities, antifraud activities, rating or underwriting;

41           (7) For use in providing notice to the owners of towed  
42 or impounded vehicles;

43           (8) For use by any licensed private investigator agen-  
44 cy or licensed security service for any purpose permitted  
45 under this section;

46 (9) For use by an employer or its agent or insurer to  
47 obtain or verify information relating to a holder of a com-  
48 mercial driver's license that is required under the Commer-  
49 cial Motor Vehicle Safety Act of 1986 (49 U.S.C. App.  
50 2710 et seq.);

51 (10) For use in connection with the operation of pri-  
52 vate toll transportation facilities;

53 (11) For bulk distribution for surveys, marketing or  
54 solicitations after the division has implemented methods  
55 and procedures to ensure that:

56 (A) Persons are provided an opportunity, in a clear  
57 and conspicuous manner, to prohibit such uses; and

58 (B) The information will be used, rented or sold sole-  
59 ly for bulk distribution for surveys, marketing and solici-  
60 tations, and that surveys, marketing and solicitations will  
61 not be directed at those individuals who have requested in  
62 a timely fashion that the material not be directed at them;  
63 and

64 (12) For any other use specifically authorized by law  
65 that is related to the operation of a motor vehicle or public  
66 safety.

**§17A-2A-8. Disclosure of individual records.**

1 Personal information as defined in section three of  
2 this article that is contained in an individual record may be  
3 disclosed to any person making a request, without regard  
4 to intended use, after the division has provided in a clear  
5 and conspicuous manner on forms for issuance or renewal  
6 of operator or driver licenses, registrations, titles or identi-  
7 fication documents, notice that personal information col-  
8 lected by the division may be disclosed to any person  
9 making a request for an individual record, and has provid-  
10 ed in a clear and conspicuous manner on the forms an  
11 opportunity for each person who is the subject of a record  
12 to prohibit such disclosure.

**§17A-2A-9. Fees.**

1 Any person making a request for disclosure of per-  
2 sonal information required or permitted under sections  
3 five through eight of this article, both inclusive, shall pay  
4 to the division all reasonable fees related to providing the  
5 information: *Provided*, That all fees under this section  
6 shall be set by legislative rule pursuant to article three,  
7 chapter twenty-nine-a of this code.

**§17A-2A-10. Additional conditions.**

1 Prior to disclosing personal information the division  
2 may require the person making the request to: (a) Verify  
3 his or her identity; (b) verify that the information will be  
4 used only as authorized, or that the consent of the person  
5 who is the subject of the information has been obtained;  
6 and (c) make and file a written application in such form  
7 and containing certification requirements as the division  
8 may prescribe.

**§17A-2A-11. Resale or redisclosure.**

1 (a) An authorized recipient of personal information,  
2 except a recipient under subsection (11), section seven of  
3 this article or section eight of this article, may resell or  
4 redisclose the information for any use permitted under  
5 section seven of this article except the use for bulk distri-  
6 bution for surveys, marketing or solicitations as provided  
7 in subsection (11), section seven of this article.

8 (b) An authorized recipient of an individual record  
9 under section eight of this article may resell or redisclose  
10 personal information for any purpose.

11 (c) An authorized recipient of personal information  
12 for bulk distribution for surveys, marketing or solicita-  
13 tions, under subsection (11), section seven of this article  
14 may resell or redisclose personal information only in  
15 accordance with the terms of said subsection concerning  
16 the right of individuals who have requested in a timely  
17 manner, not to have the surveys, marketing or solicitations  
18 directed at them.

19 (d) Any authorized recipient who resells or  
20 rediscloses personal information shall: (1) Maintain for a  
21 period of not less than five years, records as to the person  
22 or entity receiving information, and the permitted use for  
23 which it was obtained; and (2) make the records available  
24 for inspection by the division, upon request.

**§17A-2A-12. Rules.**

1 The division may promulgate rules in accordance  
2 with the provisions of chapter twenty-nine-a of this code  
3 to carry out the purposes of this article.

**§17A-2A-13. Penalty for false representation.**

1 Any person who requests the disclosure of personal  
2 information from division records and misrepresents his  
3 or her identity or makes a false statement on any applica-  
4 tion required by the division pursuant to this article is  
5 guilty of a misdemeanor and, upon conviction thereof,  
6 shall be fined not more than one thousand dollars or con-  
7 fined in jail for not more than one year, or both fined and  
8 confined.

**§17A-2A-14. Effective date.**

1 This article shall take effect the first day of Septem-  
2 ber, one thousand nine hundred ninety-seven.

**ARTICLE 3. ORIGINAL AND RENEWAL OF REGISTRATION;  
ISSUANCE OF CERTIFICATES OF TITLE.**

**§17A-3-22. Issuance and distribution of registration bulletins.**

1 The commissioner shall annually, following a renewal  
2 of registration, compile and publish in books or bulletins a  
3 list of all registered vehicles and shall thereafter compile  
4 and publish monthly supplements thereto. The list of  
5 registered vehicles shall be arranged serially according to  
6 the registration numbers assigned to registered vehicles  
7 and shall contain in addition the names and addresses of  
8 registered owners and a brief description of each vehicle.

9 Law-enforcement officers may be furnished with  
10 copies of the lists, and copies may also be furnished to  
11 other interested parties as may be authorized by the gover-



12 nor or by the commissioner. The commissioner may also  
13 furnish copies of the lists to similar officers in adjoining  
14 states. Subject to the provisions of article two-a of this  
15 chapter, copies may be furnished to any person upon  
16 application, at a price to be fixed by the commissioner.

## **CHAPTER 17D. MOTOR VEHICLE SAFETY RESPONSIBILITY LAW.**

### **ARTICLE 2. ADMINISTRATION OF LAW.**

#### **§17D-2-2. Commissioner to furnish abstract of operating record; fee for abstract.**

1 The commissioner shall upon request and subject to  
2 the provisions of article two-a, chapter seventeen-a of this  
3 code, furnish any person a certified abstract of the operat-  
4 ing record of any person subject to the provisions of this  
5 chapter, and if there is no record of any conviction of the  
6 person of a violation of any law relating to the operation  
7 of a motor vehicle or of any injury or damage caused by  
8 the person, the commissioner shall so certify. The com-  
9 missioner shall collect five dollars for each abstract.

## **CHAPTER 17E. UNIFORM COMMERCIAL DRIVER'S LICENSE ACT.**

### **ARTICLE 1. COMMERCIAL DRIVER'S LICENSE.**

#### **§17E-1-17. Driving record information to be furnished.**

1 Subject to the provisions of article two-a, chapter  
2 seventeen-a of this code, the commissioner shall furnish  
3 full information regarding the driving record of any per-  
4 son:

5 (a) To the driver license administrator of any other  
6 state or province or territory of Canada requesting that  
7 information;

8 (b) To any employer or prospective employer;

9 (c) To insurers upon request;

10 (d) To credit reporting organizations and for other  
11 legitimate business transactions; and

12 (e) To the driver.

# CHAPTER 183

(Com. Sub. for H. B. 4490—By Delegates Talbott, Gallagher, Clements, Trump, Preece, Kelley and Kallai)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section three, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section seven, article nine of said chapter; to amend and reenact section nine, article three, chapter seventeen-b of said code; to amend and reenact section six, article two-a, chapter seventeen-d of said code; and to amend and reenact section one, article six-a, chapter thirty-three of said code, all relating to surrender of registration plate or notification upon cancelling insurance coverage; establishing a verification process; changing random sample methods; misdemeanor penalties; suspension of motor vehicle registration; judicial review of suspension; reinstatement fees; providing that courts require current documentation of insurance; and requiring notice of insurance cancellation by registered or certified mail.

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

That section three, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that section seven, article nine of said chapter be amended and reenacted; that section nine, article three, chapter seventeen-b of said code be amended and reenacted; that section six, article two-a, chapter seventeen-d of said code be amended and reenacted; and that section one, article six-a, chapter thirty-three of said code be amended and reenacted, all to read as follows:

## **Chapter**

- 17A. Motor Vehicle Administration, Registration, Certificate of Title, and Antitheft Provisions.**
- 17B. Motor Vehicle Driver's Licenses.**
- 17D. Motor Vehicle Safety.**
- 33. Insurance.**

**CHAPTER 17A. MOTOR VEHICLE ADMINISTRATION,  
REGISTRATION, CERTIFICATE OF TITLE, AND  
ANTITHEFT PROVISIONS.**

**Article**

- 3. Original and Renewal of Registration; Issuance of Certificates of Title.**
- 9. Offenses Against Registration Laws and Suspension or Revocation of Registration.**

**ARTICLE 3. ORIGINAL AND RENEWAL OF REGISTRATION;  
ISSUANCE OF CERTIFICATES OF TITLE.**

**§17A-3-3. Application for registration; statement of insurance or other proof of security to accompany application; criminal penalties; fees; special revolving fund.**

1           Every owner of a vehicle subject to registration under  
2 this article shall make application to the division for the  
3 registration of the vehicle upon the appropriate form or  
4 forms furnished by the division and every such applica-  
5 tion shall bear the signature of the owner or his or her  
6 authorized agent, written with pen and ink, and the appli-  
7 cation shall contain:

8           (a) The name, bona fide residence and mailing ad-  
9 dress of the owner, the county in which he or she resides,  
10 or business address of the owner if a firm, association or  
11 corporation.

12           (b) A description of the vehicle including, insofar as  
13 the data specified in this section may exist with respect to a  
14 given vehicle, the make, model, type of body, the manu-  
15 facturer's serial or identification number or other number  
16 as determined by the commissioner.

17           (c) In the event a motor vehicle is designed, construct-  
18 ed, converted or rebuilt for the transportation of property,  
19 the application shall include a statement of its declared  
20 gross weight if the motor vehicle is to be used alone, or if  
21 the motor vehicle is to be used in combination with other  
22 vehicles, the application for registration of the motor vehi-  
23 cle shall include a statement of the combined declared  
24 gross weight of the motor vehicle and the vehicles to be  
25 drawn by the motor vehicle; declared gross weight being

26 the weight declared by the owner to be the actual com-  
27 bined weight of the vehicle or combination of vehicles and  
28 load when carrying the maximum load which the owner  
29 intends to place on the vehicle; and the application for  
30 registration of each vehicle shall also include a statement  
31 of the distance between the first and last axles of that vehi-  
32 cle or combination of vehicles.

33 The declared gross weight stated in the application  
34 shall not exceed the permissible gross weight for the axle  
35 spacing listed in the application as determined by the table  
36 of permissible gross weights contained in chapter  
37 seventeen-c of this code; and any vehicle registered for a  
38 declared gross weight as stated in the application is subject  
39 to the single-axle load limit set forth in chapter  
40 seventeen-c of this code.

41 (d) Each applicant shall state whether the vehicle is or  
42 is not to be used in the public transportation of passengers  
43 or property, or both, for compensation, and if used for  
44 compensation, or to be used, the applicants shall certify  
45 that the vehicle is used for compensation, and shall, as a  
46 condition precedent to the registration of such vehicle,  
47 obtain a certificate of convenience, or permit from the  
48 public service commission.

49 (e) A statement under penalty of false swearing that  
50 liability insurance is in effect and will continue to be in  
51 effect through the entire term of the vehicle registration  
52 period within limits which shall be no less than the re-  
53 quirement of section two, article four, chapter seventeen-d  
54 of this code, which shall contain the name of the appli-  
55 cant's insurer, the name of the agent or agency which  
56 issued the policy and the effective date of the policy, and  
57 such other information as may be required by the com-  
58 missioner of motor vehicles, or that the applicant has qual-  
59 ified as a self-insurer meeting the requirements of section  
60 two, article six, chapter seventeen-d of the code and that as  
61 a self-insurer he or she has complied with the minimum  
62 security requirements as established in section two, article  
63 four, chapter seventeen-d, or that the applicant has submit-  
64 ted bond or other security approved by the commissioner  
65 of motor vehicles which shall provide the equivalent of the

66 policy of insurance specified in this section, or that the  
67 applicant has submitted the required cash or other securi-  
68 ties with the state treasurer as set forth in the provisions of  
69 section sixteen, article four, chapter seventeen-d of this  
70 code.

71 (1) Intentional lapses of insurance coverage.

72 (A) In the case of a periodic use or seasonal vehicle, as  
73 defined in section three, article two-a, chapter seventeen-d  
74 of this code, the owner may provide, in lieu of other state-  
75 ments required by this section, a statement, under penalty  
76 of false swearing, that liability insurance is in effect during  
77 the portion of the year the vehicle is in actual use, within  
78 limits which shall be no less than the requirements of sec-  
79 tion two, article four, chapter seventeen-d of this code, and  
80 other information relating to the seasonal use, on a form  
81 designed and provided by the division.

82 (B) Any registrant who prior to expiration of his or  
83 her vehicle registration drops or cancels insurance cover-  
84 age for any reason other than periodic or seasonal use  
85 shall either surrender the registration plate or shall, by  
86 certified mail, notify the division of the cancellation. The  
87 notice shall contain a statement under penalty of false  
88 swearing that the vehicle will not be operated on the roads  
89 or highways of this state.

90 (C) The registration of any vehicle upon which insur-  
91 ance coverage has been dropped or canceled under para-  
92 graph (B) shall be reinstated upon submission of current  
93 proof of insurance and payment of the duplicate plate fee  
94 prescribed by this chapter.

95 (2) Verification process.

96 The division shall select no fewer than one percent of  
97 the total number of motor vehicles registered annually for  
98 a random sample verification of current insurance cover-  
99 age. The division may also select an owners statement of  
100 insurance submitted at the time of registration or registra-  
101 tion renewal for verification.

102 Random sample verification of current insurance cov-  
103 erage shall be conducted on a monthly basis. The basis

104 for each sample shall be the entire registered motor vehi-  
105 cle base. The selection of a registration for random sam-  
106 ple verification shall not preclude the registration from  
107 being selected again in any subsequent month.

108 The division shall notify the registrant by regular mail  
109 that he or she has twenty days to provide the division with  
110 proof of insurance indicating current insurance coverage  
111 on the indicated vehicle as of the date of the notice. The  
112 information shall be verified with the indicated insurance  
113 company as provided in this section or in the case of a  
114 verification of the original owner's statement of insurance,  
115 proof of insurance as of the date of submission of the  
116 owner's statement.

117 When a statement or registration is selected for verifi-  
118 cation, the division shall forward the information provided  
119 by the registrant to the listed insurer. The insurer shall  
120 notify the division, on a form required by the commis-  
121 sioner, within twenty calendar days if the liability insur-  
122 ance is or is not in effect, as required by this section.

123 The division may select for verification any statement  
124 of liability insurance submitted by a person who has previ-  
125 ously been convicted or whose registration or driver's  
126 license has been suspended for violating the provisions of  
127 section three, article two-a, chapter seventeen-d of this  
128 code, or whose statements of liability insurance have previ-  
129 ously been found to be incorrect. The division may also  
130 determine the correctness of information relating to proof  
131 of other security satisfying the requirements of this sec-  
132 tion.

133 Following the twenty-day period, if the registrant has  
134 not responded, or the division determines through the  
135 verification process with the insurance company that there  
136 is or was no liability insurance in effect, and the registrant  
137 has not complied with the provisions of intentional lapse  
138 of insurance, then the commissioner shall send a notice of  
139 pending suspension of the motor vehicle registration and  
140 the suspension of the owner or owner's driver's license to  
141 the registrant by certified mail. The notice of pending  
142 suspension shall grant the registrant an additional twenty  
143 days from the date of the mailing to provide current proof

144 of insurance as of the original notice date or other re-  
145 requested information to the commissioner. Following this  
146 additional twenty-day period, if the registrant fails to pro-  
147 vide proof of current insurance coverage as of the date of  
148 the original notice, an order of suspension shall be direct-  
149 ed to the superintendent by the commissioner as provided  
150 in section seven, article nine of this chapter.

151 The commissioner shall suspend the motor vehicle  
152 registration until current proof of insurance is received  
153 and shall suspend the driver's license of the owner or own-  
154 ers of the motor vehicle for a period of ninety days: *Pro-*  
155 *vided*, That whenever the commissioner determines that  
156 the vehicle was actually insured despite the receipt of a  
157 notice from the insurer, or the license plate was surren-  
158 dered to the division upon cancellation of coverage or that  
159 the registrant complied with the intentional lapse of cover-  
160 age notice provisions, the suspension shall be withdrawn  
161 and any fees collected by the state shall be returned.

162 Upon the timely written request of a person whose  
163 vehicle registration or driver's license is suspended under  
164 the provisions of this section, the commissioner shall stay  
165 the suspension, and afford the person an opportunity to be  
166 heard. The written request must be filed with the commis-  
167 sioner in person or by registered or certified mail, return  
168 receipt requested, within ten days after receipt of a copy of  
169 the order of suspension.

170 If the commissioner finds that the person whose vehi-  
171 cle registration or driver's license was suspended was not in  
172 violation of the provisions of this section, the commission-  
173 er shall rescind his or her earlier order of suspension.

174 A copy of the commissioner's order made and entered  
175 following the hearing shall be served on the person by  
176 registered or certified mail, return receipt requested. Dur-  
177 ing the pendency of any hearing, the revocation of the  
178 person's license to operate a motor vehicle in this state  
179 shall be stayed. If the commissioner shall, after hearing,  
180 make and enter an order affirming the commissioner's  
181 earlier order of revocation, the person shall be entitled to  
182 judicial review as set forth in chapter twenty-nine-a of this  
183 code. The commissioner shall not stay enforcement of the

184 order during the appeal. Pending the appeal, the court  
185 may grant a stay or supersedeas of the order only upon  
186 motion and hearing, and a finding by the court upon the  
187 evidence presented, that there is a substantial probability  
188 that the appellant shall prevail upon the merits, and the  
189 appellant will suffer irreparable harm if the order is not  
190 stayed: *Provided*, That in no event shall the stay or super-  
191 sedeas of the order exceed thirty days.

192 (3) If any person making an application required  
193 under the provisions of this section, in the application  
194 knowingly provides false information, false proof of secu-  
195 rity or a false statement of insurance, or if any person,  
196 including an applicant's insurance agent, knowingly coun-  
197 sels, advises, aids or abets another in providing false infor-  
198 mation, false proof of security, or a false statement of  
199 insurance in the application, he or she is guilty of a misde-  
200 meanor and, upon conviction thereof, shall be fined not  
201 more than five hundred dollars, or be imprisoned in the  
202 county or regional jail for a period not to exceed fifteen  
203 days, or both fined and imprisoned, and in addition to the  
204 fine or imprisonment shall have his or her operator's or  
205 chauffeur's license and vehicle registration suspended for  
206 a period of six months.

207 (f) Any further information as may reasonably be  
208 required by the division to enable it to determine whether  
209 the vehicle is lawfully entitled to registration.

210 (g) Each such application for registration shall be  
211 accompanied by the fees provided in this article, and an  
212 additional fee of fifty cents for each motor vehicle for  
213 which the applicant seeks registration, the fee to be depos-  
214 ited in a special revolving fund for the operation by the  
215 division of its functions established by the provisions of  
216 article two-a, chapter seventeen-d of this code.

**ARTICLE 9. OFFENSES AGAINST REGISTRATION LAWS AND  
SUSPENSION OR REVOCATION OF REGISTRA-  
TION.**

**§17A-9-7. Surrender of evidences of registration, etc., upon  
cancellation, suspension or revocation; willful  
failure or refusal to surrender; fee for reinstatement.**



1           Whenever the registration of a vehicle, a certificate of  
2 title, a registration card, registration plate or plates, a tem-  
3 porary registration plate or marker, the right to issue tem-  
4 porary registration plates or markers, any nonresident or  
5 other permit, or any license certificate or dealer special  
6 plates issued under the provisions of article six of this  
7 chapter, is canceled, suspended or revoked as authorized  
8 in this chapter, the owner, holder or other person in pos-  
9 session of the evidences of the registration, title, permit or  
10 license or any special dealer plates shall, except as other-  
11 wise provided in article six of this chapter, immediately  
12 return the evidences of the registration, title, permit or  
13 license that was canceled, suspended or revoked, together  
14 with any dealer special plates relating to any license certifi-  
15 cate, or any dealer special plate or plates if only the dealer  
16 special plate is suspended, to the division: *Provided*, That  
17 the owner or holder shall, before reinstatement, pay a fee  
18 of ten dollars in addition to all other fees, which shall be  
19 collected by the division and credited to a special revol-  
20 ving fund in the state treasury to be appropriated to the  
21 division for use in enforcement of the provisions of this  
22 code.

23           If any person willfully fails or refuses to return to the  
24 division the evidences of the registration, title, permit or  
25 license that have been canceled, suspended or revoked, or  
26 any dealer special plates, when obligated so to do as pro-  
27 vided in this section, the commissioner shall immediately  
28 notify the superintendent of the state police who shall, as  
29 soon as possible, secure possession of the evidence of  
30 registration, title, permit or license or any special dealer  
31 plates and return it to the division. The superintendent of  
32 the state police shall make a report in writing to the com-  
33 missioner, within two weeks after being notified by the  
34 commissioner, as to the result of his or her efforts to se-  
35 cure the possession and return of the evidences of registra-  
36 tion, title, permit or license, or any dealer special plates.

37           For each registration, certificate of title, registration  
38 card, registration plate or plates, temporary registration  
39 plate or marker, permit, license certificate or dealer special  
40 plate, which the owner, holder or other person in posses-  
41 sion of the registration, title, permit or license or any spe-

42 cial dealer plates shall have willfully failed or refused, as  
43 provided in this section, to return to the division within ten  
44 days from the time that the cancellation, suspension or  
45 revocation becomes effective, and which has been certified  
46 to the superintendent of the state police as specified in this  
47 section, the owner or holder shall, before the registration,  
48 title, permit or license or any special dealer plates may be  
49 reinstated, if reinstatement is permitted, in addition to all  
50 other fees and charges, pay a fee of fifteen dollars, which  
51 shall be collected by the division of motor vehicles, paid  
52 into the state treasury and credited to the general fund to  
53 be appropriated to the state police for application in the  
54 enforcement of the road laws.

55 A total of twenty-five dollars may be collected on each  
56 reinstatement for each vehicle to which any cancellation,  
57 suspension or revocation relates: *Provided*, That when  
58 any motor vehicle registration is suspended for failure to  
59 maintain motor vehicle liability insurance the reinstatement  
60 fee is one hundred dollars, and if the vehicle owner  
61 fails to surrender the vehicle registration and the orders go  
62 to the state police, an additional fee of fifty dollars shall be  
63 required before the motor vehicle registration may be  
64 reinstated. A total of one hundred fifty dollars may be  
65 collected on each reinstatement of any motor vehicle registration  
66 canceled, suspended or revoked for failure to  
67 maintain motor vehicle liability insurance.

## **CHAPTER 17B. MOTOR VEHICLE DRIVER'S LICENSES.**

### **ARTICLE 3. CANCELLATION, SUSPENSION OR REVOCATION OF LICENSES.**

#### **§17B-3-9. Surrender and return of license not required.**

1 The division, upon suspending or revoking a license,  
2 shall not require that the license be surrendered to and be  
3 retained by the division. The surrender of a license shall  
4 not be a precondition to the commencement and tolling of  
5 any applicable period of suspension or revocation: *Pro-*  
6 *vided*, That before the license may be reinstated, the li-  
7 censee shall pay a fee of fifteen dollars, in addition to all  
8 other fees and charges, which shall be collected by the  
9 division and deposited in a special revolving fund to be

10 appropriated to the division for use in the enforcement of  
11 the provisions of this section: *Provided, however,* That  
12 when any license is suspended for failure to maintain  
13 motor vehicle liability insurance, the reinstatement fee is  
14 fifty dollars.

## CHAPTER 17D. MOTOR VEHICLE SAFETY RESPONSIBILITY LAW.

### ARTICLE 2A. SECURITY UPON MOTOR VEHICLES.

#### §17D-2A-6. Investigation by duly authorized law-enforcement officer to include inquiry regarding required security; notice to division of motor vehicles.

1 At the time of investigation of a motor vehicle offense  
2 or accident in this state by the state police or other  
3 law-enforcement agency or when a vehicle is stopped by a  
4 law-enforcement officer for reasonable cause, the officer  
5 of the agency making the investigation shall inquire of  
6 the operator of any motor vehicle involved as to the exis-  
7 tence upon the vehicle of the proof of insurance or other  
8 security required by the provisions of this code. Upon a  
9 finding by the investigating law-enforcement agency,  
10 officer or agent of the motor vehicle offense or accident  
11 that the security required by the provisions of this article is  
12 not in effect, as to any vehicle, he or she shall notify the  
13 division of motor vehicles of his or her finding within five  
14 days, if no citation requiring a court appearance is issued:  
15 *Provided,* That the law-enforcement officer or agent shall  
16 not stop vehicles solely to inquire as to the certificate of  
17 insurance.

18 A defendant, who is charged with a traffic offense that  
19 requires an appearance in court, shall present the court at  
20 the time of his or her appearance or subsequent appear-  
21 ance with proof that the defendant had security in effect at  
22 the time of the traffic offense as required by this article.  
23 The court shall not base its decision solely on the presen-  
24 tation of a certificate of insurance as defined in section  
25 four, article two-a of this chapter. The court shall require  
26 current documentation from the defendant's insurance  
27 company or agent that the defendant in fact was insured at  
28 the time of the offense. If, as a result of the defendant's  
29 failure to show proof, the court determines that the defen-

30 dant has violated this article, it shall notify the division of  
31 motor vehicles within five days.

### CHAPTER 33. INSURANCE.

#### ARTICLE 6A. CANCELLATION OR NONRENEWAL OF AUTOMOBILE LIABILITY POLICIES.

##### §33-6A-1. Cancellation prohibited except for specified reasons; notice.

1 No insurer once having issued or delivered a policy  
2 providing automobile liability insurance in this state insur-  
3 ing a private passenger automobile shall, after the policy  
4 has been in effect for sixty days, or in case of renewal  
5 effective immediately, issue or cause to issue a notice of  
6 cancellation during the term of the policy except for one  
7 or more of the reasons specified in this section:

8 (a) The named insured fails to discharge when due any  
9 of his or her obligations in connection with the payment  
10 of premium for the policy or any installment of the pre-  
11 mium;

12 (b) The policy was obtained through material misrep-  
13 resentation;

14 (c) The insured violates any of the material terms and  
15 conditions of the policy;

16 (d) The named insured or any other operator, either  
17 resident in the same household or who customarily oper-  
18 ates an automobile insured under the policy:

19 (1) Has had his or her operator's license suspended or  
20 revoked during the policy period including suspension or  
21 revocation for failure to comply with the provisions of  
22 article five-a, chapter seventeen-c of this code, regarding  
23 consent for a chemical test for intoxication: *Provided,*  
24 That when a license is suspended for sixty days by the  
25 commissioner of motor vehicles because a person did  
26 drive a motor vehicle while under the age of twenty-one  
27 years with an alcohol concentration in his or her blood of  
28 two hundredths of one percent or more, by weight, but less  
29 than ten hundredths of one percent, by weight, pursuant to  
30 subsection (1), section two, article five-a, chapter  
31 seventeen-c of this code, the suspension shall not be

32 grounds for cancellation; or

33 (2) Is or becomes subject to epilepsy or heart attacks,  
34 and the individual cannot produce a certificate from a  
35 physician testifying to his or her ability to operate a motor  
36 vehicle.

37 (e) The named insured or any other operator, either  
38 resident in the same household or who customarily oper-  
39 ates an automobile insured under such policy is convicted  
40 of or forfeits bail during the policy period for any of the  
41 following:

42 (1) Any felony or assault involving the use of a motor  
43 vehicle;

44 (2) Negligent homicide arising out of the operation of  
45 a motor vehicle;

46 (3) Operating a motor vehicle while under the influ-  
47 ence of alcohol or of any controlled substance or while  
48 having an alcohol concentration in his blood of ten hun-  
49 dredths of one percent or more, by weight;

50 (4) Leaving the scene of a motor vehicle accident in  
51 which the insured is involved without reporting as required  
52 by law;

53 (5) Theft of a motor vehicle or the unlawful taking of  
54 a motor vehicle;

55 (6) Making false statements in an application for a  
56 motor vehicle operator's license;

57 (7) A third violation, committed within a period of  
58 twelve months, of any moving traffic violation which con-  
59 stitutes a misdemeanor, whether or not the violations were  
60 repetitious of the same offense or were different offenses.  
61 Notwithstanding any of the provisions of this section to  
62 the contrary, no insurance company may cancel a policy  
63 of automobile liability insurance without first giving the  
64 insured thirty days' notice, by registered or certified mail,  
65 of its intention to cancel: *Provided*, That cancellation of  
66 the insurance policy by the insurance carrier for failure of  
67 consideration to be paid by the insured upon initial issu-  
68 ance of the insurance policy is effective upon the expira-  
69 tion of ten days' notice of cancellation to the insured.

# CHAPTER 184

(Com. Sub. for S. B. 144—By Senators Miller and Love)

[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact sections three-a and sixteen, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section three, article ten of said chapter, all relating to registration of motor vehicles; payment of personal property taxes prerequisite to registration or renewal; duties of assessors; a schedule of automobile values; expiration of registrations and certifications of title; establishing an optional two-year renewal cycle for Class A motor vehicles; and combining the five different registration fees for Class A motor vehicles into one fee.

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

That sections three-a and sixteen, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that section three, article ten of said chapter be amended and reenacted, all to read as follows:

**Article**

**3. Original and Renewal of Registration; Issuance of Certificates of Title.**

**10. Fees for Registration, Licensing, Etc.**

**ARTICLE 3. ORIGINAL AND RENEWAL OF REGISTRATION;  
ISSUANCE OF CERTIFICATES OF TITLE.**

§17A-3-3a. Payment of personal property taxes prerequisite to registration or renewal; duties of assessors; schedule of automobile values.

§17A-3-16. Expiration of registration and certificates of title.

**§17A-3-3a. Payment of personal property taxes prerequisite to registration or renewal; duties of assessors; schedule of automobile values.**

- 1 Certificates of registration and renewal of registration
- 2 of any vehicle or registration plates for any vehicle shall

3 not be issued or furnished by the division of motor vehi-  
4 cles, or any other officer charged with such duty, unless  
5 the applicant for the certificate or registration plate, except  
6 an applicant exempt from payment of registration fees  
7 under section eight, article ten of this chapter, has fur-  
8 nished the receipt provided for in this section to show full  
9 payment of the personal property taxes for the calendar  
10 year which immediately precedes the calendar year in  
11 which application is made on all vehicles which were regis-  
12 tered with the division of motor vehicles in the applicant's  
13 name on the tax day for the former calendar year: *Pro-*  
14 *vided,* That after the first day of July, one thousand nine  
15 hundred ninety-seven, a certificate or registration plate  
16 shall not be issued to an applicant who has chosen the  
17 optional two-year registration system provided for in sec-  
18 tion sixteen of this article, unless the applicant has provid-  
19 ed the receipts provided for in this section to show full  
20 payment of the personal property taxes for the two calen-  
21 dar years immediately preceding the calendar year in  
22 which application is made on all vehicles which were regis-  
23 tered with the division of motor vehicles in the applicant's  
24 name on the tax day for the former calendar year. If the  
25 applicant contends that any registered vehicle was not  
26 subject to personal property taxation for that year, he or  
27 she shall furnish the information and evidence as the com-  
28 missioner of motor vehicles may require to substantiate his  
29 or her contention.

30 The assessor shall require any person having a duty to  
31 make a return of property for taxation to him or her to  
32 furnish information identifying each vehicle subject to the  
33 registration provisions of this chapter. When the property  
34 taxes on any vehicle have been paid, the officer to whom  
35 the payment was made shall deliver to the person paying  
36 the taxes a written or printed receipt for the payment, and  
37 shall retain for his or her records a duplicate of the re-  
38 ceipt. It is the duty of the assessor and sheriff, respective-  
39 ly, to see that the assessment records and the receipts con-  
40 tain information adequately identifying the vehicle as  
41 registered under the provisions of this chapter. The offi-  
42 cer receiving payment shall sign each receipt in his or her  
43 own handwriting.

44           The state tax commissioner shall annually compile a  
45 schedule of automobile values, based on the lowest values  
46 shown in a nationally accepted used car guide. The state  
47 tax commissioner shall furnish the schedule to each asses-  
48 sor and shall be used by him as a guide in placing the  
49 assessed values on all automobiles in his county.

**§17A-3-16. Expiration of registration and certificates of title.**

1           (a) Every vehicle registration under this chapter and  
2 every registration card and registration plate issued under  
3 this chapter expires at midnight on the last day of the  
4 month designated by the commissioner: *Provided*, That  
5 the commissioner may extend the period during which the  
6 registration plates may be used.

7           Certificates of title need not be renewed annually but  
8 remain valid until canceled by the division for cause or  
9 upon a transfer of any interest shown in the vehicle.

10          (b) Notwithstanding the provisions of this section or  
11 of any provision of this chapter, the commissioner shall  
12 adopt a staggered registration system whereby the registra-  
13 tion of Class A motor vehicles is for a period of twelve  
14 consecutive calendar months, the expiration dates of the  
15 registrations to be staggered throughout the year: *Provid-*  
16 *ed*, That on or after the first day of July, one thousand  
17 nine hundred ninety-seven, the commissioner shall also  
18 offer an optional two-year registration system, whereby  
19 the registration of all vehicles shall be for a period of  
20 twenty-four consecutive calendar months, the expiration  
21 dates of the registrations to be staggered throughout the  
22 year. Under this option, all annual fees due at the time of  
23 registration shall be multiplied by two.

24          (1) On or after the first day of July, one thousand  
25 nine hundred ninety-seven, all Class A motor vehicles as  
26 defined in section one, article ten of this chapter, shall be  
27 registered for a period of twelve or twenty-four consecu-  
28 tive calendar months. There hereby are established twelve  
29 registration periods, each of which shall start on the first  
30 day of each calendar month of the year and shall end on  
31 the last day of the twelfth month from date of beginning.  
32 The period ending on the thirty-first day of January is



33 designated the first period; that ending on the  
34 twenty-eighth (twenty-ninth) day of February is designat-  
35 ed the second; that ending on the thirty-first day of March  
36 is designated the third; that ending on the thirtieth day of  
37 April is designated the fourth; that ending on the  
38 thirty-first day of May is designated the fifth; that ending  
39 on the thirtieth day of June is designated the sixth; that  
40 ending on the thirty-first day of July is designated the  
41 seventh; that ending on the thirty-first day of August is  
42 designated the eighth; that ending on the thirtieth day of  
43 September is designated the ninth; that ending on the  
44 thirty-first day of October is designated the tenth; that  
45 ending on the thirtieth day of November is designated the  
46 eleventh; and that ending on the thirty-first day of Decem-  
47 ber is designated the twelfth.

48 (2) All Class A motor vehicles, which are operated for  
49 the first time upon the public highways of this state to and  
50 including the fifteenth day of any given month are subject  
51 to registration and payment of the fee for the twelve- or  
52 twenty-four-month period commencing the first day of  
53 the month of operation. All Class A motor vehicles oper-  
54 ated for the first time upon the public highways of this  
55 state on and after the sixteenth day of any given month  
56 are subject to registration and payment of fee for the  
57 twelve- or twenty-four-month period commencing the first  
58 day of the month of the next following calendar month.

59 (c) On or before the first day of July, one thousand  
60 nine hundred ninety-six, all Class T and Class R vehicles  
61 shall be registered for a maximum period of three years or  
62 portion thereof based on the number of years remaining  
63 in the three-year period designated by the commissioner.

#### ARTICLE 10. FEES FOR REGISTRATION, LICENSING, ETC.

##### §17A-10-3. Registration fees for vehicles equipped with pneumatic tires.

1 The following registration fees for the classes indicated  
2 shall be paid to the division for the registration of vehicles  
3 subject to registration under this chapter when equipped  
4 with pneumatic tires:

5 (a) Registration fees for the following classes shall be  
6 paid to the division annually:

7 (1) *Class A.* — The registration fee for all motor vehi-  
8 cles of this class is twenty-eight dollars and fifty cents:  
9 *Provided,* That the registration fees and any other fees  
10 required by this chapter for Class A vehicles under the  
11 optional biennial staggered registration system shall be  
12 multiplied by two and paid biennially to the division.

13 No license fee shall be charged for vehicles owned by  
14 churches, or by trustees for churches, which are regularly  
15 used for transporting parishioners to and from church  
16 services. Notwithstanding the exemption, the certificate of  
17 registration and license plates shall be obtained the same  
18 as other cards and plates under this article.

19 (2) *Class B, Class E and Class K.* — The registration  
20 fee for all motor vehicles of these three classes is as fol-  
21 lows:

22 (A) For declared gross weights of eight thousand one  
23 pounds to sixteen thousand pounds — twenty-eight dol-  
24 lars plus five dollars for each one thousand pounds or  
25 fraction thereof that the gross weight of the vehicle or  
26 combination of vehicles exceeds eight thousand pounds.

27 (B) For declared gross weights greater than sixteen  
28 thousand pounds, but less than fifty-five thousand pounds  
29 — seventy-eight dollars and fifty cents plus ten dollars for  
30 each one thousand pounds or fraction thereof that the  
31 gross weight of the vehicle or combination of vehicles  
32 exceeds sixteen thousand pounds.

33 (C) For declared gross weights of fifty-five thousand  
34 pounds or more — seven hundred thirty-seven dollars and  
35 fifty cents plus fifteen dollars and seventy-five cents for  
36 each one thousand pounds or fraction thereof that the  
37 gross weight of the vehicle or combination of vehicles  
38 exceeds fifty-five thousand pounds.

39 (3) *Class C and Class L.* — The registration fee for all  
40 vehicles of these two classes is seventeen dollars and fifty  
41 cents except that semitrailers, full trailers, pole trailers and  
42 converter gear registered as Class C and Class L may be

43 registered for a period of ten years at a fee of one hun-  
44 dred dollars.

45 (4) *Class G.* — The registration fee for each motorcy-  
46 cle is eight dollars.

47 (5) *Class H.* — The registration fee for all vehicles for  
48 this class operating entirely within the state is five dollars;  
49 and for vehicles engaged in interstate transportation of  
50 persons, the registration fee is the amount of the fees pro-  
51 vided by this section for Class B, Class E and Class K re-  
52 duced by the amount that the mileage of the vehicles op-  
53 erated in states other than West Virginia bears to the total  
54 mileage operated by the vehicles in all states under a for-  
55 mula to be established by the division of motor vehicles.

56 (6) *Class J.* — The registration fee for all motor vehi-  
57 cles of this class is eighty-five dollars. Ambulances and  
58 hearses used exclusively as such are exempt from the  
59 special fees set forth in this section.

60 (7) *Class S.* — The registration fee for all vehicles of  
61 this class is seventeen dollars and fifty cents.

62 (8) *Class U.* — The registration fee for all vehicles of  
63 this class is fifty-seven dollars and fifty cents.

64 (9) *Class Farm Truck.* — The registration fee for all  
65 motor vehicles of this class is as follows:

66 (A) For farm trucks of declared gross weights of eight  
67 thousand one pounds to sixteen thousand pounds — thirty  
68 dollars.

69 (B) For farm trucks of declared gross weights of six-  
70 teen thousand one pounds to twenty-two thousand pounds  
71 — sixty dollars.

72 (C) For farm trucks of declared gross weights of  
73 twenty-two thousand one pounds to twenty-eight thousand  
74 pounds — ninety dollars.

75 (D) For farm trucks of declared gross weights of  
76 twenty-eight thousand one pounds to thirty-four thousand  
77 pounds — one hundred fifteen dollars.

78 (E) For farm trucks of declared gross weights of  
79 thirty-four thousand one pounds to forty-four thousand  
80 pounds — one hundred sixty dollars.

81 (F) For farm trucks of declared gross weights of  
82 forty-four thousand one pounds to fifty-four thousand  
83 pounds — two hundred five dollars.

84 (G) For farm trucks of declared gross weights of  
85 fifty-four thousand one pounds to sixty-four thousand  
86 pounds — two hundred fifty dollars.

87 (b) Registration fees for the following classes shall be  
88 paid to the division for a maximum period of three years,  
89 or portion thereof based on the number of years remain-  
90 ing in the three-year period designated by the commis-  
91 sioner:

92 (1) *Class R.* — The annual registration fee for all  
93 vehicles of this class is twelve dollars.

94 (2) *Class T.* — The annual registration fee for all  
95 vehicles of this class is eight dollars.

96 (c) The fees paid to the division for a multi-year reg-  
97 istration provided for by this chapter shall be the same as  
98 the annual registration fee established by this section and  
99 any other fee required by this chapter multiplied by the  
100 number of years for which the registration is issued.

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## CHAPTER 185

(Com. Sub. for S. B. 113—By Senators Miller, Love, Grubb, Oliverio, Schoonover,  
Sharpe, Deem, Dugan, Whitlow, Ross, Yoder, Kimble, Manchin,  
Bowman, Helmick, Anderson, Blatnik, Wiedebusch, Plymale,  
Dittmar and Macnaughtan)

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[Passed February 22, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section twelve-a, article three,  
chapter seventeen-a of the code of West Virginia, one thou-  
sand nine hundred thirty-one, as amended, relating to disclo-

sure of odometer information; exceptions; penalties; and making West Virginia law conform to federal requirements.

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

That section twelve-a, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 3. ORIGINAL AND RENEWAL OF REGISTRATION;  
ISSUANCE OF CERTIFICATES OF TITLE.**

**§17A-3-12a. Disclosure of odometer information; exceptions;  
penalties.**

1 (a) In accordance with the provisions of sections four  
2 hundred eight-a and four hundred eight-e of the Motor  
3 Vehicle Information and Cost Savings Act, Public Law  
4 92-513, the transferor of a motor vehicle must complete  
5 the odometer disclosure form on the certificate of title or a  
6 separate written odometer disclosure statement, before  
7 executing any transfer of ownership document and before  
8 a new certificate of title may be issued for a transfer of  
9 ownership of a vehicle. The odometer disclosure form on  
10 the certificate of title and the separate written odometer  
11 disclosure statement shall contain the following informa-  
12 tion:

13 (1) The odometer reading at the time of transfer (not  
14 to include tenths of miles);

15 (2) The date of transfer;

16 (3) The transferor's name and current address;

17 (4) The transferee's name and current address;

18 (5) The transferor's printed name and signature ac-  
19 knowledging the disclosure;

20 (6) The identity of the vehicle, including its make,  
21 model, year, body type and identification number;

22 (7) Certification by the transferor that to the best of  
23 his or her knowledge the odometer reading reflects:

24 (A) The actual mileage the vehicle has been driven;

25 (B) The amount of mileage in excess of the designated  
26 mechanical odometer limit ; or

27 (C) A difference from the number of miles the vehicle  
28 has actually been driven and that the difference is greater  
29 than that caused by odometer calibration error, and that  
30 the odometer reading is not the actual mileage. This cer-  
31 tification shall state that the odometer reading does not  
32 reflect the actual mileage and should not be relied upon,  
33 and shall also include a warning notice to alert the trans-  
34 feree that a discrepancy exists between the odometer read-  
35 ing and the actual mileage; and

36 (8) A warning statement referring to state and federal  
37 law and the statement: "That failure to complete or provid-  
38 ing false information may result in fines and/or imprison-  
39 ment."

40 Upon issuance of a new title, the division shall mark  
41 the new title with an appropriate brand which reflects cer-  
42 tification of the prior owner.

43 (b) Before executing any transfer of ownership docu-  
44 ment, the lessor of a leased motor vehicle must notify a  
45 lessee in writing that the lessee is required to provide a  
46 written odometer disclosure statement to the lessor. The  
47 odometer disclosure statement shall contain the following  
48 information:

49 (1) The odometer reading at the time of transfer (not  
50 to include tenths of miles);

51 (2) The date of statement;

52 (3) The lessee's name and current address;

53 (4) The lessor's name and current address;

54 (5) The lessee's printed name and signature acknowl-  
55 edging the disclosure;

56 (6) The identity of the vehicle, including its make,  
57 model, year, body type and identification number;

58 (7) The date that the lessor notified the lessee of the  
59 disclosure requirements;

60 (8) The date that the completed disclosure statement  
61 was received by the lessor;

62 (9) The signature of the lessor;

63 (10) Certification by the lessee that to the best of his  
64 or her knowledge the odometer reading reflects:

65 (A) The actual mileage the vehicle has been driven;

66 (B) The amount of mileage in excess of the designated  
67 mechanical odometer limit; or

68 (C) A difference from the number of miles the vehicle  
69 has actually been driven and that the difference is greater  
70 than that caused by odometer calibration error, and that  
71 the odometer reading is not the actual mileage. This cer-  
72 tification shall state that the odometer reading does not  
73 reflect the actual mileage and should not be relied upon;  
74 and

75 (11) A warning statement referring to state and federal  
76 law and the statement: "That failure to complete or provid-  
77 ing false information may result in fines and/or imprison-  
78 ment."

79 If a lessor transfers the leased vehicle without obtain-  
80 ing possession of it, the lessor may indicate on the title the  
81 mileage disclosed by the lessee, unless the lessor has rea-  
82 son to believe the disclosure does not state the actual mile-  
83 age.

84 (c) Notwithstanding the provisions of this section, the  
85 form for odometer disclosure on the certificate of title or a  
86 separate written odometer disclosure statement need not be  
87 completed for any of the following motor vehicles:

88 (1) A vehicle having a gross weight of more than six-  
89 teen thousand pounds;

90 (2) A vehicle that is not self-propelled;

91 (3) A vehicle that is ten years old or older;

92 (4) A vehicle sold directly by the manufacturer to any  
93 agency of the United States in conformity with contracted  
94 specifications; or

95 (5) A new motor vehicle prior to its first transfer for  
96 purposes other than resale.

97 (d) Dealers and distributors of motor vehicles who are  
98 required by law to execute an odometer disclosure state-  
99 ment shall retain for five years a photostat, carbon or other  
100 facsimile copy of each odometer mileage statement which  
101 they issue and receive, at their primary place of business in  
102 an order that is appropriate to business requirements and  
103 that permits systematic retrieval.

104 (e) Lessors shall retain for five years following the  
105 date they transfer ownership of the leased vehicle each  
106 odometer disclosure statement which they receive from a  
107 lessee, at their primary place of business in an order that is  
08 appropriate to business requirements and that permits  
09 systematic retrieval.

10 (f) Auction companies shall retain for five years fol-  
111 lowing the date of sale of each motor vehicle, at their pri-  
112 mary place of business in an order that is appropriate to  
113 business requirements and that permits systematic retrieval,  
114 the following records:

115 (1) The name of the most recent owner (other than the  
116 auction company);

117 (2) The name of the buyer;

118 (3) The vehicle identification number; and

119 (4) The odometer reading on the date the auction  
120 company took possession of the motor vehicle.

121 (g) A transfer of a motor vehicle which has not been  
122 previously titled in this state or which has a certificate of  
123 title issued prior to the first day of January, one thousand  
124 nine hundred ninety-one, must include the execution of



127 the transfer by the owner and the purchaser on a form  
128 prescribed by the commissioner signed by each of the two  
129 parties, which form contains substantially the same infor-  
130 mation as is required in this section and with the provi-  
131 sions of the odometer mileage statement form pursuant to  
132 the Motor Vehicle Information and Cost Savings Act.

133 (h) The commissioner shall promulgate rules for the  
134 administration of this section in accordance with chapter  
135 twenty-nine-a of this code.

136 (i) Any person who violates any of the provisions of  
137 this section with intent to defraud shall be guilty of a mis-  
138 demeanor and, upon conviction thereof, shall be fined not  
139 less than two hundred dollars nor more than one thousand  
140 dollars, or imprisoned in the county jail for not more than  
141 six months, or both fined and imprisoned.

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## CHAPTER 186

(Com. Sub. for S. B. 30—By Senators Oliverio, Wiedebusch, Love, Buckalew,  
Kimble, Manchin, Anderson, Whitlow, Bailey, Wagner, Sharpe, Ross,  
Schoonover, Bowman, Walker, Deem, Yoder, Tomblin, Mr. President, Blatnik,  
Dittmar and Minear)

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[Passed March 6, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section fourteen, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to registration plates generally; renewal of registration plates; allowing a surviving spouse to continue to use his or her deceased spouse's military related license plate until the surviving spouse dies, remarries or fails to renew; providing a specialized license plate for marine corps league members; and one-time fee of ten dollars for specialized plate.

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

That section fourteen, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 3. ORIGINAL AND RENEWAL OF REGISTRATION;  
ISSUANCE OF CERTIFICATES OF TITLE.**

**§17A-3-14. Registration plates generally; description of  
plates; issuance of special numbers and  
plates; registration fees; special application  
fees; exemptions; commissioner to promul-  
gate forms; suspension and nonrenewal.**

1 (a) The division upon registering a vehicle shall issue  
2 to the owner one registration plate for a motorcycle, trail-  
3 er, semitrailer or other motor vehicle.

4 (b) Registration plates issued by the division shall meet  
5 the following requirements:

6 (1) Every registration plate shall be of reflectorized  
7 material and have displayed upon it the registration num-  
8 ber assigned to the vehicle for which it is issued; the name  
9 of this state, which may be abbreviated; and the year num-  
10 ber for which it is issued or the date of expiration of the  
11 plate.

12 (2) Every registration plate and the required letters  
13 and numerals on the plate shall be of sufficient size to be  
14 plainly readable from a distance of one hundred feet dur-  
15 ing daylight: *Provided*, That the requirements of this  
16 subdivision shall not apply to the year number for which  
17 the plate is issued or the date of expiration.

18 (3) Registration numbering for registration plates shall  
19 begin with number two.

20 (c) The division shall not issue, permit to be issued or  
21 distribute any special registration plates except as follows:

22 (1) The governor shall be issued two registration  
23 plates, on one of which shall be imprinted the numeral one  
24 and on the other the word one.

25 (2) State officials and judges may be issued special  
26 registration plates as follows:

27 (A) Upon appropriate application, there shall be issued  
28 to the secretary of state, state superintendent of free  
29 schools, auditor, treasurer, commissioner of agriculture

30 and the attorney general, the members of both houses of  
31 the Legislature, including the elected officials thereof, the  
32 justices of the supreme court of appeals of West Virginia,  
33 the representatives and senators of the state in the Con-  
34 gress of the United States, the judges of the United States  
35 district courts for the state of West Virginia and the judges  
36 of the United States court of appeals for the fourth circuit,  
37 if any of the judges are residents of West Virginia, a spe-  
38 cial registration plate for a Class A motor vehicle owned  
39 by the official or his or her spouse: *Provided*, That the  
40 division shall not issue more than two plates for each offi-  
41 cial.

42 (B) Each plate issued pursuant to this subdivision shall  
43 bear any combination of letters and numbers not to ex-  
44 ceed an amount determined by the commissioner and a  
45 designation of the office. Each plate shall supersede the  
46 regular numbered plate assigned to the official or his or  
47 her spouse during the official's term of office and while  
48 the motor vehicle is owned by the official or his or her  
49 spouse.

50 (C) An annual fee of fifteen dollars shall be charged  
51 for every registration plate issued pursuant to this subdivi-  
52 sion, which is in addition to all other fees required by this  
53 chapter.

54 (3) Members of the national guard forces may be  
55 issued special registration plates as follows:

56 (A) Upon receipt of an application on a form pre-  
57 scribed by the division and receipt of written evidence  
58 from the chief executive officer of the army national  
59 guard or air national guard, as appropriate, or the com-  
60 manding officer of any United States armed forces reserve  
61 unit that the applicant is a member thereof, the division  
62 shall issue to any member of the national guard of this  
63 state or a member of any reserve unit of the United States  
64 armed forces a special registration plate designed by the  
65 commissioner for any number of Class A motor vehicles  
66 owned by the member.

67 (B) An initial application fee of ten dollars shall be  
68 charged for each special registration plate issued pursuant

69 to this subdivision, which is in addition to all other fees  
70 required by this chapter. All initial application fees col-  
71 lected by the division shall be deposited into a special  
72 revolving fund to be used in the administration of this  
73 section.

74 (C) A surviving spouse may continue to use his or her  
75 deceased spouse's national guard forces license plate until  
76 the surviving spouse dies, remarries or does not renew the  
77 license plate.

78 (4) Specially arranged registration plates may be is-  
79 sued as follows:

80 (A) Upon appropriate application, any owner of a  
81 motor vehicle subject to Class A registration, or a motor-  
82 cycle subject to Class G registration, as defined by this  
83 article, may request that the division issue a registration  
84 plate bearing specially arranged letters or numbers with  
85 the maximum number of letters or numbers to be deter-  
86 mined by the commissioner. The division shall attempt to  
87 comply with the request wherever possible.

88 (B) The commissioner shall promulgate rules in accor-  
89 dance with the provisions of chapter twenty-nine-a of this  
90 code regarding the orderly distribution of the plates:  
91 *Provided*, That for purposes of this subdivision, the regis-  
92 tration plates requested and issued shall include all plates  
93 bearing the numbers two through two thousand.

94 (C) An annual fee of fifteen dollars shall be charged  
95 for each special registration plate issued pursuant to this  
96 subdivision, which is in addition to all other fees required  
97 by this chapter.

98 (5) Honorably discharged veterans may be issued  
99 special registration plates as follows:

100 (A) Upon appropriate application, there shall be issued  
101 to any honorably discharged veteran, of any branch of the  
102 armed services of the United States, a special registration  
103 plate for any number of vehicles titled in the name of the  
104 qualified applicant with an insignia designed by the com-  
105 missioner of the division of motor vehicles.

106 (B) A special initial application fee of ten dollars shall  
107 be charged in addition to all other fees required by law.  
108 This special fee is to compensate the division of motor  
109 vehicles for additional costs and services required in the  
110 issuing of the special registration and shall be collected by  
111 the division and deposited in a special revolving fund to  
112 be used for the administration of this section: *Provided,*  
113 That nothing in this section shall be construed to exempt  
114 any veteran from any other provision of this chapter.

115 (C) A surviving spouse may continue to use his or her  
116 deceased spouse's honorably discharged veterans license  
117 plate until the surviving spouse dies, remarries or does not  
118 renew the license plate.

119 (6) Disabled veterans may be issued special registra-  
120 tion plates as follows:

121 (A) Upon appropriate application, there shall be issued  
122 to any disabled veteran, who is exempt from the payment  
123 of registration fees under the provisions of this chapter, a  
124 registration plate for a vehicle titled in the name of the  
125 qualified applicant which bears the letters "DV" in red and  
126 also the regular identification numerals in red.

127 (B) A surviving spouse may continue to use his or her  
128 deceased spouse's disabled veterans license plate until the  
129 surviving spouse dies, remarries or does not renew the  
130 license plate.

131 (C) A qualified disabled veteran may obtain a second  
132 disabled veteran license plate as described in this section  
133 for use on a passenger vehicle titled in the name of the  
134 qualified applicant. An annual fee of fifteen dollars, in  
135 addition to all other fees required by this chapter, shall be  
136 charged for the second plate.

137 (7) Recipients of the distinguished purple heart medal  
138 may be issued special registration plates as follows:

139 (A) Upon appropriate application, there shall be issued  
140 to any armed service person holding the distinguished  
141 purple heart medal for persons wounded in combat a  
142 registration plate for a vehicle titled in the name of the  
143 qualified applicant bearing letters or numbers. The regis-

144 tration plate shall be designed by the commissioner of  
145 motor vehicles and shall denote that those individuals who  
146 are granted this special registration plate are recipients of  
147 the purple heart. All letterings shall be in purple where  
148 practical.

149 (B) Registration plates issued pursuant to this subdivi-  
150 sion are exempt from all registration fees otherwise re-  
151 quired by the provisions of this chapter.

152 (C) A surviving spouse may continue to use his or her  
153 deceased spouse's purple heart medal license plate until  
154 the surviving spouse dies, remarries or does not renew the  
155 license plate.

156 (D) A recipient of the purple heart medal may obtain  
157 a second purple heart medal license plate as described in  
158 this section for use on a passenger vehicle titled in the  
159 name of the qualified applicant. An annual fee of fifteen  
160 dollars, in addition to all other fees required by this chap-  
161 ter, shall be charged for the second plate.

162 (8) Survivors of the attack on Pearl Harbor may be  
163 issued special registration plates as follows:

164 (A) Upon appropriate application, the owner of a  
165 motor vehicle who was enlisted in any branch of the  
166 armed services that participated in and survived the attack  
167 on Pearl Harbor on the seventh day of December, one  
168 thousand nine hundred forty-one, shall be issued a special  
169 registration plate for a vehicle titled in the name of the  
170 qualified applicant. The registration plate shall be de-  
171 signed by the commissioner of motor vehicles.

172 (B) Registration plates issued pursuant to this subdivi-  
173 sion are exempt from the payment of all registration fees  
174 otherwise required by the provisions of this chapter.

175 (C) A surviving spouse may continue to use his or her  
176 deceased spouse's survivors of the attack on Pearl Harbor  
177 license plate until the surviving spouse dies, remarries or  
178 does not renew the license plate.

179 (D) A survivor of the attack on Pearl Harbor may  
180 obtain a second survivors of the attack on Pearl Harbor

181 license plate as described in this section for use on a pas-  
182 senger vehicle titled in the name of the qualified applicant.  
183 An annual fee of fifteen dollars, in addition to all other  
184 fees required by this chapter, shall be charged for the  
185 second plate.

186 (9) Nonprofit charitable and educational organizations  
187 may be issued special registration plates as follows:

188 (A) Nonprofit charitable and educational organiza-  
189 tions may design a logo or emblem for inclusion on a  
190 special registration plate and submit the logo or emblem  
191 to the commissioner for approval and authorization. Up-  
192 on the approval and authorization, the nonprofit charitable  
193 and educational organizations may market the special  
194 registration plate to organization members and the general  
195 public.

196 (B) Approved nonprofit charitable and educational  
197 organizations may accept and collect applications for  
198 special registration plates from owners of Class A motor  
199 vehicles together with a special annual fee of fifteen dol-  
200 lars, which is in addition to all other fees required by this  
201 chapter. The applications and fees shall be submitted to  
202 the division of motor vehicles with the request that the  
203 division issue a registration plate bearing a combination of  
204 letters or numbers with the organizations' logo or emblem,  
205 with the maximum number of letters or numbers to be  
206 determined by the commissioner.

207 (C) The commissioner shall promulgate rules in accor-  
208 dance with the provisions of chapter twenty-nine-a of this  
209 code regarding the procedures for and approval of special  
210 registration plates issued pursuant to this subdivision.

211 (D) The commissioner shall set an appropriate fee to  
212 defray the administrative costs associated with designing  
213 and manufacturing special registration plates for a non-  
214 profit charitable or educational organization. The non-  
215 profit charitable or educational organization shall collect  
216 this fee and forward it to the division for deposit in a spe-  
217 cial revolving fund to pay the administrative costs. The  
218 nonprofit charitable or educational organization may also  
219 collect a fee for marketing the special registration plates.

220 (10) Specified emergency or volunteer registration  
221 plates may be issued as follows:

222 (A) Any owner of a motor vehicle who is a resident of  
223 the state of West Virginia and who is a certified paramedic  
224 or emergency medical technician, a member of a volun-  
225 teer fire company or a paid fire department, a member of  
226 the state fire commission, the state fire marshal, the state  
227 fire marshal's assistants, the state fire administrator and  
228 voluntary rescue squad members may apply for a special  
229 license plate for any number of Class A vehicles titled in  
230 the name of the qualified applicant which bears the insig-  
231 nia of the profession, group or commission. Any insignia  
232 shall be designed by the commissioner. License plates  
233 issued pursuant to this subdivision shall bear the requested  
234 insignia in addition to the registration number issued to  
235 the applicant pursuant to the provisions of this article.

236 (B) Each application submitted pursuant to this subdi-  
237 vision shall be accompanied by an affidavit signed by the  
238 fire chief or department head of the applicant stating that  
239 the applicant is justified in having a registration with the  
240 requested insignia; proof of compliance with all laws of  
241 this state regarding registration and licensure of motor  
242 vehicles; and payment of all required fees.

243 (C) Each application submitted pursuant to this subdi-  
244 vision shall be accompanied by payment of a special ini-  
245 tial application fee of ten dollars, which is in addition to  
246 any other registration or license fee required by this chap-  
247 ter. All special fees shall be collected by the division and  
248 deposited into a special revolving fund to be used for the  
249 purpose of compensating the division of motor vehicles  
250 for additional costs and services required in the issuing of  
251 such special registration and for the administration of this  
252 section.

253 (11) Special scenic registration plates:

254 (A) Upon appropriate application, the commissioner  
255 shall issue a special registration plate displaying a scenic  
256 design of West Virginia no later than the first day of Janu-  
257 ary, one thousand nine hundred ninety-six. This special  
258 plate shall display the words "Wild Wonderful" as a slogan.



259 (B) A special one-time initial application fee of ten  
260 dollars shall be charged in addition to all other fees re-  
261 quired by this chapter. All initial application fees collect-  
262 ed by the division shall be deposited into a special revolv-  
263 ing fund to be used in the administration of this chapter.

264 (12) Honorably discharged marine corps league mem-  
265 bers may be issued special registration plates as follows:

266 (A) Upon appropriate application, there shall be issued  
267 to any honorably discharged marine corps league mem-  
268 ber, a special registration plate for any number of vehicles  
269 titled in the name of the qualified applicant with an insign-  
270 nia designed by the commissioner of the division of motor  
271 vehicles.

272 (B) A special one-time initial application fee of ten  
273 dollars shall be charged in addition to all other fees re-  
274 quired by this chapter. This special fee is to compensate  
275 the division of motor vehicles for additional costs and  
276 services required in the issuing of the special registration  
277 and shall be collected by the division and deposited in a  
278 special revolving fund to be used for the administration of  
279 this section: *Provided*, That nothing in this section shall  
280 be construed to exempt any veteran from any other provi-  
281 sion of this chapter.

282 (C) A surviving spouse may continue to use his or her  
283 deceased spouse's honorably discharged marine corps  
284 league license plate until the surviving spouse dies, remar-  
285 ries or does not renew the license plate.

286 (d) The commissioner shall promulgate rules in accor-  
287 dance with the provisions of chapter twenty-nine-a of this  
288 code regarding the proper forms to be used in making  
289 application for the special license plates authorized by this  
290 section.

291 (e) Nothing in this section shall be construed to re-  
292 quire a charge for a free prisoner of war license plate or a  
293 free recipient of the congressional medal of honor license  
294 plate for a vehicle titled in the name of the qualified appli-  
295 cant as authorized by other provisions of this code: *Pro-*  
296 *vided*, That a surviving spouse may continue to use his or

297 her deceased spouse's prisoner of war or congressional  
298 medal of honor license plate until the surviving spouse  
299 dies, remarries or does not renew the license plate. Quali-  
300 fied former prisoners of war and recipients of the congress-  
301 sional medal of honor may obtain a second special regis-  
302 tration plate for use on a passenger vehicle titled in the  
303 name of the qualified applicant. An annual fee of fifteen  
304 dollars, in addition to all other fees required by this chap-  
305 ter, shall be charged for the second special plate.

306 (f) Special ten-year registration plates may be issued  
307 as follows:

308 (1) The commissioner may issue or renew for a period  
309 of no more than ten years any registration plate exempted  
310 from registration fees pursuant to any provision of this  
311 code or any restricted use antique motor vehicle license  
312 plate authorized by section three-a, article ten of this chap-  
313 ter: *Provided*, That the provisions of this subsection shall  
314 not apply to any person who has had a special registration  
315 suspended for failure to maintain motor vehicle liability  
316 insurance as required by section three, article two-a, chap-  
317 ter seventeen-d of this code or failure to pay personal  
318 property taxes as required by section three-a of this arti-  
319 cle.

320 (2) An initial nonrefundable fee shall be charged for  
321 each special registration plate issued pursuant to this sub-  
322 section, which is the total amount of fees required by sec-  
323 tion fifteen, article ten of this chapter, section three, article  
324 three of this chapter or section three-a, article ten of this  
325 chapter for the period requested.

326 (g) The provisions of this section shall not be con-  
327 strued to exempt any registrant from maintaining motor  
328 vehicle liability insurance as required by section three,  
329 article two-a, chapter seventeen-d of this code or from  
330 paying personal property taxes on any motor vehicle as  
331 required by section three-a of this article.

332 (h) The commissioner may, in his or her discretion,  
333 issue a registration plate of reflectorized material suitable  
334 for permanent use on motor vehicles, trailers and semi-  
335 trailers, together with appropriate devices to be attached

336 thereto to indicate the year for which the vehicles have  
337 been properly registered or the date of expiration of the  
338 registration. The design and expiration of the plates shall  
339 be determined by the commissioner.

340 (i) Any license plate issued or renewed pursuant to  
341 this chapter, which is paid for by a check that is returned  
342 for nonsufficient funds, shall be void without further no-  
343 tice to the applicant. The applicant may not reinstate the  
344 registration until the returned check is paid by the appli-  
345 cant in cash, money order or certified check and all appli-  
346 cable fees assessed as a result thereof have been paid.

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## CHAPTER 187

(S. B. 357—By Senator Schoonover)

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[Passed March 8, 1996; in effect July 1, 1996. Approved by the Governor.]

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AN ACT to amend and reenact section twenty-three, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to individuals and state agencies exempted from using state license plates; and adding three plates per elected office of the board of public works to the exemptions.

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

That section twenty-three, article three, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 3. ORIGINAL AND RENEWAL OF REGISTRATION;  
ISSUANCE OF CERTIFICATES OF TITLE.**

**§17A-3-23. Registration plates to state, county, municipal and other governmental vehicles; use for undercover activities.**

1 Any motor vehicle designed to carry passengers,  
2 owned or leased by the state of West Virginia, or any of its

3 departments, bureaus, commissions or institutions, except  
4 vehicles used by the governor, treasurer, three plates per  
5 elected office of the board of public works, vehicles oper-  
6 ated by the department of public safety, not to exceed six  
7 vehicles operated by conservation officers of the division  
8 of natural resources, not to exceed ten vehicles operated  
9 by the arson investigators of the office of state fire mar-  
10 shal and not to exceed sixteen vehicles operated by in-  
11 spectors of the office of the alcohol beverage control  
12 commissioner, shall not be operated or driven by any  
13 person unless it shall have displayed and attached to the  
14 front thereof, in the same manner as regular motor vehicle  
15 registration plates are attached, a plate of the same size as  
16 the regular registration plate, with white lettering on a  
17 green background bearing the words "West Virginia" in  
18 one line and the words "State Car" in another line, and the  
19 lettering for the words "State Car" shall be of sufficient  
20 size to be plainly readable from a distance of one hundred  
21 feet during daylight.

22 Such vehicle shall also have attached to the rear a plate  
23 bearing a number and such other words and figures as the  
24 commissioner of motor vehicles shall prescribe. The rear  
25 plate shall also be green with the number in white.

26 On registration plates issued to vehicles owned by  
27 counties, the color shall be white on red with the word  
28 "County" on top of the plate and the words "West Virginia"  
29 on the bottom. On any registration plates issued to a city  
30 or municipality, the color shall be white on blue with the  
31 word "City" on top, and the words "West Virginia" on the  
32 bottom. The colors may not be reversed and shall be of  
33 reflectorized material. The registration plates issued to  
34 counties, municipalities and other governmental agencies  
35 authorized to receive colored plates hereunder shall be  
36 affixed to both the front and rear of such vehicles.

37 The commissioner is authorized to designate the col-  
38 ors and design of any other registration plates that are  
39 issued without charge to any other agency in accordance  
40 with the motor vehicle laws.

41       Upon application and payment of fees, the commis-  
42 sioner is authorized to issue a maximum of five Class A  
43 license plates per applicant to be used by county sheriffs  
44 and municipalities on law-enforcement vehicles while  
45 engaged in undercover investigations.

46       The commissioner is authorized to issue an unlimited  
47 number of license plates per applicant to authorized drug  
48 and violent crime task forces in the state of West Virginia  
49 when the chairperson of the control group of a drug and  
50 violent crime task force signs a written affidavit stating that  
51 the vehicle or vehicles for which the plates are being re-  
52 quested will be used only for official undercover work  
53 conducted by such drug and violent crime task force.

54       The commissioner is authorized to issue twenty Class  
55 A license plates to the criminal investigation division of  
56 the department of tax and revenue for use by its investiga-  
57 tors.

58       No other registration plate shall be issued for, or at-  
59 tached to, any such state-owned vehicle.

60       The commissioner of motor vehicles shall have a suffi-  
61 cient number of both front and rear plates produced to  
62 attach to all state-owned cars. The numbered registration  
63 plates for such vehicles shall start with the number "five  
64 hundred" and the commissioner shall issue consecutive  
65 numbers for all state-owned cars.

66       It shall be the duty of each office, department, bureau,  
67 commission or institution furnished any such vehicle to  
68 have such plates affixed thereto prior to the operation of  
69 such vehicle by any official or employee.

70       Any person who violates the provisions of this section  
71 shall be guilty of a misdemeanor and, upon conviction  
72 thereof, shall be fined not less than fifty dollars nor more  
73 than one hundred dollars.

74       Magistrates shall have concurrent jurisdiction with  
75 circuit and criminal courts for the enforcement of this  
76 section.

## CHAPTER 188

(Com. Sub. for S. B. 380—By Senator Miller)

[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact section eighteen, article six, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article by adding thereto two new sections, designated sections eighteen-a and twenty-five-a, all relating to motor vehicle dealers, license services and automobile auctions; investigation of licensees; disclosure of information to the motor vehicle dealers advisory board; revocation and suspension of licenses and plates; adding new offense to the grounds for suspending or revoking a license certificate; creating a motor vehicle dealers advisory board; composition of board; terms of board members; requiring commissioner to consult with the board; adding provisions for civil penalties for violations by vehicle dealers, license services and automobile auctions; providing for coviolator penalties; providing for hearings on civil penalties; and providing for judicial review.

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

That section eighteen, article six, chapter seventeen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said article be further amended by adding thereto two new sections, designated sections eighteen-a and twenty-five-a, all to read as follows:

### **ARTICLE 6. LICENSING OF DEALERS AND WRECKERS, ETC.**

§17A-6-18. Investigation; matters confidential; grounds for suspending or revoking license or imposing fine; suspension and revocation generally.

§17A-6-18a. Motor vehicle dealers advisory board.

§17A-6-25a. Civil penalties.

**§17A-6-18. Investigation; matters confidential; grounds for suspending or revoking license or imposing fine; suspension and revocation generally.**

1           (a) The commissioner may conduct an investigation  
2 to determine whether any provisions of this chapter have  
3 been or are about to be violated by a licensee. Any inves-  
4 tigation shall be kept in strictest confidence by the com-  
5 missioner, the division, the licensee, any complainant and  
6 all other persons, unless and until the commissioner sus-  
7 pends or revokes the license certificate of the licensee  
8 involved or fines the licensee: *Provided*, That the com-  
9 missioner may advise the motor vehicle dealers advisory  
10 board of pending actions and may disclose to the motor  
11 vehicle dealers advisory board such information as may  
12 enable it to perform its advisory function in imposing  
13 penalties. The commissioner may suspend or revoke a  
14 license certificate, suspend a special dealer plate or plates,  
15 impose a fine or take any combination of these actions, if  
16 the commissioner finds that the licensee:

17           (1) Has failed or refused to comply with the laws of  
18 this state relating to the registration and titling of vehicles  
19 and the giving of notices of transfers, the provisions and  
20 requirements of this article, or any reasonable rules autho-  
21 rized in section nine, article two of this chapter and pro-  
22 mulgated to implement the provisions of this article by the  
23 commissioner in accordance with the provisions of article  
24 three, chapter twenty-nine-a of this code;

25           (2) Has given any check in the payment of any fee  
26 required under the provisions of this chapter which is  
27 dishonored;

28           (3) In the case of a dealer, has knowingly made or  
29 permitted any unlawful use of any dealer special plate or  
30 plates issued to him or her;

31           (4) In the case of a dealer, has a dealer special plate or  
32 plates to which he or she is not lawfully entitled;

33           (5) Has knowingly made false statement of a material  
34 fact in his or her application for the license certificate then  
35 issued and outstanding;

36           (6) Has habitually defaulted on financial obligations;

- 37 (7) Does not have and maintain at each place of busi-  
38 ness (subject to the qualification contained in subdivision  
39 (17), subsection (a), section one of this article with respect  
40 to a new motor vehicle dealer) an established place of  
41 business as defined for the business in question in section  
42 one of this article;
- 43 (8) Has been guilty of any fraudulent act in connec-  
44 tion with the business of new motor vehicle dealer, used  
45 motor vehicle dealer, house trailer dealer, trailer dealer,  
46 motorcycle dealer, used parts dealer, or wrecker or  
47 dismantler;
- 48 (9) Has defrauded or is attempting to defraud any  
49 buyer or any other person, to the damage of the buyer or  
50 such other person, in the conduct of the licensee's busi-  
51 ness;
- 52 (10) Has defrauded or is attempting to defraud the  
53 state or any political subdivision of the state of any taxes  
54 or fees in connection with the sale or transfer of any vehi-  
55 cle;
- 56 (11) Has committed fraud in the registration of a  
57 vehicle;
- 58 (12) Has knowingly purchased, sold or otherwise  
59 dealt in a stolen vehicle or vehicles;
- 60 (13) Has advertised by any means, with intent to de-  
61 fraud, any material representation or statement of fact  
62 which is untrue, misleading or deceptive in any particular  
63 relating to the conduct of the licensed business;
- 64 (14) Has willfully failed or refused to perform any  
65 legally binding written agreement with any buyer;
- 66 (15) Has made a fraudulent sale or purchase;
- 67 (16) Has failed or refused to assign, reassign or trans-  
68 fer a proper certificate of title;
- 69 (17) Has a license certificate to which he or she is not  
70 lawfully entitled; or



71           (18) Has misrepresented a customer's credit or finan-  
72           cial status to obtain financing.

73           The commissioner shall also suspend or revoke the  
74           license certificate of a licensee if he or she finds the exis-  
75           tence of any ground upon which the license certificate  
76           could have been refused, or any ground which would be  
77           cause for refusing a license certificate to the licensee were  
78           he or she then applying for the license certificate.

79           (b) Whenever a licensee fails or refuses to keep the  
80           bond or liability insurance required by section four of this  
81           article in full force and effect, the commissioner shall  
82           automatically suspend the license certificate of the licensee  
83           unless and until a bond or certificate of insurance as re-  
84           quired by section four of this article is furnished to the  
85           commissioner. When the licensee furnishes the bond or  
86           certificate of insurance to the commissioner, the commis-  
87           sioner shall vacate the suspension.

88           (c) Suspensions under this section shall continue until  
89           the cause for the suspension has been eliminated or cor-  
90           rected. Revocation of a license certificate shall not pre-  
91           clude application for a new license certificate. The com-  
92           missioner shall process the application for a new license  
93           certificate in the same manner and issue or refuse to issue  
94           the license certificate on the same grounds as any other  
95           application for a license certificate is processed, consid-  
96           ered and passed upon, except that the commissioner may  
97           give any previous suspension and the revocation such  
98           weight in deciding whether to issue or refuse the license  
99           certificate as is correct and proper under all of the circum-  
100          stances.

**§17A-6-18a. Motor vehicle dealers advisory board.**

1           (a) There is created a motor vehicle dealers advisory  
2           board to assist and to advise the commissioner on the  
3           administration of laws regulating the motor vehicle indus-  
4           try; to work with the commissioner in developing new  
5           laws, rules or policies regarding the motor vehicle indus-  
6           try; and to give the commissioner such further advice and  
7           assistance as he or she may from time to time require.

8           The board shall consist of nine members and the  
9 commissioner of motor vehicles, or his or her representa-  
10 tive, who shall be an ex officio member. Two members  
11 shall represent new motor vehicle dealers, with one of  
12 these two members representing dealers that sell less than  
13 one hundred new vehicles per year; one member shall  
14 represent used motor vehicle dealers; one member shall  
15 represent wrecker/dismantler/rebuilders; one member shall  
16 represent automobile auctions; one member shall repre-  
17 sent recreational dealers; one member shall represent the  
18 West Virginia attorney general's office; and two members  
19 shall represent consumers. All of the representatives, ex-  
20 cept the attorney general representative who shall be des-  
21 ignated by the attorney general, shall be appointed by the  
22 governor with the advice and consent of the Senate, with  
23 no more than five representatives being from the same  
24 political party. The appointed members shall serve with-  
25 out compensation.

26           The terms of the board members shall be for three  
27 years commencing the first day of July, one thousand nine  
28 hundred ninety-six. Two members shall be appointed to  
29 serve one year, two members shall be appointed to serve  
30 two years and five members shall be appointed to serve  
31 three years. Successive appointments shall be for the full  
32 three years. The attorney general representative shall  
33 serve continuously.

34           The board shall meet at least four times annually and  
35 at the call of the commissioner.

36           Notwithstanding the provisions of article ten, chapter  
37 four of this code, the motor vehicle dealers advisory board  
38 shall continue until the first day of July, two thousand one.

39           (b) The commissioner shall consult with the board  
40 before he or she takes any disciplinary action against a  
41 dealer, an automobile auction or a license service to re-  
42 voke, or suspend a license, place the licensee on probation  
43 or levy a civil penalty, unless the commissioner determines  
44 that the consultation would endanger a criminal investiga-  
45 tion.

46 (c) The commissioner may consult with the board by  
47 mail, by facsimile, by telephone or at a meeting of the  
48 board, but the commissioner is not bound by the recom-  
49 mendations of the board. The commissioner shall give  
50 members seven days from the date of a mailing or other  
51 notification to respond to proposed actions, except in  
52 those instances when the commissioner determines that the  
53 delay in acting creates a serious danger to the public's  
54 health or safety or would unduly compromise the effec-  
55 tiveness of the action.

56 (d) No action taken by the commissioner shall be  
57 subject to challenge or rendered invalid on account of his  
58 or her failure to consult with the board.

**§17A-6-25a. Civil penalties.**

1 (a) In addition to any other remedy or penalty pro-  
2 vided by law, the commissioner may levy and collect a  
3 civil fine, in an amount not to exceed one thousand dollars  
4 for each first violation, against any person who violates the  
5 provisions of this article, article six-b or article six-c of this  
6 chapter, any of the rules or policies implemented to en-  
7 force those articles, or any lawful order of the commis-  
8 sioner pursuant to authority set forth in those articles.  
9 Every transaction which violates this article, article six-b or  
10 article six-c of this chapter shall be considered a separate  
11 violation. For a second violation, being any violation  
12 occurring within three years following any previous viola-  
13 tion for which the violator has been disciplined pursuant  
14 to section eighteen, article six of this chapter, the commis-  
15 sioner may levy and collect a fine in an amount not to  
16 exceed twenty-five hundred dollars, and for a third and  
17 subsequent violation occurring within the three-year peri-  
18 od following the first violation the commissioner may levy  
19 and collect a fine in an amount not to exceed five thou-  
20 sand dollars.

21 (b) A fine assessed under this section shall not take  
22 effect until the commissioner sends to the person against  
23 whom the penalty is assessed by certified mail, return  
24 receipt requested, a notice of violation finding that the

25 person has committed an offense. The notice shall contain:

26 (1) A statement of the offense the person committed;

27 (2) A summary of the facts on which the finding of a  
28 violation was made;

29 (3) The amount of the fine which is being levied; and

30 (4) An order that the person:

31 (A) Cease and desist from all future violations and  
32 pay the fine; or

33 (B) Protest in writing the findings of the commission-  
34 er or the amount of the assessed fine and request a hear-  
35 ing.

36 Any request for a hearing must be received by the  
37 commissioner within thirty days after the mailing date of  
38 the notice of violation. The notice of violation may be  
39 sent to any address which the person has used on any title  
40 or license application, or other filing or record which the  
41 commissioner believes is current. Failure of any person to  
42 receive a notice of violation does not preclude the fine  
43 from taking effect. However, the commissioner shall ac-  
44 cept as timely a request for hearing from any person who,  
45 within one year of the date the notice of violation was sent,  
46 provides satisfactory proof that he or she did not receive  
47 the notice of violation and that good cause exists to excuse  
48 his or her failure to receive the notice of violation and that  
49 he or she wishes in good faith to assert a protest to the  
50 notice of violation. The pendency of the one-year period  
51 shall not keep any penalty from taking effect, but the  
52 commissioner shall stay enforcement of the fine upon his  
53 or her acceptance of any notice filed after the thirty-day  
54 period pending the outcome of the appeal.

55 (c) Upon receipt of a timely request the commissioner  
56 shall afford the person a hearing in accordance with the  
57 rules of the division of motor vehicles. The commissioner,  
58 in addition to considering the evidence relied upon to  
59 prove or defend against a finding of a violation, shall also  
60 evaluate the appropriateness of the amount of the civil

61 penalty. In making such evaluation, the commissioner  
62 shall consider:

63 (1) The severity of the violation and its impact on the  
64 public;

65 (2) The number of similar or related violations;

66 (3) Whether the violations were willful or intentional;  
67 and

68 (4) Any other facts considered appropriate.

69 (d) In addition to any other findings of fact or con-  
70 clusions of law, the commissioner may reduce the civil  
71 penalty to a stated amount. The appellant may, at any  
72 time during the pendency of the appeal, enter into a settle-  
73 ment agreement with the commissioner. The settlement  
74 agreement may provide for a reduction in the penalty and  
75 may provide that the appellant does not admit a violation.  
76 The entry into a settlement agreement or the payment of  
77 any fine pursuant to a settlement agreement which states  
78 that the appellant does not admit a violation shall not  
79 amount to an admission of guilt for purposes of any crim-  
80 inal prosecution.

81 (e) Upon the expiration of all periods for protest or  
82 appeal of a notice of violation, including judicial review  
83 pursuant to section four, article five, chapter twenty-nine-a  
84 of this code, the notice of violation shall have the same  
85 force and effect and be enforceable as a judgment entered  
86 by any court of law of this state.

87 (f) If a corporation is found to have committed a  
88 violation against which a penalty may be assessed under  
89 this section, any officer of the corporation who is found to  
90 have knowingly and intentionally committed the violation,  
91 to have knowingly and intentionally directed another to  
92 commit the violation or to have knowingly and intention-  
93 ally failed to take reasonable steps to prevent another from  
94 committing the violation, may be individually found to be  
95 a coviolator and assessed a civil penalty as provided by  
96 this section.

## CHAPTER 189

(H. B. 2615—By Delegates Love, Linch, Williams and Given)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections two and seven, article one-d, chapter seventeen-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section five, article two of said chapter; to amend and reenact section forty-four, article fifteen, chapter seventeen-c of said code; and to amend and reenact section three, article six, chapter eighteen of said code, all relating to motorcycle safety education; requiring motorcycle courses to be conducted; extending motorcycle instruction permits; creation of motorcycle safety and education committee; powers and duties of the committee; authorizing the committee to make recommendations to the division of motor vehicles on the expenditure of funds; and motorcycle safety awareness in driver education courses.

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

That sections two and seven, article one-d, chapter seventeen-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that section five, article two of said chapter be amended and reenacted; that section forty-four, article fifteen, chapter seventeen-c of said code be amended and reenacted; and that section three, article six, chapter eighteen of said code, be amended and reenacted, all to read as follows:

### Chapter

- 17B. Motor Vehicle Driver's Licenses.
- 17C. Traffic Regulations and Laws of the Road.
- 18. Education.

### CHAPTER 17B. MOTOR VEHICLE DRIVER'S LICENSES.

#### Article

- 1D. Motorcycle Safety Education.
- 2. Issuance of License, Expiration and Renewal.

**ARTICLE 1D. MOTORCYCLE SAFETY EDUCATION.**

§17B-1D-2. Program established.

§17B-1D-7. Motorcycle safety account.

**§17B-1D-2. Program established.**

1 (a) The West Virginia motorcycle safety education  
2 program is hereby established within the division to be  
3 administered by the commissioner. The program shall  
4 include rider training courses and instructor training  
5 courses. It may also include efforts to enhance public  
6 motorcycle safety awareness, alcohol and drug effects  
7 awareness for motorcyclists, driver improvement efforts,  
8 licensing improvement efforts, program promotion and  
9 other efforts to enhance motorcycle safety through educa-  
10 tion.

11 (b) The commissioner shall appoint a program coordi-  
12 nator who shall oversee and direct the program, and con-  
13 duct an annual evaluation. Rider training courses shall be  
14 conducted annually in no fewer than four sites throughout  
15 the state, commencing no later than the first day of July,  
16 one thousand nine hundred ninety-six.

**§17B-1D-7. Motorcycle safety account.**

1 (a) There is hereby created a special fund in the state  
2 treasury which shall be designated the "motorcycle safety  
3 fund". The fund shall consist of all moneys received from  
4 motorcycle driver licensing fees except instruction permit  
5 fees, one half of the moneys received from the motorcycle  
6 safety fee assessed with each motorcycle registration under  
7 section three-b, article ten, chapter seventeen-a of this code  
8 and any other moneys specifically allocated to the fund.  
9 The fund shall not be treated by the auditor and treasurer  
10 as part of the general revenue of the state. The fund shall  
11 be a special revolving fund to be used and paid out upon  
12 order of the commissioner of motor vehicles, based upon  
13 the recommendations of the motorcycle safety and educa-  
14 tion committee created under section forty-four, article  
15 fifteen, chapter seventeen-c of this code, solely for the  
16 purposes specified in this chapter.

17 (b) The fund shall be used by the division of motor

18 vehicles to defray the cost of implementing and adminis-  
19 tering the motorcycle safety education program estab-  
20 lished in section two of this article. Moneys in the special  
21 revolving fund may also be used to defray the cost of  
22 implementing and administering the motorcycle driver  
23 licensing program.

**ARTICLE 2. ISSUANCE OF LICENSE, EXPIRATION AND RE-  
NEWAL.**

**§17B-2-5. Qualifications, issuance and fee for instruction per-  
mits.**

1 (a) Any person who is at least fifteen years of age may  
2 apply to the division for an instruction permit. The divi-  
3 sion may, in its discretion, after the applicant has appeared  
4 before the department of public safety and successfully  
5 passed all parts of the examination other than the driving  
6 test and presented documentation of compliance with the  
7 provisions of section eleven, article eight, chapter eighteen  
8 of this code, issue to the applicant an instruction permit  
9 which shall entitle the applicant while having such permit  
10 in such person's immediate possession to drive a motor  
11 vehicle upon the public highways when accompanied by a  
12 licensed driver of at least twenty-one years of age or a  
13 driver's education or driving school instructor that is act-  
14 ing in an official capacity as an instructor, who is occupy-  
15 ing a seat beside the driver, except in the event the permit-  
16 tee is operating a motorcycle, but in no event shall the  
17 permittee be allowed to operate a motorcycle upon a pub-  
18 lic highway until reaching sixteen years of age.

19 Any such instruction permit issued to a person under  
20 the age of sixteen years shall expire sixty days after the  
21 permittee reaches sixteen years of age: *Provided*, That  
22 only permittees who have reached their sixteenth birthday  
23 are eligible to take the driving examination as provided in  
24 section six of this article. The instruction permit may be  
25 renewed for one additional period of sixty days. Any such  
26 permit issued to a person who has reached the age of six-  
27 teen years shall be valid for a period of sixty days and  
28 may be renewed for an additional period of sixty days or  
29 a new permit issued. The fee for such instruction permit  
30 shall be four dollars, one dollar of which shall be paid into



31 the state treasury and credited to the state road fund, and  
32 the other three dollars of which shall be paid into the state  
33 treasury and credited to the general fund to be appropriat-  
34 ed to the department of public safety for application in the  
35 enforcement of the road law.

36 (b) Any person sixteen years of age or older may  
37 apply to the division for a motorcycle instruction permit.  
38 The division of motor vehicles may, in its discretion, after  
39 the applicant has appeared before the division of public  
40 safety and successfully passed all parts of the motorcycle  
41 examination other than the driving test, and presented  
42 documentation of compliance with the provisions of sec-  
43 tion eleven, article eight, chapter eighteen of this code,  
44 issue to the applicant an instruction permit which entitles  
45 the applicant while having such permit in such person's  
46 immediate possession to drive a motorcycle upon the  
47 public streets or highways for a period of ninety days,  
48 during the daylight hours between sunrise and sunset  
49 only. No holder of a motorcycle instruction permit shall  
50 operate a motorcycle while carrying any passenger on the  
51 vehicle.

52 A motorcycle instruction permit is not renewable, but  
53 a qualified applicant may apply for a new permit. The fee  
54 for a motorcycle instruction permit shall be five dollars,  
55 which shall be paid into a special fund in the state treasury  
56 known as the motorcycle license examination fund as  
57 established in section seven-c, article two of this chapter.

## CHAPTER 17C. TRAFFIC REGULATIONS AND LAWS OF THE ROAD.

### ARTICLE 15. EQUIPMENT.

#### §17C-15-44. Safety equipment and requirements for motor- cyclists, motorcycles, motor-driven cycles and mopeds; motorcycle safety standards and education committee.

1 (a) No person shall operate or be a passenger on any  
2 motorcycle or motor-driven cycle unless the person is  
3 wearing securely fastened on his or her head by either a  
4 neck or chin strap a protective helmet designed to deflect  
5 blows, resist penetration and spread impact forces. Any  
6 helmet worn by an operator or passenger shall meet the

7 current performance specifications established by the  
8 American National Standards Institute Standard, Z 90.1,  
9 the United States Department of Transportation Federal  
10 Motor Vehicle Safety Standard No. 218 or Snell Safety  
11 Standards for Protective Headgear for Vehicle Users.

12 (b) No person shall operate or be a passenger on any  
13 motorcycle or motor-driven cycle unless the person is  
14 wearing safety, shatter-resistant eyeglasses (excluding  
15 contact lenses), or eyegoggles or face shield that complies  
16 with the performance specifications established by the  
17 American National Standards Institute for Head, Eye and  
18 Respiratory Protection, Z 2.1. In addition, if any motor-  
19 cycle, motor-driven cycle or moped is equipped with a  
20 windshield or windscreen, the windshield or windscreen  
21 shall be constructed of safety, shatter-resistant material that  
22 complies with the performance specifications established  
23 by Department of Transportation Federal Motor Vehicle  
24 Safety Standard No. 205 and American National Stand-  
25 ards Institute, Safety Glazing Materials for Glazing Mo-  
26 tor Vehicles Operated on Land Highways, Standard Z  
27 26.1.

28 (c) No person shall operate a motorcycle,  
29 motor-driven cycle or moped on which the handlebars or  
30 grips are more than fifteen inches higher than the upper-  
31 most part of the operator's seat when the seat is not de-  
32 pressed in any manner.

33 (d) A person operating a motorcycle, motor-driven  
34 cycle or moped shall ride in a seated position facing for-  
35 ward and only upon a permanent operator's seat attached  
36 to the vehicle. No operator shall carry any other person  
37 nor shall any other person ride on the vehicle unless the  
38 vehicle is designed to carry more than one person, in  
39 which event a passenger may ride behind the operator  
40 upon the permanent operator's seat if it is designed for two  
41 persons, or upon another seat firmly attached to the vehi-  
42 cle to the rear of the operator's seat and equipped with  
43 footrests designed and located for use by the passenger or  
44 in a sidecar firmly attached to the vehicle. No person shall  
45 ride side saddle on a seat. An operator may carry as many  
46 passengers as there are seats and footrests to accommodate  
47 those passengers. Additional passengers may be carried in  
48 a factory produced sidecar provided that there is one pas-

49 senger per seat. Passengers riding in a sidecar shall be  
50 restrained by safety belts.

51 (e) Every motorcycle, motor-driven cycle and moped  
52 shall be equipped with a rearview mirror affixed to the  
53 handlebars or fairings and adjusted so that the operator  
54 shall have a clear view of the road and condition of traffic  
55 behind him for a distance of at least two hundred feet.

56 (f) There is hereby created a six member motorcycle  
57 safety and education committee consisting of: The super-  
58 intendent of the state police or a designee; the commis-  
59 sioner of motor vehicles or a designee; the director of the  
60 West Virginia safety council or a designee; a licensed  
61 motorcycle operator; an owner of a motorcycle dealer-  
62 ship; and a supplier of aftermarket nonfranchised motor-  
63 cycle supplies. The nongovernmental representatives shall  
64 be appointed by the governor with the advice and consent  
65 of the Senate, shall serve without compensation, and the  
66 terms shall be for three years, except that as to the mem-  
67 bers first appointed, one shall be appointed for a term of  
68 one year, one shall be appointed for a term of two years  
69 and one shall be appointed for a term of three years.  
70 Members may be reappointed to the committee.

71 The committee shall continue to exist pursuant to the  
72 provisions of article ten, chapter four of this code until the  
73 first day of July, one thousand nine hundred ninety-nine,  
74 to allow for the completion of a preliminary performance  
75 review by the joint committee on government operations.

76 The committee is hereby authorized to recommend to  
77 the superintendent of public safety types and makes of  
78 protective helmets, eye protection devices and equipment  
79 offered for sale, purchased or used by any person. The  
80 committee is authorized to make recommendations to the  
81 commissioner of motor vehicles regarding the use of the  
82 moneys in the motorcycle safety fund created under sec-  
83 tion seven, article one-d, chapter seventeen-b of this code.

## CHAPTER 18. EDUCATION.

### ARTICLE 6. DRIVER EDUCATION.

**§18-6-3. State board to establish minimum course standards; students with mental or physical defects; minimum standards specified.**

1 (a) The state board of education shall establish mini-  
2 mum standards for all driver education courses offered  
3 and made available to persons within the state, regardless  
4 of whether the courses are offered by public, private, paro-  
5 chial, denominational or commercial schools, but no per-  
6 son shall be permitted to enroll in any driver education  
7 course who has a known mental or physical defect that  
8 would prevent the person from qualifying for an opera-  
9 tor's license, unless the mental or physical defect is con-  
10 trolled or corrected so the person could so qualify.

11 (b) The minimum standards shall provide at least that:

12 (1) All driver education courses offered within the  
13 state are taught by instructors certified by the state board  
14 as qualified for these purposes.

15 (2) Each person enrolled in a driver education course  
16 shall receive practice driving and observation in a dual  
17 control automobile and instruction in at least the follow-  
18 ing:

19 (A) Basic and advanced driving techniques, including  
20 techniques for handling emergencies.

21 (B) Traffic regulations and laws of the road as provid-  
22 ed in chapter seventeen-c of this code, and other applica-  
23 ble state and local laws and ordinances.

24 (C) Critical mechanical parts of vehicles requiring  
25 preventive maintenance for safety.

26 (D) The vehicle, highway and community features that  
27 aid the driver in avoiding crashes; protect him and his  
28 passengers in crashes; and maximize the salvage of the  
29 injured.

30 (E) Signs, signals, highway markings and highway  
31 design features which require understanding for safe oper-  
32 ation of motor vehicles.

33 (F) Differences in characteristics of urban and rural  
34 driving, including safe use of modern expressways.

35 (G) Pedestrian safety.

36 (H) Motorcycle safety awareness.

37 (c) In addition, in driver education courses participat-  
38 ing students shall be encouraged to acquire first aid skills.

# CHAPTER 190

(H. B. 4585—By Delegates Warner, Everson and Kerns)

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[Passed March 5, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend article one, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section sixty-three; and to amend and reenact section five, article seventeen of said chapter, all relating to traffic regulations, laws of the road; size, weight and load limits; authorizing the transporting of loads on digger/derrick line trucks from sunrise to sunset except in an emergency; and providing a definition of a digger/derrick line truck.

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

That article one, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section sixty-three; and that section five, article seventeen of said chapter be amended and reenacted, all to read as follows:

## Article

1. Words and Phrases Defined.

17. Size, Weight and Load.

## ARTICLE 1. WORDS AND PHRASES DEFINED.

### §17C-1-63. Digger/derrick line truck.

- 1 "Digger/derrick line truck" means a truck which is
- 2 specifically designed and used for transporting and setting
- 3 utility poles.

## ARTICLE 17. SIZE, WEIGHT AND LOAD.

### §17C-17-5. Special load limits.

- 1 (a) Subject to the foregoing provisions of this article
- 2 limiting the length of vehicles and loads, the load upon
- 3 any vehicle operated alone or the load upon the front
- 4 vehicle of a combination of vehicles shall not extend more
- 5 than three feet beyond the foremost part of the vehicle,

6 and the load upon any vehicle operated alone or the load  
7 upon the rear vehicle of a combination of vehicles shall  
8 not extend more than six feet beyond the rear of the bed  
9 or body of such vehicle: *Provided*, That a digger/derrick  
10 line truck may be operated with a load of no more than  
11 forty feet in length, with the load extending no more than  
12 six feet beyond the foremost part of the truck and no  
13 more than nine feet beyond the rear of the bed of the  
14 body of the truck, between sunrise and sunset except in an  
15 emergency, and the operation of the truck shall comply  
16 with the provisions of section fourteen, article fifteen of  
17 this chapter.

18 (b) The limitations as to length of vehicles and loads  
19 heretofore stated in section four of this article and subsec-  
20 tion (a) of this section shall not apply to any load upon a  
21 pole trailer when transporting poles or pipes or structural  
22 material which cannot be dismembered: *Provided*, That no  
23 pole or pipe or other material exceeding eighty feet in  
24 length shall be so transported unless a permit has first  
25 been obtained as authorized in section eleven of this arti-  
26 cle.

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## CHAPTER 191

(S. B. 143—By Senators Miller and Love)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section one, article six, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to speed limitations generally; penalties for violation of speed limits; exemption from driver record point assessment for speeding on out-of-state controlled access highways and interstate highways; and exempting commercial driver license holders from point assessment exemptions while operating a commercial vehicle.

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

That section one, article six, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 6. SPEED RESTRICTIONS.**

**§17C-6-1. Speed limitations generally; penalties for violation of speed limits in school zones.**

1 (a) No person may drive a vehicle on a highway at a  
2 speed greater than is reasonable and prudent under the  
3 existing conditions and the actual and potential hazards.  
4 In every event speed shall be so controlled as may be  
5 necessary to avoid colliding with any person, vehicle or  
6 other conveyance on or entering the highways in compli-  
7 ance with legal requirements and the duty of all persons to  
8 use due care.

9 (b) Where no special hazard exists that requires lower  
10 speed for compliance with subsection (a) of this section,  
11 the speed of any vehicle not in excess of the limits speci-  
12 fied in this section or established as hereinafter authorized  
13 is lawful, but any speed in excess of the limits specified in  
14 this subsection or established as hereinafter authorized is  
15 unlawful.

16 (1) Fifteen miles per hour in a school zone during  
17 school recess or while children are going to or leaving  
18 school during opening or closing hours. A school zone is  
19 all school property including school grounds and any  
20 street or highway abutting such school grounds and ex-  
21 tending one hundred twenty-five feet along such street or  
22 highway from the school grounds. The speed restriction  
23 does not apply to vehicles traveling on a controlled-access  
24 highway which is separated from the school or school  
25 grounds by a fence or barrier approved by the state road  
26 commissioner;

27 (2) Twenty-five miles per hour in any business or  
28 residence district;

29 (3) Fifty-five miles per hour on open country high-  
30 ways, except as otherwise provided by this chapter.

31 The speeds set forth in this section may be altered as  
32 authorized in sections two and three of this article.

33 (c) The driver of every vehicle shall, consistent with  
34 the requirements of subsection (a) of this section, drive at  
35 an appropriate reduced speed when approaching and  
36 crossing an intersection or railway grade crossing, when  
37 approaching and going around a curve, when approaching  
38 a hill crest, when traveling upon any narrow or winding  
39 roadway and when special hazard exists with respect to  
40 pedestrians or other traffic or by reason of weather or  
41 highway conditions.

42 (d) The speed limit on controlled-access highways and  
43 interstate highways, where no special hazard exists that  
44 requires a lower speed, shall be not less than fifty-five  
45 miles per hour and the speed limits specified in subsection  
46 (b) of this section do not apply.

47 (e) Any person who violates the provisions of this  
48 section is guilty of a misdemeanor and, upon conviction  
49 thereof, shall be fined not more than one hundred dollars:  
50 *Provided*, That any person who violates the provisions of  
51 this section after having been previously convicted under  
52 the provisions of this section for a prior offense which  
53 occurred within the preceding one-year period, is guilty of  
54 a misdemeanor and, upon conviction thereof, shall be  
55 fined not more than two hundred dollars: *Provided, how-*  
56 *ever*, That any person who violates the provisions of this  
57 section after having been previously convicted under the  
58 provisions of this section for two or more prior offenses  
59 which occurred within the preceding two-year period, is  
60 guilty of a misdemeanor and, upon conviction thereof,  
61 shall be fined not more than five hundred dollars or con-  
62 fined in jail for not more than six months, or both: *Pro-*  
63 *vided further*, That any person who violates subdivision  
64 (1), subsection (b) of this section is guilty of a misde-  
65 meanor and, upon conviction thereof, shall be fined not  
66 less than one hundred dollars nor more than five hundred  
67 dollars, or shall be fined not less than one hundred dollars  
68 nor more than five hundred dollars and confined in jail  
69 for not more than six months, or both, for a violation of  
70 said subdivision after having been previously convicted  
71 for one or more violations of said subdivision which oc-  
72 curred within the preceding two-year period.



73 (f) If an owner or driver is arrested under the provi-  
74 sions of this section for the offense of driving above the  
75 posted speed limit on a controlled-access highway or in-  
76 terstate highway, and if the evidence shall show that the  
77 motor vehicle was being operated at less than ten miles per  
78 hour above said speed limit, then, upon conviction thereof,  
79 such person shall be fined not more than five dollars, plus  
80 court costs.

81 If an owner or driver is convicted under the provisions  
82 of this section for the offense of driving above the speed  
83 limit on a controlled-access highway or interstate highway  
84 of this state, and if the evidence shall show that the motor  
85 vehicle was being operated at less than ten miles per hour  
86 above said speed limit, then notwithstanding the provisions  
87 of section four, article three, chapter seventeen-b of this  
88 code, a certified abstract of the judgment on such convic-  
89 tion shall not be transmitted to the division of motor vehi-  
90 cles.

91 (g) If an owner or driver is convicted in another state  
92 for the offense of driving above the maximum speed limit  
93 on a controlled-access highway or interstate highway, and  
94 if the maximum speed limit in such other state is less than  
95 the maximum speed limit for a comparable controlled-  
96 access highway or interstate highway in this state, and if  
97 the evidence shall show that the motor vehicle was being  
98 operated at less than ten miles per hour above what would  
99 be the maximum speed limit for a comparable controlled-  
100 access highway or interstate highway in this state, then  
101 notwithstanding the provisions of section four, article  
102 three, chapter seventeen-b of this code, a certified abstract  
103 of the judgment on such conviction shall not be transmit-  
104 ted to the department of motor vehicles, or, if transmitted,  
105 shall not be recorded by the department, unless within a  
106 reasonable time after conviction, the person convicted has  
107 failed to pay all fines and costs imposed by the other state:  
108 *Provided*, That the provisions of this subsection do not  
109 apply to conviction of owners or drivers who have been  
110 issued a commercial driver's license as defined in chapter  
111 seventeen-e of this code, if the offense was committed  
112 while operating a commercial vehicle.

## CHAPTER 192

(S. B. 249—By Senators Anderson, Wagner, Sharpe, Yoder, Dittmar, Deem, Love, Dugan, Manchin, Whitlow, Miller, Helmick, Buckalew, Ross, Schoonover, Bailey and Oliverio)

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[Passed March 5, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section three, article twelve, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the stopping of certain vehicles at all railroad grade crossings; and removing exceptions.

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

That section three, article twelve, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 12. SPECIAL STOPS REQUIRED.

#### §17C-12-3. Certain vehicles must stop at all railroad grade crossings.

1 (a) The driver of any motor vehicle carrying passen-  
2 gers for hire, or of any bus, or of any vehicle required to  
3 be placarded under 49 CFR part 172 carrying explosive  
4 substances, flammable liquids or hazardous materials as a  
5 cargo or part of a cargo, or of any vehicle owned by an  
6 employer which, in carrying on such employer's business  
7 or in carrying employees to and from work, is carrying  
8 more than six employees of such employer, before cross-  
9 ing at grade any track or tracks of a railroad, shall stop  
10 such vehicle within fifty feet but not less than fifteen feet  
11 from the nearest rail of such railroad and while so stopped  
12 shall listen and look in both directions along such track  
13 for any approaching train and for signals indicating the  
14 approach of a train, except as hereinafter provided, and  
15 shall not proceed until he can do so safely. After stopping  
16 as required herein and upon proceeding when it is safe to  
17 do so the driver of any said vehicle shall cross only in  
18 such gear of the vehicle that there will be no necessity for

19 changing gears while traversing such crossing and the  
20 driver shall not shift gears while crossing the track or  
21 tracks.

22 (b) No stop need be made at any such crossing where  
23 a police officer or a traffic-control signal directs traffic to  
24 proceed.

25 (c) Any person driving a vehicle that requires a com-  
26 mercial driver's license who fails to comply with the re-  
27 quirements of this section is guilty of a misdemeanor and,  
28 upon conviction thereof, shall be fined one hundred dol-  
29 lars or imprisoned for not more than ten days. The com-  
30 missioner shall promulgate rules to further penalize those  
31 convicted of violating this section by levying three points  
32 against the violator's driver's license record: *Provided,*  
33 That if the electric or mechanical signal device is malfunc-  
34 tioning, this subsection shall not apply.

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## CHAPTER 193

(S. B. 501—By Senator Boley)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section six, article thirteen, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to motor vehicles; stopping, standing and parking privileges for persons with mobility impairments; qualification; issuance of special registration plates and removable windshield placards bearing the international symbol of access; expiration dates; specifications for registration plates, windshield placards, handicapped parking spaces and signs; definitions; application; transitional provisions; violations; and penalties.

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

That section six, article thirteen, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 13. STOPPING, STANDING AND PARKING.****§17C-13-6. Stopping, standing or parking privileges for persons with a mobility impairment; definitions; qualification; special registration plates and removable windshield placards; expiration; application; violation; penalties.**

1 (a) Any owner of a Class A motor vehicle subject to  
2 registration under the provisions of article three, chapter  
3 seventeen-a of this code, who is:

4 (1) A person with a mobility impairment;

5 (2) A relative of a person with a mobility impairment;

6 (3) A person who regularly resides with a person with  
7 a mobility impairment; or

8 (4) A person who regularly transports a person who  
9 has a mobility impairment, may submit an application for  
10 a special registration plate or a removable windshield placard.  
11

12 (b) Any person with a mobility impairment, any relative  
13 of a person with a mobility impairment, any person  
14 who regularly resides with a person with a mobility impairment or any person who regularly transports a person  
15 who has a mobility impairment may submit an application  
16 for a removable windshield placard for a Class A vehicle  
17 by submitting to the commissioner:  
18

19 (1) An application on a form prescribed and furnished  
20 by the commissioner, specifying whether the applicant  
21 desires a special registration plate, a removable windshield  
22 placard, or both; and

23 (2) A certificate issued by a licensed physician stating  
24 that the applicant or the applicant's relative is a person with  
25 a mobility impairment, or that the person regularly residing  
26 with the applicant or regularly transported by the  
27 applicant is a person with a mobility impairment, as defined  
28 in this section, and furthermore, the physician shall  
29 specify whether the disability is temporary (not to exceed  
30 six months) or permanent (one to five years or more in  
31 expected duration).

32       Upon receipt of the completed application, the physi-  
33       cian's certificate and the regular registration fee for the  
34       applicant's vehicle class, if the commissioner finds that the  
35       applicant qualifies for the special registration plate or a  
36       removable windshield placard as provided in this section,  
37       he or she shall issue to the applicant a special registration  
38       plate (upon remittance of the regular registration fee), or a  
39       removable windshield placard (red for temporary and blue  
40       for permanent), or both. Upon request, the commissioner  
41       shall also issue to any otherwise qualified applicant one  
42       additional placard having the same expiration date as the  
43       applicant's original placard. The placard shall be dis-  
44       played by hanging it from the interior rear view mirror of  
45       the motor vehicle so that it is conspicuously visible from  
46       outside the vehicle when parked in a designated handi-  
47       capped parking space. The placard may be removed from  
48       the rear view mirror whenever the vehicle is being operat-  
49       ed to ensure clear vision and safe driving. Only in the  
50       event that there is no rear view mirror in the vehicle may  
51       the placard be displayed on the dashboard of the vehicle.

52       (c) As used in this section, the following terms have  
53       the meanings ascribed to them in this subsection:

54       (1) A person with a "mobility impairment" means a  
55       person who, as determined by a licensed physician:

56       (A) Cannot walk two hundred feet without stopping to  
57       rest;

58       (B) Cannot walk without the use of or assistance from  
59       a brace, cane, crutch, prosthetic device, wheelchair, other  
60       assistive device or another person;

61       (C) Is restricted by lung disease to such an extent that  
62       the person's force (respiratory) expiratory volume for one  
63       second, when measured by spirometry, is less than one  
64       liter or the arterial oxygen tension is less than sixty mm/hg  
65       on room air at rest;

66       (D) Uses portable oxygen;

67       (E) Has a cardiac condition to such an extent that the  
68       person's functional limitations are classified in severity as

69 Class III or Class IV according to standards established by  
70 the American heart association; or

71 (F) Is severely limited in his or her ability to walk  
72 because of an arthritic, neurological, orthopedic or other  
73 physical condition.

74 (2) "Special registration plate" means a registration  
75 plate that displays the international symbol of access in a  
76 color that contrasts with the background, in letters and  
77 numbers the same size as those on the plate, and which  
78 may be used in lieu of a regular registration plate.

79 (3) "Removable windshield placard" (permanent or  
80 temporary) means a two-sided, hanger style placard mea-  
81 suring three inches by nine and one-half inches, with all of  
82 the following on each side:

83 (A) The international symbol of access, measuring at  
84 least three inches in height, centered on the placard, in  
85 white on a blue background;

86 (B) An identification number measuring one inch in  
87 height;

88 (C) An expiration date in numbers measuring one  
89 inch in height; and

90 (D) The seal or other identifying symbol of the issu-  
91 ing authority.

92 (4) "Regular registration fee" means the standard reg-  
93 istration fee for a vehicle of the same class as the appli-  
94 cant's.

95 (5) "Public entity" means state or local government or  
96 any department, agency, special purpose district or other  
97 instrumentality of a state or local government.

98 (6) "Public facility" means all or any part of any  
99 buildings, structures, sites, complexes, roads, parking lots  
100 or other real or personal property, including the site where  
101 the facility is located.

102 (7) "Place(s) of public accommodation" means a facil-  
103 ity or facilities operated by a private entity whose opera-

104 tions affect commerce and fall within at least one of the  
105 following categories:

106 (A) Inns, hotels, motels and other places of lodging;

107 (B) Restaurants, bars or other establishments serving  
108 food or drink;

109 (C) Motion picture houses, theaters, concert halls,  
110 stadiums or other places of exhibition or entertainment;

111 (D) Auditoriums, convention centers, lecture halls or  
112 other places of public gatherings;

113 (E) Bakeries, grocery stores, clothing stores, hardware  
114 stores, shopping centers or other sales or rental establish-  
115 ments;

116 (F) Laundromats, dry cleaners, banks, barber and  
117 beauty shops, travel agencies, shoe repair shops, funeral  
118 parlors, gas or service stations, offices of accountants and  
119 attorneys, pharmacies, insurance offices, offices of profes-  
120 sional health care providers, hospitals or other service  
121 establishments;

122 (G) Terminals, depots or other stations used for public  
123 transportation;

124 (H) Museums, libraries, galleries or other places of  
125 public display or collection;

126 (I) Parks, zoos, amusement parks or other places of  
127 recreation;

128 (J) Public or private nursery, elementary, secondary,  
129 undergraduate or post-graduate schools or other places of  
130 learning and day care centers, senior citizen centers,  
131 homeless shelters, food banks, adoption agencies or other  
132 social services establishments; and

133 (K) Gymnasiums, health spas, bowling alleys, golf  
134 courses or other places of exercise or recreation.

135 (8) "Commercial facility" means a facility whose oper-  
136 ations affect commerce and which are intended for non-  
137 residential use by a private entity.

138 Any person who falsely or fraudulently obtains or  
139 seeks to obtain the special plate or the removable wind-  
140 shield placard provided for in this section, and any person  
141 who falsely certifies that a person is mobility impaired in  
142 order that an applicant may be issued the special registra-  
143 tion plate or windshield placard hereunder, is guilty of a  
144 misdemeanor and, upon conviction thereof, in addition to  
145 any other penalty he or she may otherwise incur, shall be  
146 fined one hundred dollars.

147 (d) The commissioner shall set the expiration date for  
148 special registration plates and permanent removable wind-  
149 shield placards on the last day of a given month and year,  
150 to be valid for a minimum of one year but not more than  
151 five years, after which time a new application must be  
152 submitted to the commissioner. After the commissioner  
153 receives the new application, signed by a certified physi-  
154 cian, the commissioner shall issue: (i) A new special regis-  
155 tration plate or new permanent removable windshield  
156 placard; or (ii) official labels imprinted with the new expi-  
157 ration date and designed so as to be placed over the old  
158 dates on the original registration plate or windshield plac-  
159 ard.

160 (e) The commissioner shall set the expiration date of  
161 temporary removable windshield placards to be valid for a  
162 period of approximately six months after the application  
163 was received and approved by the commissioner.

164 (f) The commissioner shall issue to each applicant who  
165 is granted a special registration plate or windshield placard  
166 an identification card bearing the applicant's name, as-  
167 signed identification number and expiration date. The  
168 applicant must thereafter carry this identification card on  
169 his or her person whenever parking in a handicapped  
170 parking space.

171 (g) A handicapped parking space should comply with  
172 the provisions of the Americans with Disabilities Act  
173 Guidelines, contained in 28 C.F.R. 36, Appendix A, Sec-  
174 tion 4.6. In particular, the parking space should be a  
175 minimum of eight feet wide with an adjacent access aisle  
176 for vans having side mounted handicap lifts. Access aisles  
177 should be marked using diagonal stripes or other appro-



178 priate markings denoting that the space is a no-parking  
179 zone. Lines or markings on the pavement or curbs for  
180 parking spaces and access aisles may be in any color,  
181 although blue is the generally accepted color for handi-  
182 capped parking.

183 (h) A vehicle from any other state, United States terri-  
184 tory or foreign country displaying an officially issued  
185 special registration plate, placard or decal bearing the  
186 international symbol of access, shall be recognized and  
187 accepted as meeting the requirements of this section, re-  
188 gardless of where the plate, placard or decal is mounted or  
189 displayed on the vehicle.

190 (i) Free stopping, standing or parking places marked  
191 with the international symbol of access shall be designated  
192 in close proximity to all public entities, including state,  
193 county and municipal buildings and facilities, places of  
194 public accommodation and commercial facilities. These  
195 parking places shall be reserved solely for persons with a  
196 mobility impairment during the hours that those buildings  
197 are open for business.

198 (j) Any person whose vehicle properly displays a valid,  
199 unexpired special registration plate or removable wind-  
200 shield placard may park the vehicle for unlimited periods  
201 of time in parking zones unrestricted as to length of park-  
202 ing time permitted: *Provided*, That this privilege does not  
203 mean that the vehicle may park in any zone where stop-  
204 ping, standing or parking is prohibited or which creates  
205 parking zones for special types of vehicles or which pro-  
206 hibits parking during heavy traffic periods during speci-  
207 fied rush hours or where parking would clearly present a  
208 traffic hazard. To the extent any provision of any ordi-  
209 nance of any political subdivision of this state is contrary  
210 to the provisions of this section, the provisions of this  
211 section take precedence and apply.

212 The privileges provided for in this subsection apply  
213 only during those times when the vehicle is being used for  
214 the transportation of a person with a mobility impairment.  
215 Any person who knowingly exercises, or attempts to exer-  
216 cise, these privileges at a time when the vehicle is not being  
217 used for the transportation of a person with a mobility

218 impairment is guilty of a misdemeanor and, upon conviction  
219 thereof, in addition to any other penalty he or she  
220 may otherwise incur, shall be fined one hundred dollars.

221 (k) No person may stop, stand or park a motor vehicle  
222 in an area designated, zoned or marked for handicapped  
223 parking with signs or instructions displaying the international  
224 symbol of access, either by itself or with explanatory  
225 text. Such signs may be mounted on a post or a wall in  
226 front of the handicapped parking space and instructions  
227 may appear on the ground or pavement, but use of both  
228 methods is preferred. Handicapped parking spaces for  
229 vans having an eight-foot adjacent access aisle should be  
230 designated as "van accessible" but may be used by any  
231 vehicle displaying a valid special registration plate or removable  
232 windshield placard. These spaces are intended  
233 solely for persons with a mobility impairment, as defined  
234 in this section. If at any time, a person is not mobility  
235 impaired and does not display upon his or her vehicle a  
236 special registration plate or removable windshield placard  
237 issued by the commissioner, he or she may not lawfully  
238 park in a handicapped parking space: *Provided*, That  
239 any person in the act of transporting a person with a mobility  
240 impairment as defined in this section, may stop,  
241 stand or park a motor vehicle not displaying a special  
242 registration plate or removable windshield placard in the  
243 area designated for handicapped parking by the international  
244 symbol of access for the limited purposes of loading  
245 or unloading a passenger with a mobility impairment:  
246 *Provided, however*, That the vehicle shall be promptly  
247 moved after the completion of this limited purpose.

248 Any person who violates the provisions of this subsection  
249 is guilty of a misdemeanor and, upon conviction  
250 thereof, shall be fined one hundred dollars.

251 (l) Signs erected in the future that designate areas as  
252 "handicapped parking" or that display the international  
253 symbol of access shall also include the words "\$100 fine".

254 (m) No person may stop, stand or park a motor vehicle  
255 in an area designated or marked off as an access aisle  
256 adjacent to a van-accessible parking space or regular  
257 handicapped parking space. Any person, including a

257 driver of a vehicle displaying a valid removable windshield  
258 placard or special registration plate, who violates the provi-  
259 sions of this subsection is guilty of a misdemeanor and,  
260 upon conviction thereof, shall be fined one hundred dol-  
261 lars.

262 (n) The commissioner shall establish a grace period  
263 for individuals who, on the effective date of the amend-  
264 ment adding this subsection, hold special registration  
265 plates or removable windshield placards bearing no expi-  
266 ration date to submit their applications for newly issued  
267 special registration plates and windshield placards, after  
268 which time any undated registration plate or windshield  
269 placard is invalid and subject to confiscation by any duly  
270 appointed law-enforcement officer.

271 (o) The commissioner shall adopt and promulgate  
272 rules in accordance with the provisions of article three,  
273 chapter twenty-nine-a of this code to effectuate the provi-  
274 sions of this section and provide for an orderly transition  
275 to provisions enacted by the Legislature in its regular  
276 session in the year one thousand nine hundred ninety-six.

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## CHAPTER 194

(S. B. 118—By Senators Wiedebusch, Yoder, Minear, Wagner and Bowman)

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[Passed March 5, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section three, article one, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the parks section and parks functions of the division of natural resources until the first day of July, one thousand nine hundred ninety-seven.

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

That section three, article one, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 1. ORGANIZATION AND ADMINISTRATION.****§20-1-3. Division of natural resources, office of director and commission established; termination date for division of natural resources and for parks section of division of natural resources.**

1 A division of natural resources, the office of director  
2 of the division of natural resources and a natural resources  
3 commission are hereby created and established in the state  
4 government with jurisdiction, powers, functions, services  
5 and enforcement processes as provided in this chapter and  
6 elsewhere by law.

7 Pursuant to the provisions of article ten, chapter four  
8 of this code, the division of natural resources shall contin-  
9 ue to exist until the first day of July, two thousand one.

10 Pursuant to the provisions of article ten, chapter four  
11 of this code, the parks section and parks functions of the  
12 division of natural resources, transferred to the division of  
13 natural resources pursuant to the provisions of section  
14 twelve, article one, chapter five-b of this code, shall contin-  
15 ue to exist within the division of natural resources until the  
16 first day of July, one thousand nine hundred ninety-seven,  
17 to allow for monitoring of compliance with recommenda-  
18 tions contained in the preliminary performance review and  
19 to allow for further review by the joint committee on gov-  
20 ernment operations.

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## CHAPTER 195

(H. B. 4481—By Delegates Love, Ellis, Tomblin, Dempsey,  
Preece and Whitman)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section five, article two, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to unlawful methods of hunting and providing an exception for carrying certain uncased firearms.

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

That section five, article two, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 2. WILDLIFE RESOURCES.**

**§20-2-5. Unlawful methods of hunting and fishing and other unlawful acts.**

1           Except as authorized by the director, it is unlawful at  
2 any time for any person to:

3           (1) Shoot at or to shoot any wild bird or animal un-  
4 less it is plainly visible to him;

5           (2) Dig out, cut out or smoke out, or in any manner  
6 take or attempt to take, any live wild animal or wild bird  
7 out of its den or place of refuge, except as may be autho-  
8 rized by regulations promulgated by the director or by  
9 law;

10          (3) Make use of, or take advantage of, any artificial  
11 light in hunting, locating, attracting, taking, trapping or  
12 killing any wild bird or wild animal, or to attempt to do so,  
13 while having in his possession or subject to his control, or  
14 for any person accompanying him to have in his posses-  
15 sion or subject to his control, any firearm, whether cased  
16 or uncased, bow, arrow, or both, or other implement or  
17 device suitable for taking, killing or trapping a wild bird  
18 or animal: *Provided*, That it shall not be unlawful to hunt  
19 or take raccoon, opossum or skunk by the use of artificial  
20 lights. No person shall be guilty of a violation of this  
21 subdivision merely because he looks for, looks at, attracts  
22 or makes motionless a wild bird or wild animal with or by  
23 the use of an artificial light, unless at such time he has in  
24 his possession a firearm, whether cased or uncased, bow,  
25 arrow, or both, or other implement or device suitable for  
26 taking, killing or trapping a wild bird or wild animal, or  
27 unless such artificial light (other than the head lamps of an  
28 automobile or other land conveyance) is attached to, a part  
29 of, or used from within or upon an automobile or other  
30 land conveyance.

31 Any person violating the provisions of this subdivi-  
32 sion shall be guilty of a misdemeanor, and, upon convic-  
33 tion thereof, shall for each offense be fined not less than  
34 one hundred dollars nor more than five hundred dollars  
35 and shall be imprisoned in the county jail for not less than  
36 ten days nor more than one hundred days;

37 (4) Hunt for, take, kill, wound or shoot at wild ani-  
38 mals or wild birds from an airplane, or other airborne  
39 conveyance, an automobile, or other land conveyance, or  
40 from a motor-driven water conveyance, except as may be  
41 authorized by regulations promulgated by the director;

42 (5) Take any beaver or muskrat by any means other  
43 than by trap;

44 (6) Catch, capture, take or kill by seine, net, bait, trap  
45 or snare or like device of any kind, any wild turkey, ruffed  
46 grouse, pheasant or quail;

47 (7) Destroy or attempt to destroy needlessly or will-  
48 fully the nest or eggs of any wild bird or have in his pos-  
49 session such nest or eggs unless authorized to do so under  
50 regulations or under a permit by the director;

51 (8) Except as provided in section six of this article,  
52 carry an uncased or loaded gun in any of the woods of  
53 this state except during the open firearms hunting season  
54 for wild animals and nonmigratory wild birds within any  
55 county of the state, unless he has in his possession a permit  
56 in writing issued to him by the director: *Provided*, That  
57 this section shall not prohibit hunting or taking of unpro-  
58 tected species of wild animals and wild birds and migrato-  
59 ry wild birds, during the open season, in the open fields,  
60 open water and open marshes of the state;

61 (9) Except as provided in subdivision (11) below or  
62 in section six of this article, carry an uncased or loaded  
63 gun after the hour of five o'clock antemeridian on Sunday  
64 in any woods or on any highway, railroad right-of-way,  
65 public road, field or stream of this state, except at a regu-  
66 larly used rifle, pistol, skeet, target or trapshooting ground  
67 or range;

68 (10) Have in his possession a loaded firearm or a

69 firearm from the magazine of which all shells and car-  
70 tridges have not been removed, in or on any vehicle or  
71 conveyance, or its attachments, within the state, except as  
72 may otherwise be provided by law or regulation. Except  
73 as hereinafter provided, between five o'clock postmeridian  
74 of one day and seven o'clock antemeridian, eastern stan-  
75 dard time of the day following, any unloaded firearm,  
76 being lawfully carried in accordance with the foregoing  
77 provisions, shall be so carried only when in a case or taken  
78 apart and securely wrapped. During the period from the  
79 first day of July to the thirtieth day of September, inclu-  
80 sive, of each year, the foregoing requirements relative to  
81 carrying certain unloaded firearms shall be permissible  
82 only from eight-thirty o'clock postmeridian to five o'clock  
83 antemeridian, eastern standard time: *Provided*, That the  
84 time periods for carrying unloaded and uncased firearms  
85 are extended for one hour after the postmeridian times  
86 and one hour before the antemeridian times established  
87 above if a hunter is preparing to or in the process of trans-  
88 porting or transferring the firearms to or from a hunting  
89 site, campsite, home or other place of abode;

90 (11) Hunt, catch, take, kill, trap, injure or pursue with  
91 firearms or other implement by which wildlife may be  
92 taken after the hour of five o'clock antemeridian on Sun-  
93 day any wild animals or wild birds: *Provided*, That traps  
94 previously and legally set may be tended after the hour of  
95 five o'clock antemeridian on Sunday, and the person so  
96 doing may carry only a twenty-two caliber firearm for the  
97 purpose of humanely dispatching trapped animals;

98 (12) Hunt with firearms or long bow while under the  
99 influence of intoxicating liquor;

100 (13) Hunt, catch, take, kill, injure or pursue a wild  
101 animal or bird with the use of a ferret;

102 (14) Buy raw furs, pelts or skins of fur-bearing ani-  
103 mals unless licensed to do so;

104 (15) Catch, take, kill or attempt to catch, take or kill  
105 any fish at any time by any means other than by rod, line  
106 and hooks with natural or artificial lures unless otherwise  
107 authorized by law or regulation issued by the director:

108 *Provided*, That snaring of any species of suckers, carp,  
109 fallfish and creek chubs shall at all times be lawful;

110 (16) Employ or hire, or induce or persuade, by the  
111 use of money or other things of value, or by any means,  
112 any person to hunt, take, catch or kill any wild animal or  
113 wild bird except those species on which there is no closed  
114 season, or to fish for, catch, take or kill any fish, amphibi-  
115 an or aquatic life which is protected by the provisions of  
116 this chapter or regulations of the director, or the sale of  
117 which is prohibited;

118 (17) Hunt, catch, take, kill, capture, pursue, transport,  
119 possess or use any migratory game or nongame birds  
120 included in the terms of conventions between the United  
121 States and Great Britain and between the United States and  
122 United Mexican States for the protection of migratory  
123 birds and wild mammals concluded, respectively, the six-  
124 teenth day of August, one thousand nine hundred sixteen,  
125 and the seventh day of February, one thousand nine hun-  
126 dred thirty-six, except during the time and in the manner  
127 and numbers prescribed by the Federal Migratory Bird  
128 Treaty Act and regulations made thereunder;

129 (18) Kill, take, catch or have in his possession, living  
130 or dead, any wild bird, other than a game bird; or expose  
131 for sale, or transport within or without the state any such  
132 bird, except as aforesaid. No part of the plumage, skin or  
133 body of any protected bird shall be sold or had in posses-  
134 sion for sale, except mounted or stuffed plumage, skin,  
135 bodies or heads of such birds legally taken and stuffed or  
136 mounted, irrespective of whether such bird was captured  
137 within or without this state, except the English or Europe-  
138 an sparrow (*Passer domesticus*), starling (*Sturnus vulgaris*),  
139 crow (*Corvus brachyrhynchos*) and cowbird (*Molothrus*  
140 *ater*), which shall not be protected and the killing thereof  
141 at any time is lawful;

142 (19) Use dynamite or any like explosive or poison-  
143 ous mixture placed in any waters of the state for the pur-  
144 pose of killing or taking fish. Any person violating the  
145 provisions of this subdivision shall be guilty of a felony,  
146 and, upon conviction thereof, shall be fined not more than  
147 five hundred dollars or imprisoned for not less than six



148 months nor more than three years, or both fined and im-  
149 prisoned;

150 (20) Have a bow and gun, or have a gun and any  
151 arrow or arrows, in the fields or woods at the same time;

152 (21) Have a crossbow in the woods or fields or use a  
153 crossbow to hunt for, take or attempt to take any wildlife;

154 (22) Take or attempt to take turkey, bear, elk or deer  
155 with any arrow unless the same is equipped with a point  
156 having at least two sharp cutting edges measuring in ex-  
157 cess of three fourths of an inch wide;

158 (23) Take or attempt to take any wildlife with an  
159 arrow having an explosive head or shaft, a poisoned arrow  
160 or an arrow which would affect wildlife by any chemical  
161 action;

162 (24) Shoot an arrow across any public highway or  
163 from aircraft, motor-driven watercraft, motor vehicle or  
164 other land conveyance;

165 (25) Permit any dog owned by him or under his  
166 control to chase, pursue or follow upon the track of any  
167 wild animal or wild bird, either day or night, between the  
168 first day of May and the fifteenth day of August next  
169 following: *Provided*, That dogs may be trained on wild  
170 animals and wild birds, except deer and wild turkeys, and  
171 field trials may be held or conducted on the grounds or  
172 lands of the owner or by his bona fide tenant or tenants or  
173 upon the grounds or lands of another person with his  
174 written permission or on public lands, at any time: *Pro-*  
175 *vided, however*, That notwithstanding any of the above  
176 provisions, no person may train a dog in any county, or  
177 portion thereof, in which a legal bear hunting season has  
178 been established prior to the first day of July, one thou-  
179 sand nine hundred eighty-eight, except that residents may  
180 train dogs in such counties after the twenty-fourth day of  
181 August through the end of the legal small game hunting  
182 season: *Provided further*, That nonresidents shall not train  
183 dogs in this state at any time except during the legal small  
184 game hunting season: *And provided further*, That the  
185 person training said dogs does not have firearms or other

186 implements in his possession during the closed season on  
187 such wild animals and wild birds, whereby wild animals or  
188 wild birds could be taken or killed;

189 (26) Conduct or participate in a field trial,  
190 shoot-to-retrieve field trial, water race or wild hunt  
191 hereafter referred to as trial: *Provided*, That any person,  
192 group of persons, club or organization may hold such trial  
193 at any time of the year upon obtaining such permit as is  
194 provided for in section fifty-six of this article. The person  
195 responsible for obtaining said permit shall prepare and  
196 keep an accurate record of the names and addresses of all  
197 persons participating in said trial, and make same readily  
198 available for inspection by any conservation officer upon  
199 request; and

200 (27) Except as provided in section four of this article,  
201 hunt, catch, take, kill or attempt to hunt, catch, take or kill  
202 any wild animal, wild bird or wild fowl except during the  
203 open season established by regulation of the director as  
204 authorized by subdivision (6), section seven, article one of  
205 this chapter.

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## CHAPTER 196

(S. B. 389—By Senator Dittmar)

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[Passed March 6, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend article two, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section five-d, relating to prohibiting certain fertility control in wildlife; and promulgation of rules.

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

That article two, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section five-d, to read as follows:

**ARTICLE 2. WILDLIFE RESOURCES.****§20-2-5d. Use of chemicals, biological compounds or devices on free roaming wildlife populations for fertility control.**

1 Notwithstanding any other provisions of this code and  
2 except as specifically authorized by the director in consul-  
3 tation with the wildlife resources section of the division, it  
4 is unlawful for anyone to administer any chemical, biolog-  
5 ical compound or device to free roaming or noncaptive  
6 wildlife for the purpose of fertility control. The director  
7 shall promulgate legislative rules in accordance with the  
8 provisions of article three, chapter twenty-nine-a of this  
9 code whereby the director may issue such authorization.

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**CHAPTER 197**

(H. B. 4515—By Delegates Love and Riggs)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend article two, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section twenty-three-e, relating to implementation of allocation methodology regarding whitewater rafting.

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

That article two, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section twenty-three-e, to read as follows:

**ARTICLE 2. WILDLIFE RESOURCES.****§20-2-23e. Implementation of allocation methodology.**

1 Other provisions of this article notwithstanding, the  
2 implementation of an allocation methodology, based upon

3 criteria identified in the three-year study of carrying ca-  
 4 pacity for the New, Gauley, Cheat, Shenandoah and Tygart  
 5 rivers, the overall economic impact on the state and the  
 6 safety of the general public as identified in section  
 7 twenty-three-a of this article, shall be made not later than  
 8 the thirty-first day of December, one thousand nine hun-  
 9 dred ninety-seven, by rules promulgated pursuant to chap-  
 10 ter twenty-nine-a of this code.

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## CHAPTER 198

(Com. Sub. for H. B. 4420—By Delegates Mezzatesta, Osborne, Ball and Williams)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section one, article seven, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to conservation officers; selection, appointment, powers and duties of emergency and special conservation officers; revocation of appointments; designation of conservation officer's primary residence; providing a monthly subsistence allowance for regularly appointed conservation officers and establishing that sum at one hundred thirty dollars per month.

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

That section one, article seven, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 7. LAW ENFORCEMENT, MOTORBOATING, LITTER.**

**PART I. LAW ENFORCEMENT, PROCEDURES  
AND PENALTIES.**

**§20-7-1. Chief conservation officer; conservation officers; special and emergency conservation officers; subsistence allowance; expenses.**

1 The division's law-enforcement policies, practices and

2 programs shall be under the immediate supervision and  
3 direction of the division law-enforcement officer selected  
4 by the director and designated as chief conservation offi-  
5 cer as provided in section thirteen, article one of this chap-  
6 ter.

7 Under the supervision of the director, the chief con-  
8 servation officer shall organize, develop and maintain law-  
9 enforcement practices, means and methods geared, timed  
10 and adjustable to seasonal, emergency and other needs  
11 and requirements of the division's comprehensive natural  
12 resources program. All division personnel detailed and  
13 assigned to law-enforcement duties and services under this  
14 section shall be known and designated as conservation  
15 officers and shall be under the immediate supervision and  
16 direction of the chief conservation officer. All conserva-  
17 tion officers shall be trained, equipped and conditioned  
18 for duty and services wherever and whenever required by  
19 division law-enforcement needs.

20 The chief conservation officer, acting under supervi-  
21 sion of the director, is authorized to select and appoint  
22 emergency conservation officers for a limited period of  
23 time for effective enforcement of the provisions of this  
24 chapter when considered necessary because of emergency  
25 or other unusual circumstances. The emergency conser-  
26 vation officers shall be selected from qualified civil service  
27 personnel of the division, except in emergency situations  
28 and circumstances when the director may designate offi-  
29 cers, without regard to civil service requirements and qual-  
30 ifications, to meet law-enforcement needs. Emergency  
31 conservation officers shall exercise all powers and duties  
32 prescribed in section four of this article for full-time sala-  
33 ried conservation officers except the provisions of subdivi-  
34 sion (8) of said section.

35 The chief conservation officer, acting under supervi-  
36 sion of the director, is also authorized to select and ap-  
37 point as special conservation officers any full-time civil  
38 service employee who is assigned to, and has direct re-  
39 sponsibility for management of, an area owned, leased or  
40 under the control of the division and who has satisfactorily  
41 completed a course of training established and adminis-  
42 tered by the chief conservation officer, when such action is  
43 considered necessary because of law-enforcement needs.

44 The powers and duties of a special conservation officer,  
45 appointed under this provision, is the same within his or  
46 her assigned area as prescribed for full-time salaried con-  
47 servation officers. The jurisdiction of the person appoint-  
48 ed as a special conservation officer, under this provision,  
49 shall be limited to the division area or areas to which he or  
50 she is assigned and directly manages.

51 The chief conservation officer, acting under supervi-  
52 sion of the director, is also authorized to appoint as special  
53 conservation officers any full-time civil service forest fire  
54 control personnel who have satisfactorily completed a  
55 course of training established and administered by the  
56 chief conservation officer. The jurisdiction of forest fire  
57 control personnel appointed as special conservation offi-  
58 cers is limited to the enforcement of the provisions of  
59 article three of this chapter.

60 The chief conservation officer, with the approval of  
61 the director, has the power and authority to revoke any  
62 appointment of an emergency conservation officer or of a  
63 special conservation officer at any time.

64 Conservation officers are subject to seasonal or other  
65 assignment and detail to duty whenever and wherever  
66 required by the functions, services and needs of the divi-  
67 sion.

68 The chief conservation officer shall designate the area  
69 of primary residence of each conservation officer, includ-  
70 ing himself or herself. Since the area of business activity  
71 of the division is actually anywhere within the territorial  
72 confines of the state of West Virginia, actual expenses  
73 incurred shall be paid whenever the duties are performed  
74 outside the area of primary assignment and still within the  
75 state.

76 Conservation officers shall receive, in addition to their  
77 base pay salary, a minimum monthly subsistence allow-  
78 ance for their required telephone service, dry cleaning of  
79 required uniforms, and meal expenses while performing  
80 their regular duties in their area of primary assignment in  
81 the amount of one hundred thirty dollars each month.  
82 This subsistence allowance does not apply to special or  
83 emergency conservation officers appointed under this  
84 section.

## CHAPTER 199

(Com. Sub. for H. B. 4497—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)  
[By Request of the Executive]

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirteen, relating to creating the West Virginia stream partners program; setting forth legislative findings and purpose; creating the West Virginia stream partners program fund; identifying an executive committee; coordinating the West Virginia stream partners program; funding the stream partners program; limiting grants; requiring matching moneys or services; stating grant qualifications; and providing for support of administering agencies.

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

That chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article thirteen, to read as follows:

### ARTICLE 13. WEST VIRGINIA STREAM PARTNERS PROGRAM.

§20-13-1. Short title.

§20-13-2. Legislative findings and purpose.

§20-13-3. West Virginia stream partners program created; executive committee identified; program coordination.

§20-13-4. Stream partners program fund.

§20-13-5. Grant qualifications.

§20-13-6. Administering agency support.

#### §20-13-1. Short title.

1 This article shall be known and cited as the "West  
2 Virginia Stream Partners Program Act."

#### §20-13-2. Legislative findings and purpose.

1       The Legislature finds that efforts to restore, protect  
2 and utilize West Virginia's rivers and streams for public  
3 health, recreation, commercial and habitat uses are most  
4 successful when citizens work in partnership with state  
5 agencies to manage the state's rivers and streams by  
6 combining community resources, local initiative and state  
7 agency support.

8       It is the purpose of the Legislature, therefore, to  
9 establish a program to encourage citizens to work in  
10 partnership with appropriate state agencies so that the  
11 state's rivers and streams: (a) Are safe for swimming,  
12 fishing and other forms of recreation; (b) can support  
13 appropriate public and commercial purposes; and (c) can  
14 provide habitat for plant and animal life.

**§20-13-3. West Virginia stream partners program creat-  
ed; executive committee identified; program  
coordination.**

1       There is hereby created the West Virginia stream  
2 partners program and within the division of natural  
3 resources there is hereby created the West Virginia stream  
4 partners program fund. Subject to annual appropriation  
5 of the Legislature into the West Virginia stream partners  
6 program fund, the program shall be jointly administered  
7 by the division of natural resources, the division of  
8 environmental protection, the division of forestry and the  
9 West Virginia state soil conservation agency. The director  
10 or commissioner of each of these administering agencies  
11 or his or her designee shall collectively constitute an  
12 executive committee to oversee the program. The  
13 governor shall designate a member of the executive  
14 committee to serve as chair. The committee may  
15 designate a staff member from the existing staff of one of  
16 the administering agencies to coordinate the program on  
17 behalf of the executive committee. Pursuant to the  
18 provisions of article ten, chapter four of this code, the  
19 stream partners program and stream partners program  
20 fund shall continue to exist until the first day of July, one  
21 thousand nine hundred ninety-nine, to allow for the  
22 completion of a preliminary performance review and to



23 allow for further review by the joint committee on  
24 government operations.

**§20-13-4. Stream partners program fund.**

1 Money from the general revenue may be annually  
2 appropriated into the West Virginia stream partners  
3 program fund. The West Virginia stream partners  
4 program fund shall be used solely to provide grants to  
5 groups comprised of representatives located in the  
6 immediate area of the stream or streams being addressed  
7 that are dedicated to achieving the purpose stated in  
8 section two of this article. The grants shall be awarded by  
9 consensus of the executive committee in accordance with  
10 legislative rules promulgated by the division of  
11 environmental protection pursuant to article three, chapter  
12 twenty-nine-a of this code. Each grant shall be matched  
13 by the group of representatives with cash or in-kind  
14 services in, at least, an amount equal to twenty percent of  
15 the grant: *Provided*, That no grant shall exceed the  
16 amount of five thousand dollars.

**§20-13-5. Grant qualifications.**

1 In order to qualify for grants from the West Virginia  
2 stream partners program fund, a group of representatives  
3 located in the immediate area of a stream or streams which  
4 qualify under section two of this article shall apply to the  
5 executive committee in accordance with the following  
6 requirements and in accordance with any other provision  
7 of this article or any applicable rule. The application shall:

8 (a) Identify the stream or streams to be restored,  
9 protected, utilized or enhanced;

10 (b) Identify the representatives of groups applying  
11 for funds and the financially responsible entity to receive  
12 funds, all from the geographic area immediatly  
13 surrounding the stream or streams. These identified  
14 individuals shall represent the general public, industry,  
15 environmental groups, sportsmen, forestry, agriculture,  
16 local government, tourism, recreation and affected  
17 landowners, all located in the geographic area immediatly  
18 surrounding the stream or streams;

19 (c) Demonstrate an ability to achieve within the grant  
 20 year a specific improvement project that enhances the  
 21 identified stream or streams; and

22 (d) Evidence a commitment to educate the citizens in  
 23 the area of the identified stream or streams about the ben-  
 24 efits of restoring, protecting and enhancing the stream or  
 25 streams in a responsible manner.

**§20-13-6. Administering agency support.**

1 The administering agencies may provide staff and  
 2 other resources as necessary to address the technical assis-  
 3 tance and administrative needs of the West Virginia stream  
 4 partners program and West Virginia stream partners pro-  
 5 gram fund. This support may include the utilization of  
 6 resources and formulation of policies to achieve the pur-  
 7 pose set forth in section two of this article.

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## CHAPTER 200

(H. B. 4737—By Mr. Speaker, Mr. Chambers, and Delegates Manuel, Kuhn,  
 Jenkins, Johnson, Yeager and Smirl)

(Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.)

AN ACT to amend chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article fourteen; and to amend and reenact section one, article twenty-nine, chapter thirty of said code, all relating to establishing the Hatfield-McCoy regional recreation authority and the powers, goals and duties associated therewith; providing a statement of legislative purpose and findings; providing definitions; establishing the Hatfield-McCoy regional recreation authority; providing for a method of appointment to the board of the authority; prescribing the terms of appointment; required surety bonds; setting forth the powers and duties of the authority; providing for meetings of the board and payments

of expenses; appointment of an executive director; authorizing rangers and describing the duties, powers and limitations of rangers and prescribing certain law-enforcement authority; limiting the liability of the state; and providing criminal penalties for a violation of the rules promulgated by the board.

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

That chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article fourteen; and that section one, article twenty-nine, chapter thirty of said code be amended and reenacted, all to read as follows:

## **Chapter**

**20. Natural Resources.**

**30. Professions and Occupations.**

## **CHAPTER 20. NATURAL RESOURCES.**

### **ARTICLE 14. HATFIELD-MCCOY REGIONAL RECREATION AUTHORITY.**

§20-14-1. Legislative findings.

§20-14-2. Definitions.

§20-14-3. Creation; appointment of board; terms.

§20-14-4. Board; quorum; executive director; expenses.

§20-14-5. Powers of authority.

§20-14-6. Hatfield-McCoy recreation area rangers.

§20-14-7. Bonds not a debt of the state.

§20-14-8. Criminal penalties.

#### **§20-14-1. Legislative findings.**

1       The West Virginia Legislature finds that there is a  
2 significant need within the state and throughout the east-  
3 ern United States for well-managed facilities for  
4 trail-oriented recreation for off-highway vehicle enthusi-  
5 asts, mountain bicyclists and others. The Legislature fur-  
6 ther finds that under an appropriate contractual and man-  
7 agement scheme, well-managed, trail-oriented, recreation  
8 facilities could exist on private property without diminish-

9 ing the landowner's interest, control or profitability in the  
10 land.

11 The Legislature further finds that, with the cooperation  
12 of private landowners who hold large tracts of land, there  
13 is an opportunity to provide trail-oriented recreation facil-  
14 ities primarily on private property in the mountainous  
15 terrain of southern West Virginia and that the facilities will  
16 provide significant benefit to the state and to the commu-  
17 nities in southern West Virginia through increased tourism  
18 in the same manner as whitewater rafting and snow skiing  
19 benefit the state and communities surrounding those activ-  
20 ities.

21 The Legislature further finds that the creation and  
22 empowering of a statutory corporation to work with the  
23 landowners, county officials and community leaders, state  
24 and federal government agencies, recreational user groups  
25 and other interested parties to enable and facilitate the  
26 implementation of the facilities will greatly assist in the  
27 realization of these potential benefits.

#### **§20-14-2. Definitions.**

1 Unless the context clearly requires a different mean-  
2 ing, the terms used in this section have the following  
3 meanings:

4 (a) "Authority" means the Hatfield-McCoy regional  
5 recreational authority;

6 (b) "Board" means the board of the Hatfield-McCoy  
7 regional recreation authority;

8 (c) "Hatfield-McCoy recreation area" means a system  
9 of recreational trails and appurtenant facilities, including  
10 trail head centers, parking areas, camping facilities, picnic  
11 areas, recreational areas, historic or cultural interpretive  
12 sites and other facilities that are a part of the system; and

13 (d) "Participating county" means the counties of  
14 Boone, Lincoln, Logan, McDowell, Mingo, Wayne and  
15 Wyoming, and, with the approval of the board, any other

16 county or counties where trails and other recreational  
17 facilities relating to the Hatfield-McCoy recreation area  
18 are developed in the future with the cooperation of the  
19 county commission.

**§20-14-3. Creation; appointment of board; terms.**

1 (a) There is hereby created the "Hatfield-McCoy re-  
2 gional recreation authority" which is a public corporation  
3 and a government instrumentality existing for the purpose  
4 of enabling and facilitating the development and opera-  
5 tion of a system of trail-oriented recreation facilities for  
6 use by off-highway vehicle enthusiasts, equestrians, moun-  
7 tain bicyclists and others. This recreational trail system  
8 shall be located in southern West Virginia with significant  
9 portions of the recreational trail system being located on  
10 private property made available for use through lease,  
11 license, easement or other appropriate legal form by a  
12 willing landowner.

13 (b) The authority shall be governed by a board of at  
14 least seventeen members who shall be representative of the  
15 various interests involved in the Hatfield-McCoy recre-  
16 ation area project in the southern region of the state and  
17 who shall be appointed as follows:

18 (1) The county commission of each participating  
19 county, as defined in section two of this article, shall ap-  
20 point two members of the board as follows:

21 (A) One member who represents and is associated with  
22 a corporation or individual landowner whose land is being  
23 used or is expected to be used in the future as part of the  
24 Hatfield-McCoy recreation area project. This member  
25 shall be appointed to a four-year term.

26 (B) One member who represents and is associated with  
27 travel and tourism or economic development efforts within  
28 the county. The initial appointment shall be for a two-year  
29 term, but all subsequent appointments shall be for a  
30 four-year term.

31 (2) The members of the board appointed under subdivi-  
32 sion (1), subsection (b) of this section by the county  
33 commissions shall appoint three additional board mem-

34 bers, at least two of whom represent and are associated  
35 with recreational users of the Hatfield-McCoy recreation  
36 area project. These members shall serve three-year terms.

37 (3) The following three persons shall serve as nonvot-  
38 ing members representing the state: The director of the  
39 division of travel and tourism, the director of the division  
40 of natural resources, and the director of the division of  
41 forestry, or their respective designees.

42 Any appointed member whose term has expired shall  
43 serve until his or her successor has been duly appointed  
44 and qualified. Any person appointed to fill a vacancy shall  
45 serve only for the unexpired term. Any appointed mem-  
46 ber is eligible for reappointment. Members of the board  
47 are not entitled to compensation for services performed as  
48 members but are entitled to reimbursement for all reason-  
49 able and necessary expenses actually incurred in the per-  
50 formance of their duties.

51 (c) Before the authority issues any revenue bonds or  
52 revenue refunding bonds under the authority of this arti-  
53 cle, each appointed voting member of the board shall  
54 execute a surety bond in the penal sum of twenty-five  
55 thousand dollars and the officers and executive director of  
56 the board shall each execute a surety bond in the penal  
57 sum of fifty thousand dollars. Each surety bond shall be  
58 conditioned upon the faithful performance of the duties  
59 of the member, officer or director, shall be executed by a  
60 surety company authorized to transact business in this  
61 state as surety and shall be approved by the governor and  
62 filed in the office of the secretary of state. The authority  
63 shall pay premiums on the surety bonds from funds ac-  
64 cruing to the authority.

**§20-14-4. Board; quorum; executive director; expenses.**

1 The board is the governing body of the authority and  
2 the board shall exercise all the powers given the authority  
3 in this article.

4 The board shall meet quarterly, unless a special meet-  
5 ing is called by its chairman: *Provided*, That on the sec-  
6 ond Monday of July of each even-numbered year, or as  
7 soon thereafter as feasible, the board shall meet to elect a

8 chairman, secretary and treasurer from among its own  
9 members.

10 A majority of the members of the board constitutes a  
11 quorum, and a quorum shall be present for the board to  
12 conduct business. Unless the bylaws require a larger num-  
13 ber, action may be taken by majority vote of the members  
14 present.

15 The board shall prescribe, amend, and repeal bylaws  
16 and rules governing the manner in which the business of  
17 the authority is conducted and shall review and approve an  
18 annual budget.

19 The board shall appoint an executive director to act as  
20 its chief executive officer, to serve at the will and pleasure  
21 of the board. The board, acting through its executive di-  
22 rector, may employ any other personnel considered neces-  
23 sary and may appoint counsel and legal staff for the au-  
24 thority and retain such temporary engineering, financial  
25 and other consultants or technicians as may be required  
26 for any special study or survey consistent with the provi-  
27 sions of this article. The executive director shall carry out  
28 plans to implement the provisions of this article and to  
29 exercise those powers enumerated in the bylaws. The ex-  
30 ecutive director shall prepare annually a budget to be  
31 submitted to the board for its review and approval.

32 All costs incidental to the administration of the author-  
33 ity, including office expenses, personal services expense  
34 and current expense, shall be paid in accordance with  
35 guidelines issued by the board from funds accruing to the  
36 authority.

37 All expenses incurred in carrying out the provisions of  
38 this article shall be payable solely from funds provided  
39 under the authority of this article and no liability or obli-  
40 gation may be incurred by the authority under this article  
41 beyond the extent to which moneys have been provided  
42 under the authority of this article.

#### **§20-14-5. Powers of authority.**

1 The authority, as a public corporation and govern-  
2 mental instrumentality exercising public powers of the  
3 state, may exercise all powers necessary or appropriate to

4 carry out the purposes of this article, including, but not  
5 limited to, the power:

6 (1) To acquire, own, hold and dispose of property, real  
7 and personal, tangible and intangible;

8 (2) To lease property, whether as lessee or lessor, and  
9 to acquire or grant through easement, license, or other  
10 appropriate legal form, the right to develop and use prop-  
11 erty and open it to the use of the public;

12 (3) To mortgage or otherwise grant security interests  
13 in its property;

14 (4) To procure insurance against any losses in connec-  
15 tion with its property, license or easements, contracts, in-  
16 cluding hold-harmless agreements, operations or assets in  
17 such amounts and from such insurers as the authority  
18 considers desirable;

19 (5) To maintain such sinking funds and reserves as the  
20 board determines appropriate for the purposes of meeting  
21 future monetary obligations and needs of the authority;

22 (6) To sue and be sued, implead and be impleaded,  
23 and complain and defend in any court;

24 (7) To contract for the provision of legal services by  
25 private counsel, and notwithstanding the provisions of  
26 article three, chapter five of this code, the counsel may, in  
27 addition to the provisions of other legal services, represent  
28 the authority in court, negotiate contracts and other agree-  
29 ments on behalf of the authority, render advice to the  
30 authority on any matter relating to the authority, prepare  
31 contracts and other agreements, and provide such other  
32 legal services as may be requested by the authority;

33 (8) To adopt, use and alter at will a corporate seal;

34 (9) To make, amend, repeal and adopt bylaws for the  
35 management and regulation of its affairs;

36 (10) To appoint officers, agents and employees, and to  
37 contract for and engage the services of consultants;

38 (11) To make contracts of every kind and nature and  
39 to execute all instruments necessary or convenient for  
40 carrying on its business, including contracts with any other



41 governmental agency of this state or of the federal gov-  
42 ernment or with any person, individual, partnership or  
43 corporation to effect any or all of the purposes of this  
44 article;

45 (12) Without in any way limiting any other subdivi-  
46 sion of this section, to accept grants and loans from and  
47 enter into contracts and other transactions with any federal  
48 agency;

49 (13) To maintain an office at such places within the  
50 state as it may designate;

51 (14) To borrow money and to issue its bonds, security  
52 interests or notes and to provide for and secure the pay-  
53 ment of the bonds, security interests or notes, and to pro-  
54 vide for the rights of the holders of the bonds, security  
55 interests or notes, and to purchase, hold and dispose of  
56 any of its bonds, security interests or notes;

57 (15) To sell, at public or private sale, any bond or  
58 other negotiable instrument, security interest, or obligation  
59 of the authority in such manner and upon such terms as  
60 the authority considers would best serve the purposes of  
61 this article;

62 (16) To issue its bonds, security interests and notes  
63 payable solely from the revenues or other funds available  
64 to the authority, and the authority may issue its bonds,  
65 security interests or notes in such principal amounts as it  
66 considers necessary to provide funds for any purpose  
67 under this article, including:

68 (A) The payment, funding or refunding of the princi-  
69 pal of, interest on or redemption premiums on, any bonds,  
70 security interests or notes issued by it whether the bonds,  
71 security interests, notes or interest to be funded or refund-  
72 ed have or have not become due;

73 (B) The establishment or increase of reserves to secure  
74 or to pay bonds, security interests, notes or the interest on  
75 the bonds, security interest or notes, and all other costs or  
76 expenses of the authority incident to and necessary or  
77 convenient to carry out its corporate purposes and powers.  
78 Any bonds, security interests or notes may be additionally

79 secured by a pledge of any revenues, funds, assets, or  
80 moneys of the authority from any source whatsoever;

81 (17) To issue renewal notes or security interests, to  
82 issue bonds to pay notes or security interests and, whenever  
83 it considers refunding expedient, to refund any bonds  
84 by the issuance of new bonds, whether the bonds to be  
85 refunded have or have not matured except that no renewal  
86 notes may be issued to mature more than ten years from  
87 the date of issuance of the notes renewed and no refund-  
88 ing bonds may be issued to mature more than twenty-five  
89 years from the date of issuance;

90 (18) To apply the proceeds from the sale of renewal  
91 notes, security interests of refunding bonds to the pur-  
92 chase, redemption or payment of the notes, security inter-  
93 ests or bonds to be refunded;

94 (19) To accept gifts or grants of property, funds, secu-  
95 rity interests, money, materials, labor, supplies or services  
96 from the federal government or from any governmental  
97 unit or any person, firm or corporation, and to carry out  
98 the terms or provisions of, or make agreements with re-  
99 spect to, or pledge any gifts or grants, and to do any and  
100 all things necessary, useful, desirable or convenient in  
101 connection with the procuring, acceptance or disposition  
102 of gifts or grants;

103 (20) To the extent permitted under its contracts with  
104 the holders of bonds, security interests or notes of the  
105 authority, to consent to any modification of the rate of  
106 interest, time of payment of any installment of principal or  
107 interest, security or any other term of any bond, security  
108 interest, note, contract or agreement of any kind to which  
109 the authority is a party;

110 (21) To sell security interests in the loan portfolio of  
111 the authority. The security interests shall be evidenced by  
112 instruments issued by the authority. Proceeds from the  
113 sale of security interests may be issued in the same manner  
114 and for the same purposes as bond and note venues;

115 (22) To promulgate legislative rules in accordance  
116 with the provisions of article three, chapter twenty-nine-a  
117 of this code, as necessary to implement and make effective

118 the powers, duties and responsibilities invested in the au-  
119 thority by the provisions of this article and otherwise by  
120 law, including regulation of the conduct of persons using  
121 the Hatfield-McCoy recreation area;

122 (23) To construct, reconstruct, improve, maintain,  
123 repair, operate and manage the Hatfield-McCoy recreation  
124 area at the locations within the state as may be determined  
125 by the authority;

126 (24) To exercise all power and authority provided in  
127 this article necessary and convenient to plan, finance, con-  
128 struct, renovate, maintain and operate or oversee the oper-  
129 ation of the Hatfield-McCoy recreation area at such loca-  
130 tions within the state as may be determined by the authori-  
131 ty;

132 (25) To exercise such other and additional powers as  
133 may be necessary or appropriate for the exercise of the  
134 powers conferred in this section;

135 (26) To exercise all of the powers which a corporation  
136 may lawfully exercise under the laws of this state;

137 (27) To provide for law enforcement within the  
138 Hatfield-McCoy recreational area by appointing rangers  
139 as provided in section six of this article;

140 (28) To develop, maintain and operate or to contract  
141 for the development, maintenance and operation of the  
142 Hatfield-McCoy recreation area;

143 (29) To enter into contract with landowners and other  
144 persons holding an interest in the land being used for its  
145 recreational facilities to hold those landowners and other  
146 persons harmless with respect to any claim in tort growing  
147 out of the use of the land for public recreation or growing  
148 out of the recreational activities operated or managed by  
149 the authority from any claim except a claim for damages  
150 proximately caused by the willful or malicious conduct of  
151 the landowner or other person or any of his or her agents  
152 or employees;

153 (30) To assess and collect a reasonable fee from those  
154 persons who use the trails, parking facilities, visitor centers  
155 or other facilities which are part of the Hatfield-McCoy

156 recreation area, and to retain and utilize that revenue for  
157 any purposes consistent with this article;

158 (31) To cooperate with the states of Kentucky and  
159 Virginia and appropriate state and local officials and com-  
160 munity leaders in those states to connect the trails of the  
161 West Virginia portion of the Hatfield-McCoy recreation  
162 area with similar recreation facilities in those states;

163 (32) To enter into contracts or other appropriate legal  
164 arrangements with landowners under which their land is  
165 made available for use as part of the Hatfield-McCoy  
166 recreation area; and

167 (33) To directly operate and manage recreation activi-  
168 ties and facilities within the Hatfield-McCoy recreation  
169 area.

**§20-14-6. Hatfield-McCoy recreation area rangers.**

1 The board is hereby authorized to appoint bona fide  
2 residents of this state to act as Hatfield-McCoy recreation  
3 area rangers upon any premises which are part of the  
4 Hatfield-McCoy recreation area, subject to the conditions  
5 and restrictions imposed by this section. Before perform-  
6 ing the duties of ranger, each appointed person shall qual-  
7 ify for the position of ranger in the same manner as is  
8 required of county officers by the taking and filing of an  
9 oath of office as required by section one, article one,  
10 chapter six of this code and by posting an official bond as  
11 required by section one, article two, chapter six of this  
12 code. No ranger may carry a gun or other dangerous  
13 weapon.

14 It is the duty of any person appointed and qualified to  
15 preserve law and order on any premises which are part of  
16 the Hatfield-McCoy recreation area, the immediately adja-  
17 cent property of landowners who are making land avail-  
18 able for public use under agreement with the authority,  
19 and on streets, highways or other public lands utilized by  
20 the trails, parking areas or related recreational facilities,  
21 and other immediately adjacent public lands. For this  
22 purpose, the ranger shall be considered to be a  
23 law-enforcement officer in accordance with the provisions  
24 of section one, article twenty-nine, chapter thirty of this

25 code, and, as to offenses committed within those areas,  
26 have and may exercise all the powers and authority and  
27 are subject to all the requirements and responsibilities of a  
28 law-enforcement officer. The assignment of rangers to  
29 the duties authorized by this section may not supersede in  
30 any way the authority or duty of other peace officers to  
31 preserve law and order on those premises.

32 The salary of all rangers shall be paid by the board.  
33 The board shall furnish each ranger with an official uni-  
34 form to be worn while on duty and shall furnish and re-  
35 quire each ranger while on duty to wear a shield with an  
36 appropriate inscription and to carry credentials certifying  
37 the person's identity and authority as a ranger.

38 The board may at its pleasure revoke the authority of  
39 any ranger. The executive director shall report the termi-  
40 nation of employment of a ranger by filing a notice to  
41 that effect in the office of the clerk of each county in  
42 which the rangers' oath of office was filed, and in the case  
43 of a ranger licensed to carry a gun or other dangerous  
44 weapon, by notifying the clerk of the circuit court of the  
45 county in which the license for the gun or other danger-  
46 ous weapon was granted.

#### **§20-14-7. Bonds not a debt of the state.**

1 Revenue bonds and revenue refunding bonds of the  
2 Hatfield-McCoy regional recreation authority issued un-  
3 der the provisions of this article do not constitute a debt of  
4 the state or of any political subdivision of the state or a  
5 pledge of the faith and credit of the state or of any politi-  
6 cal subdivision, but the bonds shall be payable solely from  
7 the funds provided for in this article from revenues result-  
8 ing from the issuance of bonds. All bonds shall contain on  
9 the face of the bond a statement to the effect that neither  
10 the state nor any political subdivision of the state is obli-  
11 gated to pay the bond or the interest on the bond except  
12 from revenues of the recreational project or projects for  
13 which they are issued and that neither the faith or credit  
14 nor the taxing power of the state or any political subdivi-

15 sion of the state is pledged to the payment of the principal  
16 or the interest on the bonds.

**§20-14-8. Criminal penalties.**

1 Any person who violates any of the rules promulgated  
2 by the board under authority of this article is guilty of a  
3 misdemeanor and, upon conviction thereof, shall for each  
4 offense be fined not more than five hundred dollars.

**CHAPTER 30. PROFESSIONS AND OCCUPATIONS.**

**ARTICLE 29. LAW-ENFORCEMENT TRAINING AND CERTIFI-  
CATION.**

**§30-29-1. Definitions.**

1 For the purposes of this article, unless a different  
2 meaning clearly appears in the context:

3 "Approved law-enforcement training academy" means  
4 any training facility which is approved and authorized to  
5 conduct law-enforcement training as provided in this arti-  
6 cle;

7 "Chief executive" means the superintendent of the state  
8 police; the chief conservation officer of the division of  
9 natural resources; the sheriff of any West Virginia county;  
10 or the chief of any West Virginia municipal law-enforce-  
11 ment agency;

12 "County" means the fifty-five major political subdivi-  
13 sions of the state;

14 "Exempt rank" means any noncommissioned or com-  
15 missioned rank of sergeant or above;

16 "Governor's committee on crime, delinquency and  
17 correction" or "governor's committee" means the gover-  
18 nor's committee on crime, delinquency and correction  
19 established as a state planning agency pursuant to section  
20 one, article nine, chapter fifteen of this code;

21 "Law-enforcement officer" means any duly authorized  
22 member of a law-enforcement agency who is authorized  
23 to maintain public peace and order, prevent and detect  
24 crime, make arrests and enforce the laws of the state or  
25 any county or municipality thereof, other than parking  
26 ordinances, and shall include those persons employed as  
27 security officers at state institutions of higher education in  
28 accordance with the provisions of section five, article four,  
29 chapter eighteen-b of this code, although those institu-  
30 tions may not be considered law-enforcement agencies.  
31 The term also includes those persons employed as rangers  
32 by the Hatfield-McCoy regional recreation authority in  
33 accordance with the provisions of section six, article four-  
34 teen, chapter twenty of this code, although the authority  
35 may not be considered a law-enforcement agency: *Pro-*  
36 *vided*, That the subject rangers shall pay the tuition and  
37 costs of training. As used in this article, the term  
38 "law-enforcement officer" does not apply to the chief  
39 executive of any West Virginia law-enforcement agency or  
40 any watchman or special conservation officer;

41 "Law-enforcement official" means the duly appointed  
42 chief administrator of a designated law-enforcement agen-  
43 cy or a duly authorized designee;

44 "Municipality" means any incorporated town or city  
45 whose boundaries lie within the geographic boundaries of  
46 the state;

47 "Subcommittee" or "law-enforcement training sub-  
48 committee" means the subcommittee of the governor's  
49 committee on crime, delinquency and correction created  
50 by section two of this article; and

51 "West Virginia law-enforcement agency" means any  
52 duly authorized state, county or municipal organization  
53 employing one or more persons whose responsibility is  
54 the enforcement of laws of the state or any county or  
55 municipality thereof: *Provided*, That neither the Hatfield-  
56 McCoy regional recreation authority nor any state institu-  
57 tion of higher education may be deemed a law-enforce-  
58 ment agency.

# CHAPTER 201

(H. B. 2489—By Delegate Mezzatesta)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend article five-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section nineteen; and to amend and reenact sections four, five, six and seven, article twenty-five, chapter thirty of said code, all relating to nursing homes, personal care homes and residential board and care homes; authorizing the department to promulgate legislative rules to comply with federal law and regulations; and authorizing the nursing home administrators licensing board to propose by legislative rule the amounts of licensing fees for nursing home administrators.

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

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

## Chapter

**16. Public Health.**

**30. Professions and Occupations.**

## CHAPTER 16. PUBLIC HEALTH.

### ARTICLE 5C. NURSING AND PERSONAL CARE HOMES AND RESIDENTIAL BOARD AND CARE HOMES.

#### §16-5C-19. Federal law; legislative rules.

1 Notwithstanding any provision in this code to the  
2 contrary, the department shall promulgate legislative rules,  
3 in compliance with the provisions of article three, chapter  
4 twenty-nine-a of this code, pertaining to nursing homes,



5 when those rules are required for compliance with federal  
6 law or regulations. The rules may be filed as emergency  
7 rules.

## CHAPTER 30. PROFESSIONS AND OCCUPATIONS.

### ARTICLE 25. NURSING HOME ADMINISTRATORS.

§30-25-4. Qualifications for license; exceptions; application, fees.

§30-25-5. Issuance of license; renewal of license; renewal fee; display of license.

§30-25-6. Emergency permit.

§30-25-7. Powers and duties of board.

#### §30-25-4. Qualifications for license; exceptions; application, fees.

1 (a) To be eligible for a license as a nursing home  
2 administrator a person must:

3 (1) Be of good moral character;

4 (2) Possess the qualifications and meet any reasonable  
5 standards as the board may prescribe pursuant to  
6 subsection (a), section seven of this article;

7 (3) Pass the examination prescribed by the board in  
8 the subject of nursing home administration; and

9 (4) Have sufficient knowledge and soundness of  
10 judgment to be able to adequately discharge the functions  
11 of a nursing home administrator.

12 (b) Any person who holds a license or certificate as a  
13 nursing home administrator issued by any other state, the  
14 requirements for which are found by the board to be at  
15 least as great as those provided in this article may be  
16 granted a license without examination if he or she meets  
17 all of the other requirements for licensing in this state.

18 (c) Any applicant for any license shall submit an  
19 application for the license at the time, in the manner, on  
20 the forms and containing the information as the board  
21 may, from time to time, by reasonable legislative rules  
22 prescribe and pay to the board the prescribed license fee,  
23 which fee shall be returned to the applicant if he or she is  
24 denied a license.

**§30-25-5. Issuance of license; renewal of license; renewal fee; display of license.**

1       Whenever the board finds that an applicant meets all  
2 of the requirements of this article for a license as a nursing  
3 home administrator, it shall immediately issue the license  
4 to the applicant; otherwise the board shall deny the  
5 applicant a license. The license is valid for a period ending  
6 on the thirtieth day of June next ensuing and may be  
7 renewed without examination upon application for  
8 renewal on a form prescribed by the board and payment  
9 to the board of the prescribed renewal fee: *Provided*, That  
10 the board may deny an application for renewal for any  
11 reason that would justify the denial of the original  
12 application for a license. The board shall prescribe the  
13 form of licenses and each license shall be conspicuously  
14 displayed by the licensee at the nursing home that he or  
15 she administers.

**§30-25-6. Emergency permit.**

1       If a licensed nursing home administrator dies or is  
2 unable to continue due to an unexpected cause, the owner,  
3 governing body or other appropriate authority in charge  
4 of the nursing home involved may designate an acting  
5 administrator to whom the board may immediately issue  
6 an emergency permit if it finds the appointment will not  
7 endanger the safety of the occupants of the nursing home.  
8 An emergency permit is valid for a period determined by  
9 the board not to exceed six months and shall not be  
10 renewed. The prescribed fee for an emergency permit  
11 shall be paid to the board.

**§30-25-7. Powers and duties of board.**

1       (a) The board shall:

2       (1) Examine applicants and determine their eligibility  
3 for a license or emergency permit as a nursing home  
4 administrator;

5       (2) Prepare, conduct and grade an apt and proper  
6 examination of applicants for a license and determine the  
7 satisfactory passing score on the examination;

8 (3) Promulgate reasonable legislative rules in  
9 accordance with and subject to the provisions of article  
10 three, chapter twenty-nine-a of this code, for the proper  
11 performance of its duties and shall establish fees for  
12 examinations, permits, licenses and renewals sufficient to  
13 cover the costs of administration of this article;

14 (4) Issue, renew, deny, suspend or revoke licenses and  
15 emergency permits in accordance with the provisions of  
16 this article and, in accordance with the administrative  
17 procedures provided in this article, may review, affirm,  
18 reverse, vacate or modify its order with respect to any  
19 denial, suspension or revocation;

20 (5) Develop, impose and enforce standards which must  
21 be met by individuals in order to receive a license as a  
22 nursing home administrator. The standards shall be  
23 designed to ensure that nursing home administrators will  
24 be individuals who are of good character and are  
25 otherwise suitable, and who, by training or experience in  
26 the field of institutional administration, are qualified to  
27 serve as nursing home administrators;

28 (6) Employ, direct, discharge and define the duties of  
29 personnel necessary to effectuate the provisions of this  
30 article;

31 (7) Keep accurate and complete records of its  
32 proceedings, certify the records as may be appropriate,  
33 and prepare, from time to time, a list showing the names  
34 and addresses of all licensees;

35 (8) Approve courses of study or training in the field  
36 of nursing home administration which sufficiently meet  
37 education and training requirements for nursing home  
38 administrators established by this article;

39 (9) Conduct a course of study or training of the type  
40 referred to in subdivision (8) of this subsection if the  
41 courses are not otherwise reasonably available to residents  
42 of this state; and

43 (10) Take other action as may be reasonably  
44 necessary or appropriate to effectuate the provisions of  
45 this article.

46 (b) All moneys paid to the board shall be accepted by  
47 a person designated by the board and deposited by him or  
48 her with the treasurer of the state and credited to an ac-  
49 count to be known as the "West Virginia nursing home  
50 administrators licensing board fund." Reimbursement of  
51 all reasonable and necessary costs and expenses actually  
52 incurred by members, and by the board in the administra-  
53 tion of this article shall be paid from the fund.

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## CHAPTER 202

(Com. Sub. for H. B. 4523—By Delegates Kiss, Staton, Collins, Preece,  
J. Martin, Kuhn and Whitman)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend article five, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section seventeen, relating to requiring legislative approval prior to the execution of an agreement related to the transport of ozone; and requiring certain hearings and reports concerning the energy use, tax, economic development, utility costs and rates, competitiveness and employment impacts of any proposed interstate agreement related to the transport of ozone.

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

That article five, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section seventeen, to read as follows:

### **ARTICLE 5. AIR POLLUTION CONTROL.**

#### **§22-5-17. Interstate ozone transport.**

1           (a) This section of the Air Pollution Control Act may  
2 be referred to as the Interstate Ozone Transport Oversight  
3 Act.

4           (b) The Legislature hereby finds that:

5           (1) The federal Clean Air Act, as amended, contains a  
6 comprehensive regulatory scheme for the control of emis-  
7 sions from mobile and stationary sources, which will im-  
8 prove ambient air quality and health and welfare in all  
9 parts of the nation.

10          (2) The number of areas unable to meet national  
11 ambient air quality standards for ozone has been declining  
12 steadily and will continue to decline with air quality im-  
13 provements resulting from implementation of the federal  
14 Clean Air Act amendments of 1990, and the mobile and  
15 stationary source emission controls specified therein.

16          (3) Scientific research on the transport of atmospher-  
17 ic ozone across state boundaries is proceeding under the  
18 auspices of the United States environmental protection  
19 agency (U.S. EPA), state agencies, and private entities,  
20 which research will lead to improved scientific understand-  
21 ing of the causes and nature of ozone transport, and emis-  
22 sion control strategies potentially applicable thereto.

23          (4) The northeast ozone transport commission estab-  
24 lished by the federal Clean Air Act amendments of 1990  
25 has proposed emission control requirements for stationary  
26 and mobile sources in certain northeastern states and the  
27 District of Columbia in addition to those specified by the  
28 federal Clean Air Act Amendments of 1990.

29          (5) Membership of the northeast ozone transport  
30 commission includes, by statute, representatives of state  
31 environmental agencies and governors' offices; similar  
32 representation is required in the case of other ozone trans-  
33 port commissions established by the Administrator of the  
34 United States environmental protection agency pursuant to  
35 Section 176A of the federal Clean Air Act, as amended.

36          (6) The northeast ozone transport commission nei-  
37 ther sought nor obtained state legislative oversight or ap-

38 proval prior to reaching its decisions on mobile and sta-  
39 tionary source requirements for states included within the  
40 northeast ozone transport region.

41 (7) The Commonwealth of Virginia and other parties  
42 have challenged the constitutionality of the northeast  
43 ozone transport commission and its regulatory proposals  
44 under the guarantee, compact, and joinder clauses of the  
45 United States Constitution.

46 (8) The United States environmental protection agen-  
47 cy, acting outside of the aforementioned statutory require-  
48 ments for the establishment of new interstate transport  
49 commissions, is encouraging the state of West Virginia and  
50 twenty-four other states outside of the northeast to partici-  
51 pate in multistate negotiations through the ozone transport  
52 assessment group; such negotiations are intended to pro-  
53 vide the basis for an interstate memorandum of under-  
54 standing or other agreement on ozone transport requiring  
55 reductions of emissions of nitrogen oxides or volatile  
56 organic compounds in addition to those specified by the  
57 federal Clean Air Act amendments of 1990, membership  
58 of the ozone transport assessment group consists of state  
59 and federal air quality officials, without state legislative  
60 representation or participation by the governor.

61 (9) Emission control requirements exceeding those  
62 specified by federal law can adversely affect state econom-  
63 ic development, competitiveness, employment, and income  
64 without corresponding environmental benefits; in the case  
65 of electric utility emissions of nitrogen oxides, it is esti-  
66 mated that control costs in addition to those specified by  
67 the federal Clean Air Act could exceed five billion dollars  
68 annually in a thirty-seven state region of the eastern Unit-  
69 ed States, including the state of West Virginia.

70 (10) Requiring certain eastern states to meet emission  
71 control requirements more stringent than those otherwise  
72 applicable to other states and unnecessary for environ-  
73 mental protection would unfairly affect interstate competi-  
74 tion for new industrial development and employment  
75 opportunities.

76 (c) It is therefore directed that:

77 (1) Not later than ten days subsequent to the receipt  
78 by the director of the division of environmental protection  
79 of any proposed memorandum of understanding or other  
80 agreement by the ozone transport assessment group, or  
81 similar group, potentially requiring the state of West Vir-  
82 ginia to undertake emission reductions in addition to those  
83 specified by the federal Clean Air Act, the director of the  
84 division of environmental protection shall submit such  
85 proposed memorandum or other agreement to the presi-  
86 dent of the Senate and the speaker of the House of Dele-  
87 gates for consideration.

88 (2) Upon receipt of the aforesaid memorandum of  
89 understanding or agreement, the President and the Speak-  
90 er shall refer the understanding or agreement to one or  
91 more appropriate legislative committees with a request that  
92 such committees convene one or more public hearings to  
93 receive comments from agencies of government and other  
94 interested parties on its prospective economic and environ-  
95 mental impacts on the state of West Virginia and its citi-  
96 zens, including impacts on energy use, taxes, economic  
97 development, utility costs and rates, competitiveness and  
98 employment.

99 (3) Upon completion of the public hearings re-  
100 quired by the preceding subdivision, the committees(s)  
101 shall forward to the president and the speaker a report  
102 containing its findings and recommendations concerning  
103 any proposed memorandum of understanding or other  
104 agreement related to the interstate transport of ozone. The  
105 report shall make findings with respect to the economic,  
106 health, safety and welfare and environmental impacts on  
107 the state of West Virginia and its citizens, including im-  
108 pacts on energy use, taxes, economic development, utility  
109 costs and rates, competitiveness and employment.

110 (4) Upon receipt of the report required by the pre-  
111 ceding subdivision, the president and speaker shall there-  
112 after transmit the report to the governor for such further  
113 consideration or action as may be warranted.

114 (5) Nothing in this section shall be construed to  
115 preclude the Legislature from taking such other action  
116 with respect to any proposed memorandum of  
117 understanding or other agreement related to the interstate  
118 transport of ozone as it deems appropriate.

119 (6) No person is authorized to commit the state of  
120 West Virginia to the terms of any such memorandum or  
121 agreement unless specifically approved by an act of the  
122 Legislature.

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## CHAPTER 203

(H. B. 4519—By Delegates Michael and Mezzatesta)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section one, article eleven, chapter twenty-two-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the Interstate Commission on the Potomac River Basin.

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

That section one, article eleven, chapter twenty-two-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 11. INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN.**

**§22C-11-1. Creation of commission; members; terms; compact with other political units.**

1 There is hereby created a commission consisting of  
2 three members, to act jointly with commissioners ap-  
3 pointed for like purposes by the commonwealths of  
4 Pennsylvania and Virginia, the state of Maryland, and the  
5 District of Columbia, and an additional three members to  
6 be appointed by the president of the United States, and  
7 which, together with the other commissioners appointed as



8 hereinbefore mentioned, shall constitute and be known as  
9 the "Interstate Commission on the Potomac River Basin."  
10 The said commission of the state of West Virginia shall  
11 consist of three members. The governor, by and with the  
12 advice and consent of the Senate, shall appoint two  
13 persons as two of such commissioners, each of whom shall  
14 be a resident and citizen of this state. The terms of one of  
15 the said two commissioners first appointed shall be three  
16 years and of the other shall be six years; and their  
17 successors shall be appointed by the governor, by and with  
18 the advice and consent of the Senate, for terms of six years  
19 each. Each commissioner shall hold office until his  
20 successor shall be appointed and qualified. Vacancies  
21 occurring in the office of any such commissioner for any  
22 reason or cause shall be filled by appointment by the  
23 governor, by and with the advice and consent of the  
24 Senate, for the unexpired term. The third commissioner  
25 from this state is the director of the division of  
26 environmental protection, and the term of the ex officio  
27 commissioner terminates at the time he ceases to hold said  
28 office. Said ex officio commissioner may delegate, from  
29 time to time, to any deputy or other subordinate in his  
30 division or office, the power to be present and participate,  
31 including voting, as his representative or substitute at any  
32 meeting of or hearing by or other proceeding of the  
33 commission. The term of each of the initial three members  
34 shall begin at the date of the appointment of the two  
35 appointive commissioners: *Provided*, That the compact  
36 hereinafter referred to shall then have gone into effect, in  
37 accordance with article six thereof, otherwise to begin  
38 upon the date said compact shall become effective, in  
39 accordance with said article six.

40 Any commissioner may be removed from office by  
41 the governor.

42 The governor of the state of West Virginia is hereby  
43 authorized and directed to execute a compact on behalf of  
44 the state of West Virginia, with the other states and the  
45 district hereinabove referred to, who may by their  
46 legislative bodies so authorize a compact in form  
47 substantially as follows:

48

## A COMPACT

49       Whereas, It is recognized that abatement of existing  
50 pollution and the control of future pollution of interstate  
51 streams can best be promoted through a joint agency  
52 representing the several states located wholly or in part  
53 within the area drained by any such interstate streams; and

54       Whereas, The Congress of the United States has given  
55 its consent to the states of Maryland and West Virginia, the  
56 commonwealths of Pennsylvania and Virginia, and the  
57 District of Columbia to enter into a compact providing for  
58 the creation of a conservancy district to consist of the  
59 drainage basin of the Potomac River and the main and  
60 tributary streams therein, for "the purpose of regulating,  
61 controlling, preventing, or otherwise rendering un-  
62 objectionable and harmless the pollution of the waters of  
63 said Potomac drainage area by sewage and industrial and  
64 other wastes"; and

65       Whereas, The regulation, control and prevention of  
66 pollution is directly affected by the quantities of water in  
67 said streams and the uses to which such water may be put,  
68 thereby requiring integration and coordination of the  
69 planning for the development and use of the water and  
70 associated land resources through cooperation with, and  
71 support and coordination of, the activities of federal, state,  
72 local and private agencies, groups, and interests concerned  
73 with the development, utilization and conservation of the  
74 water and associated land resources of the said  
75 conservancy district; now, therefore,

76       The states of Maryland and West Virginia, the  
77 commonwealths of Pennsylvania and Virginia, and the  
78 District of Columbia, hereinafter designated signatory  
79 bodies, do hereby create the Potomac valley conservancy  
80 district, hereinafter designated the conservancy district,  
81 comprising all of the area drained by the Potomac River  
82 and its tributaries; and also, do hereby create, as an agency  
83 of each signatory body, the interstate commission on the  
84 Potomac River basin, hereinafter designated the  
85 commission, under the articles of organization as set forth  
86 below.

87

## Article I

88       The interstate commission on the Potomac River basin  
89 shall consist of three members from each signatory body  
90 and three members appointed by the president of the  
91 United States. Said commissioners, other than those  
92 appointed by the president, shall be chosen in a manner  
93 and for the terms provided by law of the signatory body  
94 from which they are appointed, and shall serve without  
95 compensation from the commission but shall be paid by  
96 the commission their actual expenses incurred and  
97 incident to the performance of their duties.

98       (A) The commission shall meet and organize within  
99 thirty days after the effective date of this compact, shall  
100 elect from its number a chairman and vice chairman, shall  
101 adopt suitable bylaws, shall make, adopt and promulgate  
102 such rules and regulations as are necessary for its  
103 management and control, and shall adopt a seal.

104       (B) The commission shall appoint, and at its pleasure,  
105 remove or discharge such officers and legal, engineering,  
106 clerical, expert and other assistants as may be required to  
107 carry the provisions of this compact into effect, and shall  
108 determine their qualifications and fix their duties and  
109 compensation. Such personnel as may be employed shall  
110 be employed without regard to any civil service or other  
111 similar requirements for employees of any of the  
112 signatory bodies. The commission may maintain one or  
113 more offices for the transaction of its business and may  
114 meet at any time within the area of the signatory bodies.

115       (C) The commission shall keep accurate accounts of  
116 all receipts and disbursements and shall make an annual  
117 report thereof and shall in such report set forth in detail  
118 the operations and transactions conducted by it pursuant  
119 to this compact. The commission, however, shall not incur  
120 any obligations for administrative or other expenses prior  
121 to the making of appropriations adequate to meet the  
122 same nor shall it in any way pledge the credit of any of  
123 the signatory bodies. Each of the signatory bodies reserves  
124 the right to make at any time an examination and audit of  
125 the accounts of the commission.

126 (D) A quorum of the commission shall, for the  
127 transaction of business, the exercise of any powers, or the  
128 performance of any duties, consist of at least six members  
129 of the commission who shall represent at least a majority  
130 of the signatory bodies: *Provided*, That no action of the  
131 commission relating to policy or stream classification or  
132 standards shall be binding on any one of the signatory  
133 bodies unless at least two of the commissioners from such  
134 signatory body shall vote in favor thereof.

135 Article II

136 The commission shall have the power:

137 (A) To collect, analyze, interpret, coordinate, tabulate,  
138 summarize and distribute technical and other data relative  
139 to, and to conduct studies, sponsor research and prepare  
140 reports on, pollution and other water problems of the  
141 conservancy district.

142 (B) To cooperate with the legislative and  
143 administrative agencies of the signatory bodies, or the  
144 equivalent thereof, and with other commissions and  
145 federal, local governmental and nongovernmental  
146 agencies, organizations, groups and persons for the  
147 purpose of promoting uniform laws, rules or regulations  
148 for the abatement and control of pollution of streams and  
149 the utilization, conservation and development of the water  
150 and associated land resources in the said conservancy  
151 district.

152 (C) To disseminate to the public information in  
153 relation to stream pollution problems and the utilization,  
154 conservation and development of the water and associated  
155 land resources of the conservancy district and on the aims,  
156 views, purposes and recommendations of the commission  
157 in relation thereto.

158 (D) To cooperate with, assist, and provide liaison for  
159 and among, public and nonpublic agencies and  
160 organizations concerned with pollution and other water  
161 problems in the formulation and coordination of plans,  
162 programs and other activities relating to stream pollution  
163 or to the utilization, conservation or development of water  
164 or associated land resources, and to sponsor cooperative

165 action in connection with the foregoing.

166 (E) In its discretion and at any time during or after the  
167 formulation thereof, to review and to comment upon any  
168 plan or program of any public or private agency or  
169 organization relating to stream pollution or the utilization,  
170 conservation or development of water or associated land  
171 resources.

172 (F) (1) To make, and, if needful from time to time,  
173 revise and to recommend to the signatory bodies,  
174 reasonable minimum standards for the treatment of  
175 sewage and industrial or other wastes now discharged or to  
176 be discharged in the future to the streams of the  
177 conservancy district, and also, for cleanliness of the  
178 various streams in the conservancy district.

179 (2) To establish reasonable physical, chemical and  
180 bacteriological standards of water quality satisfactory for  
181 various classifications of use. It is agreed that each of the  
182 signatory bodies through appropriate agencies will  
183 prepare a classification of its interstate waters in the district  
184 in entirety or by portions according to present and  
185 proposed highest use, and for this purpose technical  
186 experts employed by appropriate state water pollution  
187 control agencies are authorized to confer on questions  
188 relating to classification of interstate waters affecting two  
189 or more states. Each signatory body agrees to submit its  
190 classification of its interstate waters to the commission with  
191 its recommendations thereon.

192 The commission shall review such classification and  
193 recommendations and accept or return the same with its  
194 comments. In the event of return, the signatory body will  
195 consider the comments of the commission and resubmit  
196 the classification proposal, with or without amendment,  
197 with any additional comments for further action by the  
198 commission.

199 It is agreed that after acceptance of such classification,  
200 the signatory body through its appropriate state water  
201 pollution control agencies will work to establish programs  
202 of treatment of sewage and industrial wastes which will  
203 meet or exceed standards established by the commission

204 for classified waters. The commission may from time to  
205 time make such changes in definitions of classifications  
206 and in standards as may be required by changed  
207 conditions or as may be necessary for uniformity and in a  
208 manner similar to that in which these standards and  
209 classifications were originally established.

210 It is recognized, owing to such variable factors as  
211 location, size, character and flow and the many varied uses  
212 of the waters subject to the terms of this compact, that no  
213 single standard of sewage and waste treatment and no  
214 single standard of quality of receiving waters is practical  
215 and that the degree of treatment of sewage and industrial  
216 wastes should take into account the classification of the  
217 receiving waters according to present and proposed  
218 highest use, such as for drinking water supply, bathing and  
219 other recreational purposes, maintenance and propagation  
220 of fish life, industrial and agricultural uses, navigation and  
221 disposal of wastes.

222

### Article III

223 For the purpose of dealing with the problems of  
224 pollution and of water and associated land resources in  
225 specific areas which directly affect two or more, but not  
226 all, signatory bodies, the commission may establish  
227 sections of the commissions consisting of the  
228 commissioners from such affected signatory bodies:  
229 *Provided*, That no signatory body may be excluded from  
230 any section in which it wishes to participate. The  
231 commissioners appointed by the president of the United  
232 States may participate in any section. The commission  
233 shall designate, and from time to time may change, the  
234 geographical area with respect to which each section shall  
235 function. Each section shall, to such extent as the  
236 commission may from time to time authorize, have  
237 authority to exercise and perform with respect to its  
238 designated geographical area any power or function  
239 vested in the commission, and in addition may exercise  
240 such other powers and perform such functions as may be  
241 vested in such section by the laws of any signatory body  
242 or by the laws of the United States. The exercise or  
243 performance by a section of any power or function vested

244 in the commission may be financed by the commission,  
245 but the exercise or performance of powers or functions  
246 vested solely in a section shall be financed through funds  
247 provided in advance by the bodies, including the United  
248 States, participating in such section.

249 Article IV

250 The moneys necessary to finance the commission in  
251 the administration of its business in the conservancy  
252 district shall be provided through appropriations from the  
253 signatory bodies and the United States, in the manner  
254 prescribed by the laws of the several signatory bodies and  
255 of the United States, and in amounts as follows:

256 The pro rata contribution shall be based on such  
257 factors as population; the amount of industrial and  
258 domestic pollution; and a flat service charge; as shall be  
259 determined from time to time by the commission, subject,  
260 however, to the approval, ratification and appropriation of  
261 such contribution by the several signatory bodies.

262 Article V

263 Pursuant to the aims and purposes of this compact, the  
264 signatory bodies mutually agree:

265 1. Faithful cooperation in the abatement of existing  
266 pollution and the prevention of future pollution in the  
267 streams of the conservancy district and in planning for the  
268 utilization, conservation and development of the water and  
269 associated land resources thereof.

270 2. The enactment of adequate and, insofar as is  
271 practicable, uniform legislation for the abatement and  
272 control of pollution and control and use of such streams.

273 3. The appropriation of biennial sums on the  
274 proportionate basis as set forth in article four.

275 Article VI

276 This compact shall become effective immediately after  
277 it shall have been ratified by the majority of the  
278 legislatures of the states of Maryland and West Virginia,  
279 the commonwealths of Pennsylvania and Virginia, and by  
280 the commissioners of the District of Columbia, and

281 approval by the Congress of the United States: *Provided*,  
282 That this compact shall not be effective as to any signatory  
283 body until ratified thereby.

284 Article VII

285 Any signatory body may, by legislative action, after one  
286 year's notice to the commission, withdraw from this com-  
287 pact.

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## CHAPTER 204

(S. B. 358—By Senators Wooton, Anderson, Buckalew, Dittmar,  
Miller, Ross, Schoonover, Scott and Yoder)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections one, three, four-a, five, six, seven, eight, ten, eleven and twelve, article one, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto two new sections, designated sections one-a and seven-a; and to amend and reenact section five-a, article two of said chapter, all relating to state boards of examination or registration; application of article; legislative findings and declaration; officers; lay members of professional boards; meetings; quorum; investigatory powers; duties; application for license or registration; fees; contents of license or certificate of registration; continuing education; denial, suspension or revocation of a license or registration; disposition of money; compensation of members; expenses; record of proceedings; register of applicants; report to governor and Legislature; and legal corporations.

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

That sections one, three, four-a, five, six, seven, eight, ten, eleven and twelve, article one, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto two new sections, designated sections one-a and



seven-a; and that section five-a, article two of said chapter be amended and reenacted, all to read as follows:

**Article**

1. **General Provisions Applicable to All State Boards of Examination or Registration Referred to in Chapter.**
2. **Attorneys-at-law.**

**ARTICLE 1. GENERAL PROVISIONS APPLICABLE TO ALL STATE BOARDS OF EXAMINATION OR REGISTRATION REFERRED TO IN CHAPTER.**

- §30-1-1. Application of article.
- §30-1-1a. Legislative findings and declaration.
- §30-1-3. Officers.
- §30-1-4a. Lay members of professional boards.
- §30-1-5. Meetings; quorum; investigatory powers; duties.
- §30-1-6. Application for license or registration; examination fee.
- §30-1-7. Contents of license or certificate of registration.
- §30-1-7a. Continuing education.
- §30-1-8. Denial, suspension or revocation of a license or registration; probation; proceedings; effect of suspension or revocation; transcript; report; judicial review.
- §30-1-10. Disposition of money; fines; legislative audit.
- §30-1-11. Compensation of members; expenses.
- §30-1-12. Record of proceedings; register of applicants; certified copies of records prima facie evidence; report to governor and Legislature.

**§30-1-1. Application of article.**

- 1 Unless otherwise specifically provided, every board of
- 2 examination or registration referred to in this chapter shall
- 3 conform to the requirements prescribed in the following
- 4 sections of this article.

**§30-1-1a. Legislative findings and declaration.**

- 1 The Legislature hereby finds and declares that as a
- 2 matter of public policy the practice of the professions
- 3 referred to in this chapter is a privilege and is not a natural
- 4 right of individuals. The fundamental purpose of licen-
- 5 sure and registration is to protect the public, and any li-
- 6 cense, registration, certificate or other authorization to
- 7 practice issued pursuant to this chapter is a revocable priv-
- 8 ilege.

**§30-1-3. Officers.**

1 (a) Every board referred to in this chapter shall elect  
2 annually from its members a president and a secretary  
3 who shall hold their offices for one year, but shall contin-  
4 ue to hold their offices until their successors are elected.  
5 However, the state board of law examiners, the state board  
6 of examiners for nurses and the state board of dental ex-  
7 aminers may each elect a secretary from outside their  
8 membership.

9 (b) The officers of the boards referred to in this chap-  
10 ter shall register annually with the governor, the secretary  
11 of administration, the legislative auditor and the secretary  
12 of state.

**§30-1-4a. Lay members of professional boards.**

1 (a) Notwithstanding any provisions of this code to the  
2 contrary, the governor shall appoint at least one lay person  
3 to represent the interests of the public on every health  
4 professional licensing board which is referred to in this  
5 chapter. If the total number of members on any of these  
6 boards after the appointment of one lay person is an even  
7 number, one additional lay person shall be appointed.  
8 Lay members shall serve in addition to any other members  
9 otherwise provided for by law or rule. Lay members shall  
10 be at least eighteen years of age, shall be of good moral  
11 character, and shall be competent to represent and safe-  
12 guard the interests of the public. Each lay member is  
13 empowered to participate in and vote on all transactions  
14 and business of the board, committee or group to which  
15 he or she is appointed.

16 (b) Any person whose addition to a board as a lay  
17 member under the provisions of this section results in the  
18 addition of an odd number of lay additions to the board  
19 shall serve for a term ending in an odd-numbered year on  
20 the date in that year on which terms of the professional  
21 members expire. Of the members first appointed, each  
22 shall serve for a term ending in the year one thousand  
23 nine hundred seventy-nine, and the successor to each of  
24 the first members shall serve for a term equal in length to  
25 the terms of the other professional members of the board.

26 (c) Any person whose addition to a board as a lay  
27 member under the provisions of this section results in the  
28 addition of an even number of lay additions to the board  
29 shall serve for a term ending in an even-numbered year on  
30 the date in that year on which terms of the professional  
31 members expire. Of the members first appointed, each  
32 shall serve for a term ending in the year one thousand  
33 nine hundred seventy-eight, and the successor to each of  
34 the first members shall serve for a term equal in length to  
35 the terms of the other professional members of the board.

**§30-1-5. Meetings; quorum; investigatory powers; duties.**

1 (a) Every board referred to in this chapter shall hold at  
2 least one meeting each year, at such time and place as it  
3 may prescribe by rule, for the examination of applicants  
4 who desire to practice their respective professions or occu-  
5 pations in this state and to transact any other business  
6 which may legally come before it. The board may hold  
7 additional meetings as may be necessary, which shall be  
8 called by the secretary at the direction of the president or  
9 upon the written request of any three members. A majori-  
10 ty of the members of the board constitutes a quorum for  
11 the transaction of its business. The board is authorized to  
12 compel the attendance of witnesses, to issue subpoenas, to  
13 conduct investigations and hire an investigator, and to take  
14 testimony and other evidence concerning any matter with-  
15 in its jurisdiction. The president and secretary of the board  
16 are authorized to administer oaths for these purposes.

17 (b) Every board referred to in this chapter has a duty  
18 to investigate and resolve complaints which it receives and  
19 shall do so in a timely manner. Every board shall provide  
20 public access to the record of the disposition of the com-  
21 plaints which it receives, in accordance with the provisions  
22 of chapter twenty-nine-b of this code. Every board has a  
23 duty to report violations of individual practice acts con-  
24 tained in this chapter to the board by which the individual  
25 may be licensed, and shall do so in a timely manner upon  
26 receiving notice of such violations. Every person licensed  
27 or registered by a board has a duty to report to the board  
28 which licenses or registers him or her a known or observed  
29 violation of the practice act or the board's rules by any

30 other person licensed or registered by the same board, and  
31 shall do so in a timely manner. Law-enforcement agen-  
32 cies or their personnel and courts shall report in a timely  
33 manner to the appropriate board any violations of individ-  
34 ual practice acts by any individual.

35 (c) Whenever a board referred to in this chapter ob-  
36 tains information that a person subject to its authority has  
37 engaged in, is engaging in, or is about to engage in any  
38 act which constitutes or will constitute a violation of the  
39 provisions of this chapter which are administered and  
40 enforced by that board, it may apply to the circuit court  
41 for an order enjoining the act. Upon a showing that the  
42 person has engaged, is engaging, or is about to engage in  
43 any such act, the court shall order an injunction, restrain-  
44 ing order or other order as the court may deem appropri-  
45 ate.

**§30-1-6. Application for license or registration; examination fee.**

1 (a) Every applicant for license or registration under  
2 the provisions of this chapter shall apply for such license  
3 or registration in writing to the proper board and shall  
4 transmit with his or her application an examination fee  
5 which the board is authorized to charge for an examina-  
6 tion or investigation into the applicant's qualifications to  
7 practice.

8 (b) Each board referred to in this chapter is authorized  
9 to establish by rule a deadline for application for exami-  
10 nation which shall be no less than ten nor more than nine-  
11 ty days prior to the date of the examination.

12 (c) Boards may set by rule fees relating to the licens-  
13 ing or registering of individuals, which shall be sufficient  
14 to enable the boards to carry out effectively their responsi-  
15 bilities of licensure or registration and discipline of indi-  
16 viduals subject to their authority: *Provided*, That when  
17 any board proposes to promulgate a rule regarding fees  
18 for licensing or registration, that board shall notify its  
19 membership of the proposed rule by mailing a copy of  
20 the proposed rule to the membership at the time that the  
21 proposed rule is filed with the secretary of state for publi-

22 cation in the state register in accordance with section five,  
23 article three, chapter twenty-nine-a of this code.

**§30-1-7. Contents of license or certificate of registration.**

1 Every license or certificate of registration issued by  
2 each board shall bear a serial number, the full name of the  
3 applicant, the date of issuance, and the seal of the board.  
4 It shall be signed by the board's president and secretary or  
5 executive secretary. No license or certificate of registra-  
6 tion granted or issued under the provisions of this chapter  
7 may be assigned.

**§30-1-7a. Continuing education.**

1 Each board referred to in this chapter shall establish  
2 continuing education requirements as a prerequisite to  
3 license renewal. Each board shall develop continuing  
4 education criteria appropriate to its discipline, which shall  
5 include, but not be limited to, course content, course ap-  
6 proval, hours required and reporting periods.

**§30-1-8. Denial, suspension or revocation of a license or registration; probation; proceedings; effect of suspension or revocation; transcript; report; judicial review.**

1 (a) Every board referred to in this chapter is autho-  
2 rized to suspend or revoke the license of any person who  
3 has been convicted of a felony or who has been found to  
4 have engaged in conduct, practices or acts constituting  
5 professional negligence or a willful departure from ac-  
6 cepted standards of professional conduct. Where any  
7 person has been so convicted of a felony or has been  
8 found to have engaged in such conduct, practices or acts,  
9 every board referred to in this chapter is further autho-  
10 rized to enter into consent decrees, to reprimand, to enter  
11 into probation orders, to levy fines not to exceed one  
12 thousand dollars per day per violation, or any of these,  
13 singly or in combination. Each board is also authorized  
14 to assess administrative costs. Any costs which are as-  
15 sessed shall be placed in the special account of the board,  
16 and any fine which is levied shall be deposited in the state  
17 treasury's general revenue fund. For purposes of this

18 section, the word "felony" means a felony or crime pun-  
19 ishable as a felony under the laws of this state, any other  
20 state, or the United States. Every board referred to in this  
21 chapter is authorized to promulgate rules in accordance  
22 with the provisions of chapter twenty-nine-a of this code  
23 to delineate conduct, practices or acts which, in the judg-  
24 ment of the board, constitute professional negligence, a  
25 willful departure from accepted standards of professional  
26 conduct or which may render an individual unqualified or  
27 unfit for licensure, registration or other authorization to  
28 practice.

29 (b) Notwithstanding any other provision of law to the  
30 contrary, no certificate, license, registration or authority  
31 issued under the provisions of this chapter may be sus-  
32 pended or revoked without a prior hearing before the  
33 board or court which issued the certificate, license, regis-  
34 tration or authority. However, this does not apply in cases  
35 where a board is authorized to suspend or revoke a certifi-  
36 cate, license, registration or authority prior to a hearing if  
37 the individual's continuation in practice constitutes an  
38 immediate danger to the public.

39 (c) In all proceedings before a board or court for the  
40 suspension or revocation of any certificate, license, regis-  
41 tration or authority issued under the provisions of this  
42 chapter, a statement of the charges against the holder  
43 thereof and a notice of the time and place of hearing shall  
44 be served upon the person as a notice is served under  
45 section one, article two, chapter fifty-six of this code, at  
46 least thirty days prior to the hearing, and he or she may  
47 appear with witnesses and be heard in person, by counsel,  
48 or both. The board may take oral or written proof, for or  
49 against the accused, as it may deem advisable. If upon  
50 hearing the board finds that the charges are true, it may  
51 suspend or revoke the certificate, license, registration or  
52 authority, and suspension or revocation shall take from the  
53 person all rights and privileges acquired thereby.

54 (d) Pursuant to the provisions of section one, article  
55 five, chapter twenty-nine-a of this code, informal disposi-  
56 tion may also be made by the board of any contested case  
57 by stipulation, agreed settlement, consent order or default.

58 Further, the board may suspend its decision and place a  
59 licensee found by the board to be in violation of the appli-  
60 cable practice on probation.

61 (e) Any person denied a license, certificate, registra-  
62 tion or authority who believes the denial was in violation  
63 of this article or the article under which the license, certifi-  
64 cate, registration or authority is authorized shall be entitled  
65 to a hearing on the action denying the license, certificate,  
66 registration or authority. Hearings under this subsection  
67 shall be in accordance with the provisions for hearings  
68 which are set forth in this section.

69 (f) A stenographic report of each proceeding on the  
70 denial, suspension or revocation of a certificate, license,  
71 registration or authority shall be made at the expense of  
72 the board and a transcript thereof retained in its files. The  
73 board shall make a written report of its findings, which  
74 shall constitute part of the record.

75 (g) All proceedings under the provisions of this sec-  
76 tion are subject to review by the supreme court of appeals.

**§30-1-10. Disposition of money fines; legislative audit.**

1 (a) The secretary of every board referred to in this  
2 chapter shall receive and account for all money which it  
3 derives pursuant to the provisions of this chapter which are  
4 applicable to it. With the exception of money received as  
5 fines, each board shall pay all money which is collected  
6 into a separate special fund of the state treasury which has  
7 been established for each board. This money shall be  
8 used exclusively by each board for purposes of adminis-  
9 tration and enforcement of its duties pursuant to this chap-  
10 ter. Any money received as fines shall be deposited into  
11 the general revenue fund of the state treasury. When the  
12 special fund of any board accumulates to an amount  
13 which exceeds twice the annual budget of the board or ten  
14 thousand dollars, whichever is greater, the excess amount  
15 shall be transferred by the state treasurer to the state gen-  
16 eral revenue fund.

17 (b) Every licensing board which is authorized by the  
18 provisions of this chapter shall be subject to audit by the  
19 office of the legislative auditor.

**§30-1-11. Compensation of members; expenses.**

1 Each member of every board which is referred to in  
2 this chapter shall receive compensation and expense reim-  
3 bursement which shall not exceed the amount paid to  
4 members of the Legislature for their interim duties as  
5 recommended by the citizens legislative compensation  
6 commission and authorized by law for each day or por-  
7 tion thereof engaged in the discharge of official duties.

**§30-1-12. Record of proceedings; register of applicants; certi-  
fied copies of records prima facie evidence; re-  
port to governor and Legislature.**

1 (a) The secretary of every board shall keep a record of  
2 its proceedings and a register of all applicants for license  
3 or registration, showing for each the date of his or her  
4 application, his or her name, age, educational and other  
5 qualifications, place of residence, whether an examination  
6 was required, whether the applicant was rejected or a cer-  
7 tificate of license or registration granted, the date of this  
8 action, the license or registration number, all renewals of  
9 the license or registration, if required, and any suspension  
10 or revocation thereof. The books and register of the  
11 board shall be open to public inspection at all reasonable  
12 times, and the books and register, or a copy of any part  
13 thereof, certified by the secretary and attested by the seal  
14 of the board, shall be prima facie evidence of all matters  
15 recorded therein.

16 (b) On or before the first day of January of each year  
17 in which the Legislature meets in regular session, the  
18 board shall submit to the governor and to the Legislature a  
19 report of its transactions for the preceding two years, an  
20 itemized statement of its receipts and disbursements for  
21 that period, a full list of the names of all persons licensed  
22 or registered by it during that period, statistical reports by  
23 county of practice, by specialty if appropriate to the par-  
24 ticular profession, and a list of any complaints which were  
25 filed against persons licensed by the board, including any



26 action taken by the board regarding those complaints.  
27 The report shall be certified by the president and the sec-  
28 retary of the board, and a copy of the report shall be filed  
29 with the secretary of state.

## ARTICLE 2. ATTORNEYS-AT-LAW.

### §30-2-5a. Legal corporations.

1 (a) One or more individuals, each of whom is licensed  
2 to practice law within this state, may organize and become  
3 a shareholder or shareholders of a legal corporation.  
4 Individuals who may be practicing law as an organization  
5 created otherwise than pursuant to the provisions of this  
6 section may incorporate under and pursuant to this sec-  
7 tion. This section is not intended to amend the statutory  
8 or common law as it relates to associations or partnerships,  
9 except to allow partnerships of lawyers to organize as a  
10 legal corporation.

11 (b) A legal corporation may render professional ser-  
12 vice only through officers, employees and agents who are  
13 themselves duly licensed to render legal service within this  
14 state. The term "employee" or "agent" as used in this sec-  
15 tion does not include secretaries, clerks, typists, paralegal  
16 personnel or other individuals who are not usually and  
17 ordinarily considered by custom and practice to be ren-  
18 dering legal services for which a license is required.

19 (c) This section does not modify the law as it relates to  
20 the relationship between a person furnishing legal services  
21 and his client, nor does it modify the law as it relates to  
22 liability arising out of such a professional service relation-  
23 ship. Except for permitting legal corporations, this section  
24 is not intended to modify any legal requirement or court  
25 rule relating to ethical standards of conduct required of  
26 persons providing legal service.

27 (d) A legal corporation may issue its capital stock only  
28 to persons who are duly licensed attorneys.

29 (e) When not inconsistent with this section, the organi-  
30 zation and procedures of legal corporations shall conform  
31 to the requirements of article one, chapter thirty-one of  
32 this code.

33 (f) The West Virginia state bar may require that law-  
34 yers under its licensing authority must obtain its prior  
35 authorization before beginning to act as a legal corpora-  
36 tion and may require a fee of not more than fifty dollars  
37 for each application for authorization to form a legal  
38 corporation. The state bar may adopt rules: (1) To set  
39 reasonable standards for granting or refusing prior ap-  
40 proval; (2) to require appropriate information therefor  
41 from a legal corporation applicant; and (3) to notify the  
42 secretary of state that certain persons have been given  
43 authorization by the state bar to form a legal corporation.

44 (g) Upon notification by the West Virginia state bar of  
45 its approval, the secretary of state, upon compliance by the  
46 incorporators with this section and the applicable provi-  
47 sions of chapter thirty-one of this code, may issue to the  
48 incorporators a certificate of incorporation for the legal  
49 corporation which then may engage in practice through  
50 duly licensed or otherwise legally authorized stockholders,  
51 employees and agents.

52 (h) A shareholder of a legal corporation may sell or  
53 transfer his or her shares of stock in such corporation only  
54 to another individual who is duly licensed to practice law  
55 in this state or back to the corporation. However, a fidu-  
56 ciary representative of the estate of a lawyer may hold the  
57 stock or interest of the lawyer for a reasonable time during  
58 the administration of the estate.

59 (i) The corporate name of a legal corporation shall  
60 contain the last name or names of one or more of its  
61 shareholders. If the rules of the state bar so permit, the  
62 corporate name may contain or include the name or  
63 names of former shareholders or of persons who were  
64 associated with a predecessor partnership or other organi-  
65 zation. The corporate name shall also contain the words  
66 "legal corporation" or the abbreviation "L.C." The use of  
67 the word "company", "corporation" or "incorporated" or  
68 any other words or abbreviations in the name of a corpo-  
69 ration organized under this article which indicates that  
70 such corporation is a corporation, other than the words  
71 "legal corporation" or the abbreviation "L.C.", is specifical-  
72 ly prohibited.

## CHAPTER 205

(Com. Sub. for S. B. 133—By Senators Manchin, Miller, Ross, Scott, Oliverio and Plymale)

[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact section sixteen, article three, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to licensure procedures for physician assistants; requiring approval of educational programs for physician assistants by the successor organization to the committee on allied health education and accreditation of the American medical association; requiring rules promulgated by the board of medicine to be pursuant to the provisions of chapter twenty-nine-a; changing biennial report to an annual report and eliminating certain report requirements; adding current certification by the national commission on certification of physician assistants for licensure; changing the name of the certifying examination for physician assistants; changing requirements for temporary licensure; terminating temporary licensure upon failure of the national commission on certification of physician assistants examination; requiring notice to the board of medicine of reports of performance on certifying examination within thirty days of receipt of same; deleting conflicting language regarding criminal penalties for misrepresentation as a physician assistant; and making technical changes.

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

That section sixteen, article three, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 3. WEST VIRGINIA MEDICAL PRACTICE ACT.

**§30-3-16. Physician assistants; definitions; board of medicine rules; annual report; licensure; temporary license; relicensure; job description required; revocation or suspension of licensure; responsibilities of supervising physician; legal responsibility for physician assistants; reporting by**

**health care facilities; identification; limitations on employment and duties; fees; continuing education; unlawful representation of physician assistant as a physician; criminal penalties.**

1 (a) As used in this section:

2 (1) "Physician assistant" means an assistant to a physi-  
3 cian who is a graduate of an approved program of instruc-  
4 tion in primary health care or surgery, has attained a bac-  
5 calaureate or master's degree, has passed the national cer-  
6 tification examination and is qualified to perform direct  
7 patient care services under the supervision of a physician;

8 (2) "Physician assistant-midwife" means a physician  
9 assistant who meets all qualifications set forth under subdi-  
10 vision (1) of this subsection and fulfills the requirements  
11 set forth in subsection (d) of this section; is subject to all  
12 provisions of this section; and assists in the management  
13 and care of a woman and her infant during the prenatal,  
14 delivery and postnatal periods;

15 (3) "Supervising physician" means a doctor or doctors  
16 of medicine or podiatry permanently licensed in this state  
17 who assume legal and supervisory responsibility for the  
18 work or training of any physician assistant under his or  
19 her supervision;

20 (4) "Approved program" means an educational pro-  
21 gram for physician assistants approved and accredited by  
22 the committee on allied health education and accreditation  
23 on behalf of the American medical association or its suc-  
24 cessor; and

25 (5) "Health care facility" means any licensed hospital,  
26 nursing home, extended care facility, state health or men-  
27 tal institution, clinic or physician's office.

28 (b) The board shall promulgate rules pursuant to the  
29 provisions of article three, chapter twenty-nine-a of this  
30 code governing the extent to which physician assistants  
31 may function in this state. The rules shall provide that the  
32 physician assistant is limited to the performance of those  
33 services for which he or she is trained and that he or she  
34 performs only under the supervision and control of a

35 physician permanently licensed in this state, but that su-  
36 pervision and control does not require the personal pres-  
37 ence of the supervising physician at the place or places  
38 where services are rendered if the physician assistant's  
39 normal place of employment is on the premises of the  
40 supervising physician. The supervising physician may  
41 send the physician assistant off the premises to perform  
42 duties under his or her direction, but a separate place of  
43 work for the physician assistant shall not be established.  
44 In promulgating the rules, the board shall allow the physi-  
45 cian assistant to perform those procedures and examina-  
46 tions and in the case of certain authorized physician assis-  
47 tants to prescribe at the direction of his or her supervising  
48 physician in accordance with subsection (l) of this section  
49 those categories of drugs submitted to it in the job de-  
50 scription required by subsection (g) of this section. The  
51 board shall compile and publish an annual report that  
52 includes a list of currently licensed physician assistants  
53 and their employers and location in the state.

54 (c) The board shall license as a physician assistant any  
55 person who files an application and furnishes satisfactory  
56 evidence to it that he or she has met the following stan-  
57 dards:

58 (1) He or she is a graduate of an approved program of  
59 instruction in primary health care or surgery;

60 (2) He or she has passed the certifying examination  
61 for a primary care physician assistant administered by the  
62 national commission on certification of physician assis-  
63 tants and has maintained certification by that commission  
64 so as to be currently certified;

65 (3) He or she is of good moral character; and

66 (4) He or she has attained a baccalaureate or master's  
67 degree.

68 (d) The board shall license as a physician  
69 assistant-midwife any person who meets the standards set  
70 forth under subsection (c) of this section and, in addition  
71 thereto, the following standards:

72 (1) He or she is a graduate of a school of midwifery  
73 accredited by the American college of nurse-midwives;

74 (2) He or she has passed an examination approved by  
75 the board;

76 (3) He or she practices midwifery under the supervi-  
77 sion of a board certified obstetrician, gynecologist or a  
78 board certified family practice physician who routinely  
79 practices obstetrics.

80 (e) The board may license as a physician assistant any  
81 person who files an application and furnishes satisfactory  
82 evidence that he or she is of good moral character and  
83 meets either of the following standards:

84 (1) He or she is a graduate of an approved program of  
85 instruction in primary health care or surgery prior to the  
86 first day of July, one thousand nine hundred ninety-four,  
87 and has passed the certifying examination for a physician  
88 assistant administered by the national commission on  
89 certification of physician assistants and has maintained  
90 certification by that commission so as to be currently  
91 certified; or

92 (2) He or she had been certified by the board as a  
93 physician assistant then classified as "Type B", prior to the  
94 first day of July, one thousand nine hundred eighty-three.

95 Licensure of an assistant to a physician practicing the  
96 specialty of ophthalmology is permitted under this sec-  
97 tion: *Provided*, That a physician assistant may not dis-  
98 pense a prescription for a refraction.

99 (f) When any graduate of an approved program, with-  
100 in two years of graduation, submits an application to the  
101 board for a physician assistant license, accompanied by a  
102 job description in conformity with subsection (g) of this  
103 section, the board shall issue to that applicant a temporary  
104 license allowing that applicant to function as a physician  
105 assistant until the applicant successfully passes the national  
106 commission on certification of physician assistants' certi-  
107 fying examination: *Provided*, That the applicant shall sit  
108 for and obtain a passing score on the next offered exami-  
109 nation within one year of issuance of the temporary li-

110 cense. A physician assistant who has not been certified by  
111 the national board of medical examiners on behalf of the  
112 national commission on certification of physician assis-  
113 tants will be restricted to work under the direct supervision  
114 of the supervising physician.

115 A physician assistant who has been issued a temporary  
116 license shall, within thirty days of receipt of written notice  
117 from the national commission on certification of physi-  
118 cian assistants of his or her performance on the certifying  
119 examination, notify the board in writing of his or her  
120 results. In the event of failure of that examination, the  
121 temporary license shall expire and terminate automatical-  
122 ly, and the board shall so notify the physician assistant in  
123 writing.

124 (g) Any physician applying to the board to supervise a  
125 physician assistant shall provide a job description that sets  
126 forth the range of medical services to be provided by the  
127 assistant. Before a physician assistant can be employed or  
128 otherwise use his or her skills, the supervising physician  
129 must obtain approval of the job description from the  
130 board. The board may revoke or suspend any license of  
131 an assistant to a physician for cause, after giving that assis-  
132 tant an opportunity to be heard in the manner provided by  
133 article five of chapter twenty-nine-a of this code and as set  
134 forth in rules duly adopted by the board.

135 (h) The supervising physician is responsible for ob-  
136 serving, directing and evaluating the work, records and  
137 practices of each physician assistant performing under his  
138 or her supervision. He or she shall notify the board in  
139 writing of any termination of his or her supervisory rela-  
140 tionship with a physician assistant within ten days of the  
141 termination. The legal responsibility for any physician  
142 assistant remains with the supervising physician at all  
143 times, including occasions when the assistant under his or  
144 her direction and supervision, aids in the care and treat-  
145 ment of a patient in a health care facility. In his or her  
146 absence, a supervising physician must designate an alter-  
147 nate supervising physician, however, the legal responsibili-  
148 ty remains with the supervising physician at all times. A  
149 health care facility is not legally responsible for the ac-

150 tions or omissions of the physician assistant unless the  
151 physician assistant is an employee of the facility.

152 (i) The acts or omissions of a physician assistant em-  
153 ployed by health care facilities providing inpatient or  
154 outpatient services shall be the legal responsibility of the  
155 facilities. Physician assistants employed by facilities in  
156 staff positions shall be supervised by a permanently li-  
157 censed physician.

158 (j) A health care facility shall report in writing to the  
159 board within sixty days after the completion of the facili-  
160 ty's formal disciplinary procedure, and also after the com-  
161 mencement, and again after the conclusion, of any result-  
162 ing legal action, the name of any physician assistant prac-  
163 ticing in the facility whose privileges at the facility have  
164 been revoked, restricted, reduced or terminated for any  
165 cause including resignation, together with all pertinent  
166 information relating to the action. The health care facility  
167 shall also report any other formal disciplinary action taken  
168 against any physician assistant by the facility relating to  
169 professional ethics, medical incompetence, medical mal-  
170 practice, moral turpitude or drug or alcohol abuse. Tem-  
171 porary suspension for failure to maintain records on a  
172 timely basis or failure to attend staff or section meetings  
173 need not be reported.

174 (k) When functioning as a physician assistant, the  
175 physician assistant shall wear a name tag that identifies  
176 him or her as a physician assistant. A two and one-half by  
177 three and one-half inch card of identification shall be  
178 furnished by the board upon licensure of the physician  
179 assistant.

180 (l) A physician assistant may write or sign prescrip-  
181 tions or transmit prescriptions by word of mouth, tele-  
182 phone or other means of communication at the direction  
183 of his or her supervising physician. The board shall pro-  
184 mulgate rules pursuant to the provisions of article three,  
185 chapter twenty-nine-a of this code governing the eligibili-  
186 ty and extent to which a physician assistant may prescribe  
187 at the direction of the supervising physician. The rules  
188 shall include, but not be limited to, the following:



189 (1) Provisions for approving a state formulary classi-  
190 fying pharmacologic categories of drugs that may be  
191 prescribed by a physician assistant:

192 (A) The following categories of drugs shall be exclud-  
193 ed from the formulary: Schedules I and II of the uniform  
194 controlled substances act, anticoagulants, antineoplastics,  
195 radiopharmaceuticals, general anesthetics and radiograph-  
196 ic contrast materials;

197 (B) Drugs listed under Schedule III shall be limited to  
198 a seventy-two hour supply without refill;

199 (C) Categories of other drugs may be excluded as  
200 determined by the board;

201 (2) All pharmacological categories of drugs to be  
202 prescribed by a physician assistant shall be listed in each  
203 job description submitted to the board as required in sub-  
204 section (g) of this section;

205 (3) The maximum dosage a physician assistant may  
206 prescribe;

207 (4) A requirement that to be eligible for prescription  
208 privileges, a physician assistant shall have performed pa-  
209 tient care services for a minimum of two years immedi-  
210 ately preceding the submission to the board of the job de-  
211 scription containing prescription privileges and shall have  
212 successfully completed an accredited course of instruction  
213 in clinical pharmacology approved by the board; and

214 (5) A requirement that to maintain prescription privi-  
215 leges, a physician assistant shall continue to maintain na-  
216 tional certification as a physician assistant, and in meeting  
217 the national certification requirements shall complete a  
218 minimum of ten hours of continuing education in rational  
219 drug therapy in each certification period. Nothing in this  
220 subsection shall be construed to permit a physician assis-  
221 tant to independently prescribe or dispense drugs.

222 (m) A supervising physician shall not supervise at any  
223 one time more than two physician assistants, except that a  
224 physician may supervise up to four hospital-employed  
225 physician assistants.

226 A physician assistant shall not sign any prescription,  
227 except in the case of an authorized physician assistant at  
228 the direction of his or her supervising physician in accor-  
229 dance with the provisions of subsection (l) of this section.  
230 A physician assistant shall not perform any service that his  
231 or her supervising physician is not qualified to perform.  
232 A physician assistant shall not perform any service that is  
233 not included in his or her job description and approved by  
234 the board as provided for in this section.

235 The provisions of this section do not authorize any  
236 physician assistant to perform any specific function or  
237 duty delegated by this code to those persons licensed as  
238 chiropractors, dentists, dental hygienists, optometrists or  
239 pharmacists or certified as nurse anesthetists.

240 (n) Each application for licensure submitted by a  
241 licensed supervising physician under this section is to be  
242 accompanied by a fee of one hundred dollars. A fee of  
243 fifty dollars is to be charged for the biennial renewal of  
244 the license. A fee of twenty-five dollars is to be charged  
245 for any change of supervising physician.

246 (o) Beginning with the biennial renewal forms com-  
247 pleted by physician assistants and submitted to the board  
248 in the year one thousand nine hundred ninety-three, as a  
249 condition of renewal of physician assistant license, each  
250 physician assistant shall provide written documentation  
251 pursuant to rules promulgated by the board in accordance  
252 with chapter twenty-nine-a of this code of participation in  
253 and successful completion during the preceding two-year  
254 period of a minimum of forty hours of continuing educa-  
255 tion designated as category I by the American medical  
256 association, American academy of physician assistants or  
257 the academy of family physicians, and sixty hours of  
258 continuing education designated as category II by the  
259 association or either academy. Notwithstanding any pro-  
260 vision of this chapter to the contrary, failure to timely  
261 submit the required written documentation shall result in  
262 the automatic suspension of any license as a physician  
263 assistant until the written documentation is submitted to  
264 and approved by the board.

265 (p) It is unlawful for any physician assistant to repre-  
266 sent to any person that he or she is a physician, surgeon or  
267 podiatrist. Any person who violates the provisions of this  
268 subsection is guilty of a felony and, upon conviction  
269 thereof, shall be imprisoned in the penitentiary for not less  
270 than one nor more than two years, or be fined not more  
271 than two thousand dollars, or both fined and imprisoned.

272 (q) All physician assistants holding valid certificates  
273 issued by the board prior to the first day of July, one  
274 thousand nine hundred ninety-two, shall be considered to  
275 be licensed under this section.

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## CHAPTER 206

(H. B. 4591—By Delegates Given, Trump, Compton, Rowe and Michael)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections one and ten, article twenty-seven, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the board of barbers and cosmetologists; placing aestheticians under the authority of the board; permitting tropical birds in shops; and authorizing the promulgation of rules by the board of health to establish sanitation and safety requirements.

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

That sections one and ten, article twenty-seven, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### **ARTICLE 27. BOARD OF BARBERS AND COSMETOLOGISTS.**

§30-27-1. Board of barbers and cosmetologists; salary of board director; appointment, qualifications and terms of board members; compensation and expenses of members; powers and duties of board.

§30-27-10. Requirements to operate shops and schools; sanitary rules.

**§30-27-1. Board of barbers and cosmetologists; salary of board director; appointment, qualifications and terms of board members; compensation and expenses of members; powers and duties of board.**

1 (a) The board of barbers and beauticians heretofore  
2 established is continued and shall be known henceforth as  
3 the board of barbers and cosmetologists. The annual  
4 salary of the director of such board shall be thirty-one  
5 thousand seven hundred ninety-six dollars. All members  
6 of the board, serving for a term which has not expired on  
7 the effective date of this article, shall continue to serve the  
8 terms for which they were appointed. The board shall  
9 promulgate rules pursuant to the provisions of article  
10 three, chapter twenty-nine-a of this code, pertaining to the  
11 licensure and qualifications of barbers, cosmetologists and  
12 manicurists, and curricula and standards of instruction for  
13 schools of barbering and beauty culture. The board shall  
14 aid and assist in the enforcement of all rules in accordance  
15 with the provisions of article fourteen, chapter sixteen of  
16 this code. The board shall consist of four professional  
17 members to be appointed by the governor, by and with the  
18 advice and consent of the Senate, and one lay member to  
19 be appointed in accordance with the provisions of section  
20 four-a, article one of this chapter. Of the four professional  
21 members, one shall be an employing barber, one an em-  
22 ployee barber, one an employing cosmetologist and one  
23 an employee cosmetologist. Each professional member of  
24 the board shall have been engaged within this state in the  
25 practice of barbering or beauty culture, as the case may  
26 be, for a period of five years prior to his or her appoint-  
27 ment and no more than two of the four professional mem-  
28 bers may belong to the same political party. No member  
29 of the board shall own or have a pecuniary interest in a  
30 barber or beauty culture school licensed by or doing busi-  
31 ness within this state or shall be employed by such an  
32 institution.

33 (b) On or before the thirtieth day of June of each  
34 year, the governor shall appoint one member of the board  
35 to serve for a term of four years, to begin on the first day

36 of July. No professional member of the board may serve  
37 for more than two complete terms.

38 (c) The board shall designate one of its members as  
39 chairperson.

40 (d) Each member of the board shall receive as com-  
41 pensation a per diem of fifty dollars for each day of atten-  
42 dance at board sessions, but the compensation for each  
43 member shall not exceed the sum of three thousand dol-  
44 lars in any calendar year. Each member shall be reim-  
45 bursed for actual and necessary expenses incurred in the  
46 performance of his or her duties, upon presentation of an  
47 itemized sworn statement thereof.

48 (e) The board shall examine all applicants for licen-  
49 sure and shall issue licenses to those entitled thereto and  
50 collect examination and licensure fees, in accordance with  
51 regulations promulgated by the board of health pursuant  
52 to article fourteen, chapter sixteen of this code or the  
53 board of barbers and cosmetologists.

54 (f) It is unlawful for any person to practice or offer to  
55 practice barbering, beauty culture or manicuring in this  
56 state without first obtaining a license for such purposes  
57 from the board of barbers and cosmetologists.

58 (g) The board shall have the power to promulgate  
59 rules generally regarding the practice and conduct of  
60 barbering and beauty culture, including, but not limited to,  
61 the procedures, criteria and curricula for examination and  
62 qualifications of applicants for licensure, and for the li-  
63 censing of instructional personnel for schools of barber-  
64 ing and beauty culture, and the practice and conduct of  
65 aestheticians.

66 The power of the board to promulgate rules shall be  
67 concurrent with that of the board of health as authorized  
68 in article fourteen, chapter sixteen of this code: *Provided*,  
69 That in the case of conflicting provisions regarding re-  
70 quirements for health and sanitation, the rule of the board  
71 of health shall be deemed to apply. The board of health  
72 and the board of barbers and cosmetologists shall for a  
73 reasonable fee make available upon request to any licens-  
74 ee a copy of any rules.

**§30-27-10. Requirements to operate shops and schools; sanitary rules.**

1 It shall be unlawful for any person, firm or corpora-  
2 tion to own or operate a beauty shop or barbershop, or a  
3 school of beauty culture or barbering, or to act as a bar-  
4 ber, beautician or manicurist, unless:

5 (a) The beauty shop, barbershop, or school of beauty  
6 culture or barbering shall before opening its place of  
7 business to the public, have been approved by the board as  
8 having met all the requirements and qualifications for the  
9 places of business as are required by this article and for  
10 this purpose. It shall be the duty of the owner or operator  
11 of each beauty shop, barbershop, or school of beauty  
12 culture or barbering to notify the board, in writing, at least  
13 ten days before the proposed opening date of the shop or  
14 school, whereupon it shall become the duty of the board,  
15 through the inspectors herein provided for, to inspect that  
16 shop or school. Upon giving notice of the opening of any  
17 shop or school, the owner or operator shall pay to the  
18 board an inspection fee of twenty-five dollars. In the event  
19 the shop or school fails to meet the requirements of this  
20 article, and is not approved, the inspection fee shall be  
21 returned to the person paying same. Any shop or school  
22 meeting the prescribed requirements shall be granted a  
23 license permitting it to do business. If, however, after the  
24 lapse of ten days after the giving of the notice of opening  
25 to the board, an inspection is not made or a certificate of  
26 opening has not been granted or refused, the owner or  
27 operator of the shop or school may open provisionally  
28 subject to later inspection and to all other provisions and  
29 rules provided for in this article;

30 (b) All shops and schools, bathrooms, toilets and  
31 adjoining rooms used in connection therewith, are kept  
32 clean, sanitary, well lighted and ventilated at all times. The  
33 use of chunk alum, powder puffs and styptic pencils in  
34 any shop is prohibited;

35 (c) Each barber, beautician, manicurist, instructor and  
36 student shall thoroughly cleanse his or her hands with  
37 soap and water immediately before serving any patron;

38 (d) Each patron is served with clean, freshly laundered  
39 linen that is kept in a closed cabinet used for that purpose  
40 alone. All linens, immediately after being used, shall be  
41 placed in a receptacle used for that purpose alone.

42 The board of health shall prescribe any other rules in  
43 regard to sanitation and cleanliness in such shops and  
44 schools as it may deem proper and necessary: *Provided,*  
45 That these shops may contain a tropical bird for display  
46 purposes: *Provided, however,* That the board of health in  
47 consultation with the board of barbers and cosmetologists  
48 and the board of veterinary medicine shall promulgate  
49 rules establishing minimum sanitary and safety require-  
50 ments designed to protect the health of both the public  
51 and the tropical birds. The director of health or inspectors  
52 designated pursuant to subsection (d), section one, article  
53 fourteen, chapter sixteen of the code shall have the power  
54 to enforce compliance. All rules shall be kept posted in a  
55 conspicuous place in each shop or school.

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## CHAPTER 207

(Com. Sub. for H. B. 4136—By Mr. Speaker, Mr. Chambers, and Delegates Adkins,  
Sprouse, Amores and Leach)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirty-five, relating to licensed dietitians generally; requiring a license to practice; creating exceptions; defining terms; creating a board of dietitians; providing for terms of service; defining scope of authority and creating duties; creating a special revenue account within the state treasury; providing for expenditures, appropriations and transfers; issuance of interim permits; establishing fees; qualifications for licensure; establishing standards and criteria for licensing; license renewal; waivers; reinstatement; contents of licenses; provisions for denying, suspending or revoking licenses; administrative

hearings and procedures; judicial review; prohibitions and penalties; and termination of the board.

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

That chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article thirty-five, to read as follows:

**ARTICLE 35. BOARD OF DIETITIANS.**

- §30-35-1. License to practice.
- §30-35-2. Definitions.
- §30-35-3. Board of licensed dietitians.
- §30-35-4. Powers and duties of board.
- §30-35-5. Fees; special revenue account; expenditures and transfers.
- §30-35-6. Provisional permits; renewals; fees.
- §30-35-7. Qualifications; licensure; examinations; waivers and fees.
- §30-35-8. Renewal of licenses; reinstatement; fees; penalties; inactive lists.
- §30-35-9. Contents of license or provisional permit.
- §30-35-10. Denial, revocation or suspension of license; grounds for discipline.
- §30-35-11. Procedures for hearing.
- §30-35-12. Judicial review.
- §30-35-13. Actions to enjoin violations.
- §30-35-14. Prohibitions and penalties.
- §30-35-15. Termination of board.

**§30-35-1. License to practice.**

1 (a) After the thirtieth day of June, one thousand nine  
 2 hundred ninety-seven, anyone who represents or implies  
 3 to the public by use of the title "dietitian" or "licensed  
 4 dietitian" or any other title intended to convey the impres-  
 5 sion that he or she is authorized to practice dietetics in this  
 6 state must be licensed pursuant to this article.

7 (b) No person may use any title, sign, card or other  
 8 device which indicates that such person is a licensed dieti-  
 9 tian unless expressly authorized and licensed pursuant to  
 10 the provisions of this article: *Provided*, That a dietitian  
 11 registered by the commission on dietetic registration may  
 12 use the title of registered dietitian: *Provided, however*,



13 That the requirements and provisions of this article do not  
14 apply to any person employed as a cook at any public or  
15 private educational institution in this state.

16 (c) Nothing in this article may be construed to affect  
17 individuals who furnish nutrition information on food,  
18 food materials or dietary supplements or who engage in  
19 explanation to customers about food, food materials or  
20 dietary supplements in connection with the marketing and  
21 distribution of those products, and who do not use the title  
22 "dietician" or "licensed dietician."

### §30-35-2. Definitions.

1 As used in this article, the following terms shall have  
2 the meanings ascribed to them:

3 (a) "Board" means the West Virginia board of licensed  
4 dietitians;

5 (b) "Commission on dietetic registration" means the  
6 commission on dietetic registration that is a member of the  
7 national commission for health certifying agencies;

8 (c) "Fund" means the board of examiners for dieti-  
9 tians' administrative fund created pursuant to the provision  
10 of section five of this article;

11 (d) "Licensed dietitian" means any person who has  
12 obtained a license to practice as a licensed dietitian from  
13 the West Virginia board of licensed dietitians; and

14 (e) "Registered dietitian" means a person registered by  
15 the commission on dietetic regulation.

### §30-35-3. Board of licensed dietitians.

1 (a) There is hereby created the West Virginia board of  
2 licensed dietitians. The board consists of five members  
3 who shall be appointed by the governor, by and with the  
4 advice and consent of the Senate. The governor shall  
5 make appointments from a list of not less than eight  
6 names submitted to the governor by the West Virginia  
7 dietetic association. Each member of the board shall be a  
8 citizen of the United States and a resident of this state.  
9 Four members shall have experience as a registered or

10 licensed dietitian for a minimum of three years preceding  
11 the date of appointment. One member of the board shall  
12 be a lay person who is not a registered or licensed dietitian  
13 and not subject to the practice requirements of this subsection.  
14

15 (b) The governor shall appoint initially one member  
16 for a term of one year, one for a term of two years, one  
17 for a term of three years and two for a term of four years.  
18 Thereafter, the members of the board shall be appointed  
19 for overlapping terms of four years. No member of the  
20 board may serve more than four years.

21 (c) In the event a board member is unable to complete  
22 a term, the governor shall appoint a person with similar  
23 qualifications to complete the unexpired term. Each vacancy  
24 occurring on the board shall be filled by appointment  
25 within sixty days after such vacancy is created.

26 (d) Each member of the board shall be reimbursed for  
27 all reasonable and necessary expenses actually incurred in  
28 the performance of the board member's duties, not to  
29 exceed fifty dollars per day.

30 (e) At its initial meeting, and annually thereafter, the  
31 members shall elect a chair, vice chair and secretary. The  
32 chair shall preside over the meetings and hearings of the  
33 board. The vice chair shall assume the chair's duties in the  
34 absence of the chair. All meetings shall be general meetings  
35 for the consideration of any matter which may properly  
36 come before the board. A majority of the board  
37 constitutes a quorum for the transaction of business. The  
38 board shall meet at least once a year and at such other  
39 times and places as it may determine; and shall meet on  
40 the call of the chair. It shall be the duty of the chair to  
41 call a meeting of the board on the written request of three  
42 members thereof. The board shall keep an accurate record  
43 of all proceedings and maintain such board records.  
44 The board may employ personnel necessary to accomplish  
45 the performance of its duties: *Provided*, That the  
46 board may not expend more than it has available to it  
47 solely through the fees established in this article.

#### §30-35-4. Powers and duties of board.

1 (a) The board may, in its discretion, perform the fol-  
2 lowing functions and duties, depending on the financial  
3 resources available to the board:

4 (1) Promulgate rules in accordance with the provisions  
5 of chapter twenty-nine-a of this code to implement and  
6 effectuate the provisions of this article, including, but not  
7 limited to, legislative rules establishing the following:

8 (A) A code of professional ethics;

9 (B) Continuing education requirements and standards;

10 (C) Examination, licensure and renewal requirements  
11 of duly qualified applicants; and

12 (D) Procedures and guidelines for the suspension or  
13 revocation of a license.

14 (2) Adopt procedural and interpretive rules in accor-  
15 dance with the provisions of chapter twenty-nine-a of this  
16 code;

17 (3) Adopt an official seal;

18 (4) Conduct license examinations of duly qualified  
19 applicants;

20 (5) Issue and renew licenses and issue interim permits  
21 to duly qualified applicants;

22 (6) Impose and collect fees for the issuance and re-  
23 newal of permits or licenses;

24 (7) Suspend, revoke and reinstate licenses;

25 (8) Conduct hearings on licensing issues and any  
26 other matter properly within the jurisdiction of the board;

27 (9) Maintain a record of all proceedings of the board;  
28 and

29 (10) Submit a biennial report to the governor describ-  
30 ing the activities of the board.

31 (b) The Legislature finds and declares that this board  
32 is intended to be fully self supported through the fee

33 structure provided for in this article, and that the board  
34 shall not require any legislative appropriation beyond the  
35 revenues the board receives in fees. Accordingly, in the  
36 event the board has insufficient moneys to perform its  
37 duties under this article, the board shall prioritize its duties  
38 under this article so at all times to remain within the mon-  
39 ey available to it through the fees established in this arti-  
40 cle. The board created in this article has only discretion-  
41 ary duties.

**§30-35-5. Fees; special revenue account; expenditures and transfers.**

1 (a) All fees and other moneys collected by the board  
2 pursuant to the provisions of this article shall be deposited  
3 in an appropriated special revenue account designated the  
4 "board of examiners for licensed dietitians," which is here-  
5 by created in the state treasury.

6 (b) All expenses incurred by the board shall be paid  
7 from the special fund provided in subsection (a) herein.  
8 No compensation or expense incurred pursuant to the  
9 provisions of this article may be charged against the gen-  
10 eral revenue funds of this state. Expenditures shall be  
11 made only in accordance with appropriation by the Legis-  
12 lature pursuant to the provisions of article three, chapter  
13 twelve of this code and upon the fulfillment of the provi-  
14 sions of article two, chapter five-a of this code. Expendi-  
15 tures from the special fund shall be for the purposes set  
16 forth in this article and are not authorized from collec-  
17 tions: *Provided*, That for the fiscal year ending the thirti-  
18 eth day of June, one thousand nine hundred ninety-six,  
19 expenditures are authorized from collections rather than  
20 pursuant to an appropriation by the Legislature.

21 (c) Amounts collected which are found from time to  
22 time to exceed the funds needed to effectuate the purposes  
23 set forth in this section may be transferred to other ac-  
24 counts or funds and redesignated for other purposes upon  
25 appropriation by the Legislature.

**§30-35-6. Provisional permits; renewals; fees.**

1 (a) The board may issue a provisional permit to en-  
2 gage in practice as a licensed dietitian to any person who  
3 has not met the experience requirements set forth in this  
4 article upon the filing of an application and submission of  
5 evidence of successful completion of the education re-  
6 quirements of this article. A provisional permit expires  
7 one year from the date of issuance. Renewals may be  
8 issued for a period not to exceed three years upon request  
9 by the applicant and submission of a satisfactory explana-  
10 tion for the applicant's failure to become licensed.

11 (b) The fee for a provisional permit or renewal is fifty  
12 dollars, which shall be submitted with the application. All  
13 fees collected shall be deposited to the credit of the fund  
14 provided in section five of this article.

**§30-35-7. Qualifications; licensure; examinations; waivers  
and fees.**

1 (a) An applicant for a license to engage in practice as  
2 a licensed dietitian shall submit to the board written evi-  
3 dence, verified by oath, that he or she:

4 (1) Complies with the code of ethics adopted by the  
5 board;

6 (2) Has completed a major course of study in human  
7 nutrition, dietetics, food systems management or equiva-  
8 lent thereof and possesses a baccalaureate or postbacca-  
9 laureate degree; and

10 (3) Has completed a planned continuous professional  
11 experience component in dietetic practice of not less than  
12 nine hundred hours under the supervision of a registered  
13 or licensed dietitian.

14 (b) Each applicant is required to pass a written exami-  
15 nation demonstrating competence in the discipline of  
16 dietetics and nutrition. Each written examination may be  
17 supplemented by an oral examination. The board shall  
18 determine the times and places for examinations.

19 (c) Upon successfully passing such examination or  
20 examinations, the board shall issue to the applicant a li-  
21 cense to engage in practice as a licensed dietitian. In the

22 event an applicant has failed to pass examinations on three  
23 occasions, the applicant shall, in addition to the other re-  
24 quirements of this section, present to the board such other  
25 evidence of his or her qualifications as the board may  
26 prescribe.

27 (d) Prior to the thirtieth day of June, one thousand  
28 nine hundred ninety-seven, the board shall waive the ex-  
29 amination requirements of this section and shall grant a  
30 license to any person who:

31 (1) Is registered by the commission on dietetic regis-  
32 tration as a registered dietitian; or

33 (2) Possesses a baccalaureate or postbaccalaureate  
34 degree and has completed a major course of study in the  
35 fields of human nutrition, dietetics, food systems manage-  
36 ment or equivalent, as approved by the board, and has  
37 been engaged in the practice of dietetics or nutrition for  
38 three of the last ten years.

39 (e) Upon application and submission of the applica-  
40 ble fee, the board may waive the examination require-  
41 ments of this section and issue a license to practice as a  
42 licensed dietitian to an applicant who is registered by the  
43 commission on dietetic registration or who has been duly  
44 licensed as a nutritionist or dietitian under the laws of  
45 another state if the standards for licensing in that state are  
46 no less stringent than those required under the provisions  
47 of this article.

48 (f) Any person applying for a dietitian license shall  
49 submit a fee of fifty dollars with the application to the  
50 board, which fee shall be deposited to the credit of the  
51 fund provided in section five of this article.

**§30-35-8. Renewal of licenses; reinstatement; fees; penalties;  
inactive lists.**

1 (a) The license of every person licensed under the  
2 provisions of this article shall be annually renewed except  
3 as otherwise provided by this section. At such times as the  
4 board, in its discretion, may determine, the board shall  
5 mail a renewal application to every person whose license  
6 was initially granted or renewed during the previous calen-

7 dar year. All persons seeking renewal shall submit a com-  
8 pleted application and a fifty-dollar annual renewal fee.  
9 Upon receipt of the application and fee, the board shall  
10 verify the accuracy of the application and, if it is accurate,  
11 issue to the applicant a certificate of renewal of the license  
12 for the current year. The certificate of renewal entitles the  
13 holder thereof to practice dietetics for the period stated on  
14 the certificate of renewal.

15 (b) Any licensee who allows his or her license to lapse  
16 by failing to renew for a period not exceeding three years,  
17 may be reinstated by the board upon receipt of a satisfac-  
18 tory explanation for such failure to renew his or her li-  
19 cense and payment of the annual renewal fee plus a rein-  
20 statement fee of twenty-five dollars.

21 (c) Any person allowing his or her license to lapse for  
22 a period exceeding three years is required, to be reinstated  
23 as a licensed dietitian, to pass a written examination estab-  
24 lished by the board, and to pay to the board a licensing  
25 fee of fifty dollars.

26 (d) Any person engaged in the practice of licensed  
27 dietetics during the time his or her license has lapsed is in  
28 violation of the provisions of this article and is subject to  
29 the penalties provided in section fourteen of this article.

30 (e) Any licensed dietitian who desires to retire from  
31 practice temporarily shall submit a written notice of such  
32 retirement to the board. Upon receipt of such notice the  
33 board shall place the name of such person upon the inac-  
34 tive list. Any person remaining on the inactive list may  
35 not engage in the practice of licensed dietetics in this state  
36 and is not subject to the payment of any renewal fees.  
37 Upon submission of an application for renewal of license  
38 and payment of the renewal fee for the current year, a  
39 licensed dietitian may resume active practice.

#### **§30-35-9. Contents of license or provisional permit.**

1 Each license or provisional permit issued by the board  
2 shall bear a serial number, the full name of the applicant,  
3 the date of expiration of any such license, or the date of  
4 issuance and expiration of any such provisional permit

5 and the seal of the board, and shall be signed by the secre-  
6 tary of the board. The licensee shall display the license in  
7 his or her place of business in view of the public.

**§30-35-10. Denial, revocation or suspension of license;  
grounds for discipline.**

1 (a) The board may at any time upon its own motion,  
2 and shall upon the verified written complaint of any per-  
3 son, conduct an investigation to determine whether there  
4 are grounds for denial, suspension or revocation of a li-  
5 cense issued pursuant to the provisions of this article.

6 (b) The board may deny, revoke or suspend any li-  
7 cense to engage in the practice of licensed dietetics issued  
8 pursuant to the provisions of this article, or any applica-  
9 tion therefor, or may otherwise discipline a licensee or  
10 applicant upon proof that he or she:

11 (1) Is or was guilty of fraud or deceit in procuring or  
12 attempting to procure a license or renewal to practice as a  
13 licensed dietitian;

14 (2) Has been grossly negligent or exhibited unprofes-  
15 sional or unethical conduct in the practice as a licensed  
16 dietitian;

17 (3) Is habitually intemperate or is addicted to the use  
18 of alcohol or controlled substances;

19 (4) Is mentally incompetent; or

20 (5) Has willfully or repeatedly violated any of the  
21 provisions of this article.

**§30-35-11. Procedures for hearing.**

1 (a) Whenever the board denies an application for any  
2 original or renewal license or denies an application for a  
3 license or suspends or revokes any license, it shall make an  
4 interim order to that effect and serve a copy thereof on the  
5 applicant or licensee by certified mail, return receipt re-  
6 quested. Such order shall state the grounds for the action  
7 taken and shall require that any license or temporary per-  
8 mit suspended or revoked thereby be returned to the



9 board by the holder within twenty days after receipt of the  
10 copy of such order.

11 (b) Any person adversely affected by any such order  
12 is entitled to a hearing thereon pursuant to the provisions  
13 of article five, chapter twenty-nine-a of this code if, within  
14 twenty days after receipt of a copy of the order, he or she  
15 files with the board a written demand for such hearing. A  
16 demand for hearing shall operate automatically to stay or  
17 suspend the execution of any order. The board may re-  
18 quire the person demanding such hearing to give reason-  
19 able security for the cost of the hearing. If such person  
20 does not substantially prevail at the hearing, the costs  
21 therefor shall be assessed against him or her and may be  
22 collected by civil action or other proper remedy.

23 (c) Upon a receipt of a written demand for a hearing,  
24 the board shall set a time and place therefor not less than  
25 ten and not more than thirty days thereafter. Any sched-  
26 uled hearing may be continued by the board upon its own  
27 motion or for good cause shown by the person demand-  
28 ing the hearing.

29 (d) The provisions of article five, chapter twenty-  
30 nine-a of this code apply to and govern the hearing and  
31 administrative procedures in connection therewith.

32 (e) All administrative hearings shall be conducted by  
33 a quorum of the board. For the purpose of conducting  
34 any such hearing any member of the board may issue  
35 subpoenas and subpoenas duces tecum which shall be  
36 issued and served pursuant to the provisions of section  
37 one, article five, chapter twenty-nine-a of this code.

38 (f) At any hearing the person who demanded the same  
39 may represent himself or herself or be represented by an  
40 attorney admitted to practice in this state.

41 (g) After any such hearing and consideration of all  
42 testimony, evidence and record in the case, the board shall  
43 render its decision in writing. The written decision of the  
44 board shall be accompanied by findings of fact and con-  
45 clusions of law as specified in section three, article five,  
46 chapter twenty-nine-a of this code. A copy of such deci-

47 sion and accompanying findings and conclusions shall be  
48 served by certified mail, return receipt requested, upon the  
49 person demanding such hearing, and the attorney of re-  
50 cord.

51 (h) The decision of the board is final unless reversed,  
52 vacated or modified upon judicial review thereof in accor-  
53 dance with the provisions of section twelve of this article.

#### **§30-35-12. Judicial review.**

1 (a) Any applicant or licensee adversely affected by a  
2 decision of the board rendered after a hearing held pursu-  
3 ant to the provisions of section eleven of this article is  
4 entitled to judicial review thereof. All of the provisions of  
5 section four, article five, chapter twenty-nine-a of this code  
6 apply to, and govern, such review.

7 (b) The judgment of the circuit court shall be final  
8 unless reversed, vacated or modified on appeal to the su-  
9 preme court of appeals in accordance with the provisions  
10 of section one, article six, chapter twenty-nine-a of this  
11 code.

#### **§30-35-13. Actions to enjoin violations.**

1 (a) Whenever it appears to the board that any person  
2 has been or is violating or is about to violate any provision  
3 of this article or any final decision of the board, the board  
4 may apply in the name of the state to the circuit court of  
5 the county in which the violation or violations or any part  
6 thereof has occurred, is occurring or is about to occur, or  
7 the judge thereof in vacation, for an injunction against the  
8 person and any other persons who have been, are or are  
9 about to be, involved in any practice, act or omission, so in  
10 violation, enjoining the person or persons from any viola-  
11 tion or violations. Such application may be made and  
12 prosecuted to conclusion regardless of whether any viola-  
13 tion has resulted or shall result in prosecution or convic-  
14 tion pursuant to the provisions of section fourteen of this  
15 article.

16 (b) Upon application by the board, any circuit court  
17 of this state with appropriate jurisdiction may, by manda-  
18 tory or prohibitory injunction, compel compliance with

19 the provisions of this article and all final decisions of the  
20 board. The court may issue a temporary injunction in any  
21 case pending a decision on the merits of any application  
22 filed.

23 (c) The judgment of the circuit court upon any appli-  
24 cation permitted by the provisions of this section shall be  
25 final unless reversed, vacated or modified on appeal to the  
26 supreme court of appeals. Any such appeal shall be  
27 sought in the manner and within the time provided by law  
28 for appeals from circuit courts in other civil cases.

#### §30-35-14. Prohibitions and penalties.

1 (a) It is a misdemeanor for any person, corporation or  
2 association to:

3 (1) Sell, fraudulently obtain, furnish or assist in selling,  
4 fraudulently obtaining or furnishing any dietitian license  
5 or license record;

6 (2) Engage in the practice as a licensed dietitian under  
7 cover of any diploma, license or record illegally or fraud-  
8 ulently obtained;

9 (3) Represent or imply to the public that he or she is  
10 authorized to use the title "dietitian" or "licensed dietitian"  
11 or any other title intended to convey that impression, un-  
12 less duly licensed pursuant to the provisions of this article;

13 (4) Engage in the practice as a licensed dietitian dur-  
14 ing the time his or her license is suspended or revoked; or

15 (5) Otherwise violate any provisions of this article.

16 (b) Any person, corporation or association who vio-  
17 lates the provisions of subsection (a) of this section is  
18 guilty of a misdemeanor and, upon conviction thereof,  
19 shall be fined not less than fifty dollars nor more than one  
20 hundred dollars.

#### §30-35-15. Termination of board.

1 The board of examiners for licensed dietitians shall be  
2 terminated pursuant to the provisions of article ten, chap-  
3 ter four of this code, on the first day of July, two thousand,  
4 unless sooner terminated, continued or reestablished pur-  
5 suant to the provisions of such article.

## CHAPTER 208

(Com. Sub. for H. B. 4200—By Delegates Fleischauer, Gallagher, Compton, Mezzatesta, Amores and Petersen)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirty-six, relating to requiring licensing for acupuncturists; definitions; creating an acupuncture board; board membership; officers; quorum; meetings; reimbursement; staff; rule making authority; powers and duties; acupuncture board fund; fees; expenses; disposition of funds; license required; exemptions; qualifications of applicants; applications for licenses; issuance of license; scope of license; term and renewal of licenses; advertisements; reciprocity; inactive status; reinstatement of expired license; surrender of license; reprimands, probations, suspensions and revocation; grounds; due process procedure.

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

That chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article thirty-six, to read as follows:

### **ARTICLE 36. ACUPUNCTURISTS.**

- §30-36-1. License required to practice.
- §30-36-2. Definitions.
- §30-36-3. Board established.
- §30-36-4. Board membership.
- §30-36-5. Officers.
- §30-36-6. Quorum; meetings; reimbursement; staff.
- §30-36-7. Rule-making authority; miscellaneous powers and duties.
- §30-36-8. Acupuncture board fund; fees; expenses; disposition of funds.
- §30-36-9. License required; exemptions.
- §30-36-10. Qualifications of applicants.
- §30-36-11. Applications for license.
- §30-36-12. Issuance of license.

§30-36-13. Scope of license.

§30-36-14. Term and renewal of licenses; advertisements.

§30-36-15. Reciprocal licensure of acupuncturists from other states or countries.

§30-36-16. Inactive status; reinstatement of expired license.

§30-36-17. Surrender of license by licensee.

§30-36-18. Reprimands, probations, suspensions and revocations; grounds.

§30-36-19. Due process procedure.

### §30-36-1. License required to practice.

1 In order to protect the life, health and safety of the  
2 public, any person practicing or offering to practice as an  
3 acupuncturist is required to submit evidence that he or she  
4 is qualified to practice, and is licensed as provided in this  
5 article. After the thirtieth day of June, one thousand nine  
6 hundred ninety-seven, it shall be unlawful for any person  
7 not licensed under the provisions of this article to practice  
8 acupuncture in this state, or to use any title, sign, card or  
9 device to indicate that he or she is an acupuncturist. The  
10 provisions of this article are not intended to limit, preclude  
11 or otherwise interfere with the practice of other health care  
12 providers working in any setting and licensed by  
13 appropriate agencies or boards of the state of West  
14 Virginia whose practices and training may include  
15 elements of the same nature as the practice of a licensed  
16 acupuncturist.

### §30-36-2. Definitions.

1 (a) Unless the context in which used clearly requires a  
2 different meaning, as used in this article:

3 (1) "Acupuncture" means a form of health care, based  
4 on a theory of energetic physiology, that describes the  
5 interrelationship of the body organs or functions with an  
6 associated point or combination of points.

7 (2) "Board" means the West Virginia acupuncture  
8 board.

9 (3) "License" means a license issued by the board to  
10 practice acupuncture.

11 (4) "Moxibustion" means the burning of mugwort on  
12 or near the skin to stimulate the acupuncture point.

13 (5) "Practice acupuncture" means the use of oriental  
14 medical therapies for the purpose of normalizing  
15 energetic physiological functions including pain control,  
16 and for the promotion, maintenance and restoration of  
17 health.

18 (b) "Practice acupuncture" includes:

19 (1) Stimulation of points of the body by the insertion  
20 of acupuncture needles;

21 (2) The application of moxibustion; and

22 (3) Manual, mechanical, thermal or electrical  
23 therapies only when performed in accordance with the  
24 principles of oriental acupuncture medical theories.

**§30-36-3. Board established.**

1 There is hereby created a state board to be known and  
2 designated as the "West Virginia Acupuncture Board."

**§30-36-4. Board membership.**

1 (a) The board shall consist of five members appointed  
2 by the governor with the advise and consent of the Senate.

3 (1) Three shall be licensed acupuncturists appointed  
4 from a list submitted as provided in subsection (c) of this  
5 section;

6 (2) One shall be a member of the general public; and

7 (3) One shall be a physician licensed to practice  
8 medicine in the state of West Virginia.

9 (b) Each licensed acupuncturist shall:

10 (1) Be a resident of the state; and

11 (2) For at least three years immediately prior to  
12 appointment have been engaged in the practice of  
13 acupuncture in the state.

14 (c) For each vacancy of an acupuncture member, the  
15 board shall compile a list of names to be submitted to the  
16 governor in the following manner:

17 (1) The board shall notify all licensed acupuncturists  
18 in the state of the vacancy to solicit nominations to fill the  
19 vacancy;

20 (2) Each professional association of acupuncturists in  
21 the state shall nominate at least two persons for every  
22 vacancy; and

23 (3) Each educational institution that provides  
24 acupuncture training in the state shall nominate at least  
25 two persons for every vacancy.

26 (d) The member from the general public:

27 (1) May not be or ever have been an acupuncturist or  
28 in training to become an acupuncturist;

29 (2) May not have a household member who is an  
30 acupuncturist or in training to become an acupuncturist;

31 (3) May not participate or ever have participated in a  
32 commercial or professional field related to acupuncture;

33 (4) May not have a household member who  
34 participates in a commercial or professional field related  
35 to acupuncture; and

36 (5) May not have had within two years prior to  
37 appointment a substantial financial interest in a person  
38 regulated by the board.

39 (e) While a member of the board, the member from  
40 the general public may not have a substantial financial  
41 interest in a person regulated by the board.

42 (f) Before taking office, each appointee to the board  
43 shall take and subscribe to the oath prescribed by section  
44 5, article IV of the constitution of this state.

45 (g) Tenure; vacancies.

46 (1) The term of a member is three years.

47 (2) The terms of members are staggered from the first  
48 day of July, one thousand nine hundred ninety-six. The  
49 terms of the members first appointed shall expire as  
50 designated by the governor at the time of the nomination,  
51 one at the end of the first year, two at the end of the  
52 second year, and two at the end of the third year. As these  
53 original appointments expire, each subsequent  
54 appointment shall be for a full three-year term.

55 (3) At the end of a term, a member continues to serve  
56 until a successor is appointed and qualifies.

57 (4) A member may not serve more than two  
58 consecutive full terms.

59 (5) A member who is appointed after a term has  
60 begun serves only for the rest of the term and until a  
61 successor is appointed and qualifies.

62 (h) The governor may remove any member from the  
63 board for neglect of any duty required by law or for  
64 incompetence or unethical or dishonorable conduct.

**§30-36-5. Officers.**

1 From among its members, the board shall elect  
2 officers in a manner and for terms that the board  
3 determines.

**§30-36-6. Quorum; meetings; reimbursement; staff.**

1 (a) A majority of the full authorized membership of  
2 the board constitutes a quorum.

3 (b) The board shall meet at least twice a year, at the  
4 times and places that it determines.

5 (c) Each member of the board is entitled to  
6 reimbursement of travel and other necessary expenses  
7 actually incurred while engaging in board activities. All  
8 reimbursement of expenses shall be paid out of the  
9 acupuncture board fund created by the provisions of this  
10 article.

11 (d) The board may employ such staff as necessary to  
12 perform the functions of the board, including an  
13 administrative secretary, and pay all personnel from the  
14 acupuncture board fund in accordance with the state  
15 budget.

16 (e) The board may contract with other state boards or  
17 state agencies to share offices, personnel and other  
18 administrative function as authorized under this article.



**§30-36-7. Rule-making authority; miscellaneous powers and duties.**

1 (a) The board may propose for promulgation  
2 legislative rules to carry out the provisions of this article in  
3 accordance with the provisions of article three, chapter  
4 twenty-nine-a of this code.

5 (b) The board may adopt a code of ethics for  
6 licensure.

7 (c) In addition to the powers set forth elsewhere in  
8 this article, the board shall keep:

9 (1) Records and minutes necessary for the orderly  
10 conduct of business; and

11 (2) A list of each currently licensed acupuncturist.

**§30-36-8. Acupuncture board fund; fees; expenses; disposition of funds.**

1 (a) There is hereby established an acupuncture board  
2 fund in the state treasurer's office.

3 (b) The board may set reasonable fees for the  
4 issuance and renewal of licenses and its other services. All  
5 funds to cover the compensation and expenses of the  
6 board members or staff shall be generated by the fees set  
7 under this subsection.

8 (c) The board shall pay all fees collected under the  
9 provisions of this article to the state treasurer.

10 (d) The fund shall be used exclusively to cover the  
11 actual documented direct and indirect costs of fulfilling  
12 the statutory and regulatory duties of the board as  
13 provided by the provisions of this article. The fund is a  
14 continuing, nonlapsing fund. Any unspent portions of the  
15 fund may not be transferred or revert to the general  
16 revenue fund of the state, but shall remain in the fund to  
17 be used for the purposes specified in this article.

18 (e) The legislative auditor shall audit the accounts and  
19 transactions of the fund.

**§30-36-9. License required; exemptions.**

1 (a) Except as otherwise provided in this article, an  
2 individual shall be licensed by the board before he or she  
3 may practice acupuncture in this state.

4 (b) This section does not apply to:

5 (1) An individual employed by the federal  
6 government as an acupuncturist while practicing within the  
7 scope of that employment; or

8 (2) A student, trainee or visiting teacher who is  
9 designated as a student, trainee or visiting teacher while  
10 participating in a course of study or training under the  
11 supervision of a licensed acupuncturist in a program that  
12 is approved by the board or the state board of education.

**§30-36-10. Qualifications of applicants.**

1 To qualify for a license, an applicant shall:

2 (a) Be of good moral character;

3 (b) Be at least 18 years of age;

4 (c) Demonstrate competence in performing  
5 acupuncture by meeting one of the following standards  
6 for education, training or demonstrated experience:

7 (1) Graduation from a course of training of at least  
8 one thousand eight hundred hours, including three  
9 hundred clinical hours, that is:

10 (A) Approved by the national accreditation  
11 commission for schools and colleges of acupuncture and  
12 oriental medicine; or

13 (B) Found by the board to be equivalent to a course  
14 approved by the national accreditation commission for  
15 schools and colleges of acupuncture and oriental  
16 medicine;

17 (2) Achievement of a passing score on an  
18 examination that is:

19 (A) Given by the national commission for the  
20 certification of acupuncturists; or

21 (B) Determined by the board to be equivalent to the  
22 examination given by the national commission for the  
23 certification of acupuncturists;

24 (3) Successful completion of an apprenticeship  
25 consisting of at least two thousand seven hundred hours  
26 within a five-year period under the direction of an  
27 individual properly approved by that jurisdiction to  
28 perform acupuncture; or

29 (4) Performance of the practice of acupuncture in  
30 accordance with the law of another jurisdiction or  
31 jurisdictions for a period of at least three years within the  
32 five years immediately prior to application that consisted  
33 of at least five hundred patient visits per year; and

34 (d) Achievement of any other qualifications that the  
35 board establishes in rules.

#### **§30-36-11. Applications for license.**

1 To apply for a license, an applicant shall:

2 (a) Submit an application to the board on the form  
3 that the board requires; and

4 (b) Pay to the board the application fee set by the  
5 board.

#### **§30-36-12. Issuance of license.**

1 The board shall issue a license to any applicant who  
2 meets the requirements of this article and the rules  
3 adopted by the board pursuant to this article.

#### **§30-36-13. Scope of license.**

1 Except as otherwise provided in this article, a license  
2 authorizes the licensee to practice acupuncture while the  
3 license is effective.

#### **§30-36-14. Term and renewal of licenses; advertisements.**

1 (a) Terms of license:

2 (1) The board shall provide for the term and renewal  
3 of licenses under this section;

4 (2) The term of a license may not be more than three  
5 years;

6 (3) A license expires at the end of its term, unless the  
7 license is renewed for a term as provided by the board.

8 (b) Renewal notice. At least one month before the  
9 license expires, the board shall send to the licensee, by  
10 first-class mail to the last known address of the licensee, a  
11 renewal notice that states:

12 (1) The date on which the current license expires;

13 (2) The date by which the renewal application must  
14 be received by the board for the renewal to be issued and  
15 mailed before the license expires; and

16 (3) The amount of the renewal fee.

17 (c) Applications for renewal. Before the license  
18 expires, the licensee periodically may renew it for an  
19 additional term, if the licensee:

20 (1) Otherwise is entitled to be licensed;

21 (2) Pays to the board a renewal fee set by the board;  
22 and

23 (3) Submits to the board:

24 (A) A renewal application on the form that the board  
25 requires; and

26 (B) Satisfactory evidence of compliance with any  
27 continuing education requirements set under this section  
28 for license renewal.

29 (d) In addition to any other qualifications and  
30 requirements established by the board, the board may  
31 establish continuing education requirements as a condition  
32 to the renewal of licenses under this section.

33 (e) The board shall renew the license of and issue a  
34 renewal certificate to each licensee who meets the  
35 requirements of this section.

36 (f) A licensee may advertise only as permitted by  
37 rules adopted by the board.

**§30-36-15. Reciprocal licensure of acupuncturists from other  
states or countries.**

1 (a) The acupuncture board may by reciprocity  
2 license acupuncturists in this state who have been legally

3 registered or licensed acupuncturists in another state:  
4 *Provided*, That the applicant for such licensure shall meet  
5 the requirements of the rules for reciprocity promulgated  
6 by the board in accordance with the provisions of chapter  
7 twenty-nine-a of this code: *Provided, however*, That  
8 reciprocity is not authorized for acupuncturists from  
9 another state where that state does not permit reciprocity  
10 to acupuncturists licensed in West Virginia.

11 (b) The board may refuse reciprocity to  
12 acupuncturists from another country unless the applicant  
13 qualifies under such rules as may be promulgated by the  
14 board for licensure of foreign applicants.

15 (c) Applicants for licensure under this section shall,  
16 with their application, forward to the board the established  
17 fee.

**§30-36-16. Inactive status; reinstatement of expired license.**

1 (a) The board shall place a licensee on inactive status  
2 if the licensee submits to the board:

3 (1) An application for inactive status on the form  
4 required by the board; and

5 (2) The inactive status fee set by the board.

6 (b) The board shall issue a license to an individual  
7 who is on inactive status if the individual complies with the  
8 renewal requirements that exist at the time the individual  
9 changes from inactive to active status.

10 (c) The board shall reinstate the license of a former  
11 licensee who has failed to renew the license for any reason  
12 if the former licensee:

13 (1) Meets the renewal requirements of section  
14 fourteen of this article; and

15 (2) Pays to the board a reinstatement fee set by the  
16 board.

**§30-36-17. Surrender of license by licensee.**

1 (a) Unless the board agrees to accept the surrender of  
2 a license, a licensee may not surrender the license nor may  
3 the license lapse by operation of law while the licensee is

4 under investigation or while charges are pending against  
5 the licensee.

6 (b) The board may set conditions on its agreement  
7 with the licensee under investigation or against whom  
8 charges are pending to accept surrender of the license.

**§30-36-18. Reprimands, probations, suspensions and revocations; grounds.**

1 The board, on the affirmative vote of a majority of its  
2 full authorized membership, may reprimand any licensee,  
3 place any licensee on probation, or suspend or revoke a  
4 license if the licensee:

5 (a) Fraudulently or deceptively obtains or attempts to  
6 obtain a license for the applicant or licensee or for  
7 another;

8 (b) Fraudulently or deceptively:

9 (1) Uses a license; or

10 (2) Solicits or advertises.

11 (c) Is guilty of immoral or unprofessional conduct in  
12 the practice of acupuncture;

13 (d) Is professionally, physically or mentally incom-  
14 petent;

15 (e) Provides professional services while:

16 (1) Under the influence of alcohol; or

17 (2) Using any narcotic or controlled substance, as  
18 defined in section one hundred one, article one, chapter  
19 sixty-a of this code, or other drug that is in excess of  
20 therapeutic amounts or without a valid medical indication;

21 (f) Knowingly violates any provision of this article or  
22 any rule of the board adopted under this article;

23 (g) Is convicted of or pleads guilty or nolo  
24 contendere to a felony or to a crime involving moral  
25 turpitude, whether or not any appeal or other proceeding  
26 is pending to have the conviction or plea set aside;

27 (h) Practices acupuncture with an unauthorized  
28 person or assists an unauthorized person in the practice of  
29 acupuncture;

30 (i) Is disciplined by the licensing or disciplinary  
31 authority of any other state or country or convicted or  
32 disciplined by a court of any state or country for an act  
33 that would be grounds for disciplinary action under this  
34 section;

35 (j) Willfully makes or files a false report or record in  
36 the practice of acupuncture;

37 (k) Willfully fails to file or record any report as  
38 required by law, willfully impedes or obstructs the filing  
39 or recording of the report, or induces another to fail to file  
40 or record the report;

41 (l) Submits a false statement to collect a fee; or

42 (m) Refuses, withholds from, denies or discriminates  
43 against an individual with regard to the provision of  
44 professional services for which the person is licensed and  
45 qualified to render because the individual is HIV positive,  
46 in conformity with standards established for treatment by  
47 physicians, dentists and other licensed health care  
48 professionals in cases of this nature.

### **§30-36-19. Due process procedure.**

1 (a) Upon filing with the board a written complaint  
2 charging a person with being guilty of any of the acts  
3 described in section sixteen of this article, the  
4 administrative secretary or other authorized employee of  
5 the board shall provide a copy of the complaint or list of  
6 allegations to the person about whom the complaint was  
7 filed. That person will have twenty days thereafter to file a  
8 written response to the complaint. The board shall  
9 thereafter, if the allegations warrant, make an investigation.  
10 If the board finds reasonable grounds for the complaint, a  
11 time and place for a hearing shall be set, notice of which  
12 shall be served on the licensee or applicant at least fifteen  
13 calendar days in advance of the hearing date. The notice  
14 shall be by personal service or by certified or registered  
15 mail sent to the last known address of the person.

16 (b) The board may petition the circuit court for the  
17 county within which the hearing is being held to issue  
18 subpoenas for the attendance of witnesses and the produc-  
19 tion of necessary evidence in any hearing before it. Upon  
20 request of the respondent or of his or her counsel, the  
21 board shall petition the court to issue subpoenas in behalf  
22 of the respondent. The circuit court upon petition may  
23 issue such subpoenas as it deems necessary.

24 (c) Unless otherwise provided in this article, hearing  
25 procedures shall be promulgated in accordance with, and a  
26 person who feels aggrieved by a decision of the board  
27 may take an appeal pursuant to, the administrative proce-  
28 dures in this state as provided in chapter twenty-nine-a of  
29 this code.

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## CHAPTER 209

(S. B. 94—By Senators Wooton, Anderson, Bowman, Dittmar, Grubb, Oliverio,  
Ross, Schoonover, Wagner, Buckalew and Scott)

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[Passed March 15, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections two, six, eight, nine, thirteen-a, fifteen and seventeen, article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to public defender services generally; defining eligible proceedings to include ancillary proceedings to enhance sentences and for the forfeiture of property; defining legal representation to include services as guardian ad litem; requiring public defender corporations to file periodic reports; removing the requirement that one public defender serve two certain judicial circuits; eliminating requirement that panel attorneys file written request for appointments to represent eligible clients; compensation rates for attorney and paralegal services; limitations on reimbursements for transcripts, court reporter and transcription services, travel expenses and investigative services; voucher requirements and corrections; terms of governor's appointees to boards of directors of public defender corporations; public notice required for meetings of such boards of directors; limitations on compensation benefits to



part-time employees of public defender corporations; removal of such employees; eligibility of member of such boards of directors to represent eligible clients; and dismissal of certain employees of public defender corporations for violation of provisions restricting the part-time practice of law by such employees.

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

That sections two, six, eight, nine, thirteen-a, fifteen and seventeen, article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

#### **ARTICLE 21. PUBLIC DEFENDER SERVICES.**

§29-21-2. Definitions.

§29-21-6. Powers, duties and limitations.

§29-21-8. Public defender corporations.

§29-21-9. Panel attorneys.

§29-21-13a. Compensation and expenses for panel attorneys.

§29-21-15. Public defender corporations — Board of directors.

§29-21-17. Private practice of law by public defenders.

#### **§29-21-2. Definitions.**

1 As used in this article, the following words and phrases  
2 are hereby defined:

3 (1) "Eligible client": Any person who meets the re-  
4 quirements established by this article to receive publicly  
5 funded legal representation in an eligible proceeding as  
6 defined herein;

7 (2) "Eligible proceeding": Criminal charges which  
8 may result in incarceration; juvenile proceedings; pro-  
9 ceedings to revoke parole or probation if the revocation  
10 may result in incarceration; contempt of court; child abuse  
11 and neglect proceedings which may result in a termination  
12 of parental rights; mental hygiene commitment proceed-  
13 ings; extradition proceedings; proceedings which are an-  
14 cillary to an eligible proceeding, including, but not limited  
15 to, proceedings to enhance sentences brought pursuant to  
16 sections eighteen and nineteen, article eleven, chapter

17 sixty-one of this code, forfeiture proceedings brought  
18 pursuant to article seven, chapter sixty-a of this code, and  
19 proceedings brought to obtain extraordinary remedies;  
20 and appeals from or post-conviction challenges to the  
21 final judgment in an eligible proceeding. Legal represen-  
22 tation provided pursuant to the provisions of this article is  
23 limited to the court system of the state of West Virginia,  
24 but does not include representation in municipal courts  
25 unless the accused is at risk of incarceration;

26 (3) "Legal representation": The provision of any legal  
27 services or legal assistance as counsel or guardian ad litem  
28 consistent with the purposes and provisions of this article;

29 (4) "Private practice of law": The provision of legal  
30 representation by a public defender or assistant public  
31 defender to a client who is not entitled to receive legal  
32 representation under the provisions of this article, but does  
33 not include, among other activities, teaching;

34 (5) "Public defender": The staff attorney employed  
35 on a full-time basis by a public defender corporation who,  
36 in addition to providing direct representation to eligible  
37 clients, has administrative responsibility for the operation  
38 of the public defender corporation. The public defender  
39 may be a part-time employee if the board of directors of  
40 the public defender corporation finds efficient operation  
41 of the corporation does not require a full-time attorney  
42 and the executive director approves such part-time em-  
43 ployment;

44 (6) "Assistant public defender": A staff attorney pro-  
45 viding direct representation to eligible clients whose salary  
46 and status as a full-time or part-time employee are fixed  
47 by the board of directors of the public defender corpora-  
48 tion;

49 (7) "Public defender corporation": A corporation  
50 created under section eight of this article for the sole pur-  
51 pose of providing legal representation to eligible clients;  
52 and

53 (8) "Public defender office": An office operated by a  
54 public defender corporation to provide legal representa-  
55 tion under the provisions of this article.

**§29-21-6. Powers, duties and limitations.**

1 (a) Consistent with the provisions of this article, the  
2 agency is authorized to make grants to and contracts with  
3 public defender corporations and with individuals, part-  
4 nerships, firms, corporations and nonprofit organizations,  
5 for the purpose of providing legal representation under  
6 this article, and may make such other grants and contracts  
7 as are necessary to carry out the purposes and provisions  
8 of this article.

9 (b) The agency is authorized to accept, and employ or  
10 dispose of in furtherance of the purposes of this article,  
11 any money or property, real, personal or mixed, tangible  
12 or intangible, received by gift, devise, bequest or other-  
13 wise.

14 (c) The agency shall establish and the executive direc-  
15 tor or his designate shall operate a criminal law research  
16 center as provided for in section seven of this article. This  
17 center shall undertake directly, or by grant or contract, to  
18 serve as a clearinghouse for information; to provide train-  
19 ing and technical assistance relating to the delivery of  
20 legal representation; and to engage in research, except that  
21 broad general legal or policy research unrelated to direct  
22 representation of eligible clients may not be undertaken.

23 (d) The agency shall establish and the executive direc-  
24 tor or his designate shall operate an accounting and audit-  
25 ing division to require and monitor the compliance with  
26 this article by public defender corporations and other  
27 persons or entities receiving funding or compensation  
28 from the agency. This division shall review all plans and  
29 proposals for grants and contracts, and shall make a rec-  
30 ommendation of approval or disapproval to the executive  
31 director. The division shall prepare, or cause to be pre-  
32 pared, reports concerning the evaluation, inspection or  
33 monitoring of public defender corporations and other  
34 grantees, contractors, persons or entities receiving financial  
35 assistance under this article, and shall further carry out the

36 agency's responsibilities for records and reports as set  
37 forth in section eighteen of this article.

38       The accounting and auditing division shall require  
39 each public defender corporation to periodically report on  
40 the billable and nonbillable time of its professional em-  
41 ployees, including time utilized in administration of the  
42 respective offices, so as to compare such time to similar  
43 time expended in nonpublic law offices for like activities.

44       The accounting and auditing division shall provide to  
45 the executive director assistance in the fiscal administra-  
46 tion of all of the agency's divisions. Such assistance shall  
47 include, but not be limited to, budget preparation and  
48 statistical analysis.

49       (e) The agency shall establish and the executive direc-  
50 tor or a person designated by the executive director shall  
51 operate an appellate advocacy division for the purpose of  
52 prosecuting litigation on behalf of eligible clients in the  
53 supreme court of appeals. The executive director or a  
54 person designated by the executive director shall be the  
55 director of the appellate advocacy division. The appellate  
56 advocacy division shall represent eligible clients upon  
57 appointment by the circuit courts, or by the supreme court  
58 of appeals. The division may, however, refuse such ap-  
59 pointments due to a conflict of interest or if the executive  
60 director has determined the existing caseload cannot be  
61 increased without jeopardizing the appellate division's  
62 ability to provide effective representation. In order to  
63 effectively and efficiently utilize the resources of the ap-  
64 pellate division the executive director may restrict the  
65 provision of appellate representation to certain types of  
66 cases.

67       The executive director is empowered to select and  
68 employ staff attorneys to perform the duties prescribed by  
69 this subsection. The division shall maintain vouchers and  
70 records for representation of eligible clients for record  
71 purposes only.

**§29-21-8. Public defender corporations.**

1 (a) In each judicial circuit of the state, there is hereby  
2 created a "public defender corporation" of the circuit.  
3 The purpose of these public defender corporations is to  
4 provide legal representation in the respective circuits in  
5 accordance with the provisions of this article.

6 (b) If the judge of a single-judge circuit, the chief  
7 judge of a multi-judge circuit or a majority of the active  
8 members of the bar in the circuit determine there is a need  
9 to activate the corporation, they shall certify that fact in  
10 writing to the executive director. The executive director  
11 shall allocate funds to those corporations so certifying in  
12 the order in which he or she deems most efficient and cost  
13 effective.

14 (c) Public defender corporations may apply in writing  
15 to the executive director for permission to merge to form  
16 multi-circuit or regional public defender corporations.  
17 Applications for mergers shall be subject to the review  
18 procedures set forth in section eleven of this article.

#### **§29-21-9. Panel attorneys.**

1 (a) In each circuit of the state, the circuit court shall  
2 establish and maintain regional and local panels of private  
3 attorneys-at-law who shall be available to serve as counsel  
4 for eligible clients.

5 An attorney-at-law may become a panel attorney and  
6 be enrolled on the regional or local panel, or both, to serve  
7 as counsel for eligible clients, by informing the court. An  
8 agreement to accept cases generally or certain types of  
9 cases particularly shall not prevent a panel attorney from  
10 declining an appointment in a specific case.

11 (b) In all cases where an attorney-at-law is required to  
12 be appointed for an eligible client, the appointment shall  
13 be made by the circuit judge. In circuits where a public  
14 defender office is in operation, the judge shall appoint the  
15 public defender office unless such appointment is not  
16 appropriate due to a conflict of interest or unless the pub-  
17 lic defender corporation board of directors or the public  
18 defender, with the approval of the board, has notified the  
19 court that the existing caseload cannot be increased with-

20 out jeopardizing the ability of defenders to provide effec-  
21 tive representation.

22 If the public defender office is not available for ap-  
23 pointment, the court shall appoint one or more panel at-  
24 torneys from the local panel. If there is no local panel  
25 attorney available, the judge shall appoint one or more  
26 panel attorneys from the regional panel. If there is no  
27 regional panel attorney available, the judge may appoint a  
28 public defender office from an adjoining circuit if such  
29 public defender office agrees to the appointment.

30 In circuits where no public defender office is in opera-  
31 tion, the judge shall first refer to the local panel and then  
32 to the regional panel in making appointments, and if an  
33 appointment cannot be made from the panel attorneys, the  
34 judge may appoint the public defender office of an ad-  
35 joining circuit if the office agrees to the appointment. In  
36 any circuit, when there is no public defender, or assistant  
37 public defender, local panel attorney or regional panel  
38 attorney available, the judge may appoint one or more  
39 qualified private attorneys to provide representation, and  
40 such private attorney or attorneys shall be treated as panel  
41 attorneys for that specific case. In any given case, the  
42 appointing judge may alter the order in which attorneys  
43 are appointed if the case requires particular knowledge or  
44 experience on the part of the attorney to be appointed.

**§29-21-13a. Compensation and expenses for panel attorneys.**

1 (a) All panel attorneys shall maintain detailed and  
2 accurate records of the time expended and expenses in-  
3 curred on behalf of eligible clients, and upon completion  
4 of each case, exclusive of appeal, shall submit to the ap-  
5 pointing court a voucher for services. Claims for fees and  
6 expense reimbursements shall be submitted to the appoint-  
7 ing court on forms approved by the executive director.  
8 Claims submitted more than four years after the last date  
9 of service shall be rejected.

10 The appointing court shall review the voucher to de-  
11 termine if the time and expense claims are reasonable,  
12 necessary and valid, and shall forward the voucher to the  
13 agency with an order approving payment of the claimed

14 amount or of such lesser sum the court considers appro-  
15 priate.

16 (b) Notwithstanding any other provision of this section  
17 to the contrary, public defender services may pay by di-  
18 rect bill, prior to the completion of the case, litigation  
19 expenses incurred by attorneys appointed under this arti-  
20 cle.

21 (c) Notwithstanding any other provision of this section  
22 to the contrary, a panel attorney may be compensated for  
23 services rendered and reimbursed for expenses incurred  
24 prior to the completion of the case where: (1) More than  
25 six months have expired since the commencement of the  
26 panel attorney's representation in the case; and (2) no  
27 prior payment of attorney fees has been made to the panel  
28 attorney by public defender services during the case. The  
29 amounts of any fees or expenses paid to the panel attor-  
30 ney on such an interim basis, when combined with any  
31 such amounts paid to the panel attorney at the conclusion  
32 of the case, shall not exceed the limitations on fees and  
33 expenses imposed by this section.

34 (d) In each case in which a panel attorney provides  
35 legal representation under this article, and in each appeal  
36 after conviction in circuit court, the panel attorney shall be  
37 compensated at the following rates for actual and neces-  
38 sary time expended for services performed and expenses  
39 incurred subsequent to the effective date of this article:

40 (1) For attorney's work performed out of court, com-  
41 pensation shall be at the rate of forty-five dollars per hour.  
42 For paralegal's work performed out of court for the attor-  
43 ney, compensation shall be at the rate of the paralegal's  
44 regular compensation on an hourly basis or, if salaried, at  
45 the hourly rate of compensation which would produce the  
46 paralegal's current salary, but in no event shall the com-  
47 pensation exceed twenty dollars per hour. Out-of-court  
48 work includes, but is not limited to, travel, interviews of  
49 clients or witnesses, preparation of pleadings and  
50 prehearing or pretrial research.

51 (2) For attorney's work performed in court, compensa-  
52 tion shall be at the rate of sixty-five dollars per hour. No

53 compensation for paralegal's work performed in court  
54 shall be allowed. In-court work includes, but is not limited  
55 to, all time spent awaiting hearing or trial if the presence  
56 of the attorney is required.

57 (3) The maximum amount of compensation for  
58 out-of-court and in-court work under this subsection is as  
59 follows: For proceedings of any kind involving felonies  
60 for which a penalty of life imprisonment may be imposed,  
61 such amount as the court may approve; for all other eligi-  
62 ble proceedings, three thousand dollars unless the court,  
63 for good cause shown, approves payment of a larger sum.

64 (e) Actual and necessary expenses incurred in provid-  
65 ing legal representation for proceedings of any kind in-  
66 volving felonies for which a penalty of life imprisonment  
67 may be imposed, including, but not limited to, expenses  
68 for travel, transcripts, salaried or contracted investigative  
69 services and expert witnesses, shall be reimbursed in such  
70 amount as the court may approve. For all other eligible  
71 proceedings, actual and necessary expenses incurred in  
72 providing legal representation, including, but not limited  
73 to, expenses for travel, transcripts, salaried or contracted  
74 investigative services and expert witnesses, shall be reim-  
75 bursed to a maximum of fifteen hundred dollars unless  
76 the court, for good cause shown, approves reimbursement  
77 of a larger sum.

78 Expense vouchers shall specifically set forth the na-  
79 ture, amount and purpose of expenses incurred and shall  
80 provide such receipts, invoices or other documentation  
81 required by the executive director and the state auditor:

82 (1) (A) Reimbursement of expenses for production of  
83 transcripts of proceedings reported by a court reporter is  
84 limited to the cost per original page set forth in section  
85 four, article seven, chapter fifty-one of this code. Reim-  
86 bursement of the cost of copies of such transcripts is limit-  
87 ed to twenty-five cents per page.

88 (B) (i) There shall be no reimbursement of expenses  
89 for or production of a transcript of a preliminary hearing  
90 before a magistrate or juvenile referee, or of a magistrate  
91 court jury trial, which has been reported by a court report-



92 er at the request of the attorney, where the preliminary  
93 hearing or jury trial has also been recorded electronically  
94 in accordance with the provisions of section eight, article  
95 five, chapter fifty of this code or court rule.

96 (ii) Reimbursement of the expense of an appearance  
97 fee for a court reporter who reports a proceeding other  
98 than one described in subparagraph (i) of this paragraph,  
99 or who reports a proceeding which is not reported by an  
100 official court reporter acting in his or her official capacity  
101 for the court, is limited to twenty-five dollars. Where a  
102 transcript of such proceeding is produced, there shall be  
103 no reimbursement for the expense of any appearance fee.  
104 Where a transcript is requested by the attorney after an  
105 appearance fee has been paid, reimbursement of the ex-  
106 pense incurred to obtain the transcript is limited to the cost  
107 of producing the transcript, within the prescribed limita-  
108 tions of paragraph (A) of this subdivision, less the amount  
109 of the paid appearance fee.

110 (iii) Reimbursement of travel expenses incurred for  
111 travel by a court reporter is subject to the limitations pro-  
112 vided by subdivision (2) of this subsection.

113 (iv) Except for the appearance fees provided in this  
114 paragraph, there shall be no reimbursement for hourly  
115 court reporters' fees or fees for other time expended by  
116 the court reporter, either at the proceeding or traveling to  
117 or from the proceeding.

118 (C) Reimbursement of the cost of transcription of  
119 tapes electronically recorded during preliminary hearings  
120 or magistrate court jury trials is limited to the rates estab-  
121 lished by the supreme court of appeals for the reimburse-  
122 ment of transcriptions of electronically recorded hearings  
123 and trial.

124 (2) Reimbursement for any travel expense incurred in  
125 an eligible proceeding is limited to the rates for the reim-  
126 bursement of travel expenses established by rules promul-  
127 gated by the governor pursuant to the provisions of sec-  
128 tion eleven, article eight, chapter twelve of this code and  
129 administered by the secretary of the department of admin-

130 istration pursuant to the provisions of section forty-eight,  
131 article three, chapter five-a of this code.

132 (3) Reimbursement for investigative services is limited  
133 to a rate of thirty dollars per hour for work performed by  
134 an investigator.

135 (f) For purposes of compensation under this section,  
136 an appeal from a final order of the circuit court, or pro-  
137 ceeding seeking an extraordinary remedy, made to the  
138 supreme court of appeals, shall be considered a separate  
139 case.

140 (g) Vouchers submitted under this section shall spe-  
141 cifically set forth the nature of the service rendered, the  
142 stage of proceeding or type of hearing involved, the date  
143 and place the service was rendered and the amount of time  
144 expended in each instance. All time claimed on the  
145 vouchers shall be itemized to the nearest tenth of an hour.  
146 If the charge against the eligible client for which services  
147 were rendered is one of several charges involving multiple  
148 warrants or indictments, the voucher shall indicate such  
149 fact and sufficiently identify the several charges so as to  
150 enable the court to avoid a duplication of compensation  
151 for services rendered. The executive director shall refuse  
152 to requisition payment for any voucher which is not in  
153 conformity with the recordkeeping, compensation or other  
154 provisions of this article and in such circumstance shall  
155 return the voucher to the court or to the service provider  
156 for further review or correction.

**§29-21-15. Public defender corporations — Board of direc-  
tors.**

1 (a) The governing body of each public defender cor-  
2 poration shall be a board of directors consisting of per-  
3 sons who are residents of the area to be served by the  
4 public defender corporation.

5 (1) In multi-county circuits, and in the case of  
6 multi-circuit or regional corporations, the county commis-  
7 sion of each county within the area served shall appoint a  
8 director, who shall not be an attorney-at-law. The presi-  
9 dent of each county bar association within the area served

10 shall appoint a director, who shall be an attorney-at-law:  
11 *Provided*, That in a county where there is not an orga-  
12 nized and active bar association, the circuit court shall  
13 convene a meeting of the members of the bar of the court  
14 resident within the county and such members of the bar  
15 shall elect one of their number as a director. The gover-  
16 nor shall appoint one director, who shall serve as chair-  
17 man, who may be an attorney-at-law, unless such appoint-  
18 ment would result in there being an even number of direc-  
19 tors, in which event the governor shall appoint two direc-  
20 tors, one of whom may be an attorney-at-law. The gover-  
21 nor's appointees shall serve four-year terms which terms  
22 shall coincide with the term of the governor. Appoint-  
23 ments may be made for unexpired terms as may be neces-  
24 sary. Other board members' terms shall be as determined  
25 by the board.

26 (2) In single-county circuits, the manner of selecting  
27 directors shall be the same as that described in subdivision  
28 (1) of this subsection, except that the county commission  
29 shall appoint two directors rather than one, and the bar  
30 shall appoint two directors rather than one.

31 (b) The board of directors shall have at least four  
32 meetings a year. Timely and effective prior public notice  
33 of all meetings shall be given pursuant to rules promulgat-  
34 ed in accordance with the provisions of section three, arti-  
35 cle nine-a, chapter six of this code, and all meetings shall  
36 be public except for those concerned with matters proper-  
37 ly discussed in executive session.

38 (c) The board of directors shall establish and enforce  
39 broad policies governing the operation of the public de-  
40 fender corporation but shall not interfere with any attor-  
41 ney's professional responsibilities to clients. The duties of  
42 the board of directors shall include, but not be limited to,  
43 the following:

44 (1) Appointment of the public defender and any assis-  
45 tant public defenders as may be necessary to enable the  
46 public defender corporation to provide legal representa-  
47 tion to eligible clients; and

48       (2) Approval of the public defender corporation's  
49 budget and the fixing of professional and clerical salaries:  
50 *Provided*, That the compensation paid to any part-time  
51 public defender, part-time assistant public defender or  
52 other part-time employee shall not include benefits such  
53 as retirement, health insurance or paid leave time for ill-  
54 ness or vacation unless public defender services has certi-  
55 fied in writing to the board of directors that there exists  
56 sufficient funding to provide such benefits and the board  
57 of directors authorizes such benefits to be included in the  
58 compensation; and

59       (3) Removal of any public defender, assistant public  
60 defender or other employee for misfeasance, malfeasance  
61 or nonfeasance.

62       (d) To the extent that the provisions of chapter  
63 thirty-one of this code regarding nonprofit corporations  
64 are not inconsistent with this article, the provisions of said  
65 chapter shall be applicable to the board of directors of the  
66 public defender corporation.

67       (e) While serving on the board of directors, no mem-  
68 ber may receive compensation from the public defender  
69 corporation, but a member may receive payment for nor-  
70 mal travel and other out-of-pocket expenses required for  
71 fulfillment of the obligations of membership and may  
72 accept appointments to represent eligible clients so long as  
73 he or she does not discuss a particular case with any public  
74 defender, assistant public defender or other employee of  
75 the office governed by the board. Directors may not serve  
76 as cocounsel with the public defender or assistant public  
77 defender in any matter.

**§29-21-17. Private practice of law by public defenders.**

1       (a) No full-time public defender or full-time assistant  
2 public defender may engage in any private practice of law  
3 except as provided in this section.

4       (b) A board of directors may permit a newly em-  
5 ployed full-time public defender or full-time assistant

6 public defender to engage in the private practice of law  
7 for compensation for the sole purpose of expeditiously  
8 closing and withdrawing from existing private cases from  
9 a prior private practice. In no event shall any person em-  
10 ployed for more than ninety days as a full-time public  
11 defender or full-time assistant public defender be engaged  
12 in any other private practice of law for compensation:  
13 *Provided*, That until the first day of January, one thousand  
14 nine hundred ninety-three, the prohibition against the  
15 private practice of law does not apply to full-time public  
16 defenders employed in Class II, III or IV counties as de-  
17 fined by article seven, chapter seven of this code.

18 (c) A board of directors may permit a full-time public  
19 defender or full-time assistant public defender to engage  
20 in private practice for compensation if the defender is  
21 acting pursuant to an appointment made under a court  
22 rule or practice of equal applicability to all attorneys in  
23 the jurisdiction and if the defender remits to the public  
24 defender corporation all compensation received.

25 (d) A board of directors may permit a full-time pub-  
26 lic defender or full-time assistant public defender to en-  
27 gage in uncompensated private practice of law if the pub-  
28 lic defender or assistant public defender is acting:

29 (1) Pursuant to an appointment made under a court  
30 rule or practice of equal applicability to all attorneys in  
31 the jurisdiction; or

32 (2) On behalf of a close friend or family member; or

33 (3) On behalf of a religious, community or charitable  
34 group.

35 (e) Violation of the requirements of this section is  
36 sufficient grounds for immediate summary dismissal re-  
37 gardless of the conditions of employment established by a  
38 corporation's board of directors.

## CHAPTER 210

(Com. Sub. for H. B. 2611—By Delegate Ryan)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section thirteen, article sixteen, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to eligibility for coverage under the public employees insurance act; and providing that certain employees with twenty years of service with a participating agency and employees who have been covered by the act for twenty years may retain coverage after leaving employment if those eligible employees pay the actual cost of the retiree coverage plus five percent.

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

That section thirteen, article sixteen, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, to read as follows:

**ARTICLE 16. WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE ACT.**

**§5-16-13. Payment of costs by employer and employee; coverage for employee's spouse and dependents generally; short term continuance of coverage for involuntary employee termination; extended insurance coverage for retired employees with accrued annual leave and sick leave; increased retirement benefits for retired employees with accrued annual and sick leave; additional eligible retired employees; option for health insurance coverage without life insurance coverage made available to retirees; health insurance for surviving dependents of deceased employees.**

- 1           (a) The director is hereby authorized to provide under
- 2 any contract or contracts entered into under the provisions
- 3 of this article that the costs of any such group hospital and

4 surgical insurance, group major medical insurance, group  
5 prescription drug insurance, group life and accidental  
6 death insurance benefit plan or plans may be paid by the  
7 employer and employee. In addition, each employee shall  
8 be entitled to have his or her spouse and dependents, as  
9 defined by the rules of the public employees insurance  
10 agency, included in any group hospital and surgical  
11 insurance, group major medical insurance or group  
12 prescription drug insurance coverage: *Provided*, That such  
13 spouse and dependent coverage shall be limited to excess  
14 or secondary coverage for each spouse and dependent  
15 who has primary coverage from any other source. For  
16 purposes of this section, the term "primary coverage"  
17 means individual or group hospital and surgical insurance  
18 coverage or individual or group major medical insurance  
19 coverage or group prescription drug coverage in which  
20 the spouse or dependent is the named insured or  
21 certificate holder. The director may require proof  
22 regarding spouse and dependent primary coverage and  
23 shall adopt rules governing the nature, discontinuance and  
24 resumption of any employee's coverage for his or her  
25 spouse and dependents.

26 (b) Should a participating employee be terminated  
27 from employment involuntarily or in reduction of work  
28 force, the employee's insurance coverage provided under  
29 this article shall continue for a period of three months at  
30 no additional cost to the employee. An employee  
31 discharged for misconduct shall not be eligible for  
32 extended benefits under this section. Coverage may be  
33 extended up to the maximum period of three months,  
34 while administrative remedies contesting the charge of  
35 misconduct are pursued. If the discharge for misconduct  
36 be upheld, the full cost of the extended coverage shall be  
37 reimbursed by the employee. If the employee is again  
38 employed or recalled to active employment within twelve  
39 months of his or her prior termination, he or she shall not  
40 be considered a new enrollee and shall not be required to  
41 again contribute his or her share of the premium cost, if  
42 he or she had already fully contributed such share during  
43 the prior period of employment.

44 (c) Except as otherwise provided in subsection (f) for  
45 higher education full-time faculty employed on an annual  
46 contract basis other than for twelve months, when a  
47 participating employee, who has elected to participate in  
48 the plan before the first day of July, one thousand nine  
49 hundred eighty-eight, is compelled or required by law to  
50 retire before reaching the age of sixty-five, or when a  
51 participating employee voluntarily retires as provided by  
52 law, that employee's accrued annual leave and sick leave, if  
53 any, shall be credited toward an extension of the insurance  
54 coverage provided by this article, according to the  
55 following formulae: Such insurance coverage for a retired  
56 employee shall continue one additional month for every  
57 two days of annual leave or sick leave, or both, which the  
58 employee had accrued as of the effective date of his or her  
59 retirement. For a retired employee, his or her spouse and  
60 dependents, such insurance coverage shall continue one  
61 additional month for every three days of annual leave or  
62 sick leave, or both, which the employee had accrued as of  
63 the effective date of his or her retirement.

64 (d) Notwithstanding the preceding subsection, except  
65 as otherwise provided in subsection (f) for higher  
66 education full-time faculty employed on an annual  
67 contract basis other than for twelve months, when a  
68 participating employee who elects to participate in the  
69 plan on and after the first day of July, one thousand nine  
70 hundred eighty-eight, is compelled or required by law to  
71 retire before reaching the age of sixty-five, or when such a  
72 participating employee voluntarily retires as provided by  
73 law, that employee's annual leave or sick leave, if any, shall  
74 be credited toward one half of the premium cost of the  
75 insurance provided by this article, for periods and scope  
76 of coverage determined according to the following  
77 formulae: (1) One additional month of single retiree  
78 coverage for every two days of annual leave or sick leave,  
79 or both, which the employee had accrued as of the  
80 effective date of his or her retirement; or (2) one  
81 additional month of coverage for a retiree, his or her  
82 spouse and dependents for every three days of annual  
83 leave or sick leave, or both, which the employee had  
84 accrued as of the effective date of his or her retirement.



85 The remaining premium cost shall be borne by such  
86 retired employee if he or she elects such coverage. For  
87 purposes of this subsection, an employee who has been a  
88 participant under spouse or dependent coverage and who  
89 reenters the plan within twelve months after termination of  
90 his or her prior coverage shall be considered to have  
91 elected to participate in the plan as of the date of  
92 commencement of the prior coverage. For purposes of  
93 this subsection, an employee shall not be considered a new  
94 employee after returning from extended authorized leave  
95 on or after the first day of July, one thousand nine  
96 hundred eighty-eight.

97 (e) In the alternative to the extension of insurance  
98 coverage through premium payment provided in the two  
99 preceding subsections, the participating employee's ac-  
100 crued annual leave and sick leave may be applied, on the  
101 basis of two days retirement service credit for each one  
102 day of accrued annual and sick leave, toward an increase  
103 in the employee's retirement benefits with such days  
104 constituting additional credited service in computation of  
105 such benefits under any state retirement system. However,  
106 such credited service shall not be used in meeting initial  
107 eligibility for retirement criteria, but only as additional  
108 service credited in excess thereof.

109 (f) When a participating employee, who is a higher  
110 education full-time faculty member employed on an  
111 annual contract basis other than for twelve months, is  
112 compelled or required by law to retire before reaching the  
113 age of sixty-five, or when such a participating employee  
114 voluntarily retires as provided by law, that employee's  
115 insurance coverage, as provided by this article, shall be  
116 extended according to the following formulae: Such  
117 insurance coverage for a retired higher education full-time  
118 faculty member, formerly employed on an annual  
119 contract basis other than for twelve months, shall continue  
120 beyond the effective date of his or her retirement one  
121 additional year for each three and one-third years of  
122 teaching service, as determined by uniform guidelines  
123 established by the university of West Virginia board of  
124 trustees and the board of directors of the state college

125 system, for individual coverage, or one additional year for  
126 each five years of teaching service for "family" coverage.

127 (g) Any employee who retired prior to the twenty-first  
128 day of April, one thousand nine hundred seventy-two, and  
129 who also otherwise meets the conditions of the "retired  
130 employee" definition in section two of this article, shall be  
131 eligible for insurance coverage under the same terms and  
132 provisions of this article. The retired employee's premium  
133 contribution for any such coverage shall be established by  
134 the finance board.

135 (h) All retirees under the provisions of this article,  
136 including those defined in section two of this article; those  
137 retiring prior to the twenty-first day of April, one  
138 thousand nine hundred seventy-two; and those hereafter  
139 retiring shall be eligible for and permitted to obtain health  
140 insurance coverage. The retired employee's premium  
141 contribution for any such coverage shall be established by  
142 the finance board.

143 (i) A surviving spouse and dependents of a deceased  
144 employee, who was either an active or retired employee  
145 just prior to such decease, shall be entitled to be included  
146 in any group insurance coverage provided under this  
147 article, and such spouse and dependents shall bear the  
148 premium cost of such insurance coverage. The finance  
149 board shall establish the premium cost of any such  
150 coverage.

151 (j) In construing the provisions of this section or any  
152 other provisions of this code, the Legislature declares that  
153 it is not now nor has it ever been the Legislature's intent  
154 that elected public officials be provided any sick leave,  
155 annual leave or personal leave, and the enactment of this  
156 section is based upon the fact and assumption that no  
157 statutory or inherent authority exists extending sick leave,  
158 annual leave or personal leave to elected public officials  
159 and the very nature of such positions preclude the arising  
160 or accumulation of such, so as to be thereafter usable as  
161 premium paying credits for which such officials may  
162 claim extended insurance benefits.

163 (k) An employee, eligible for coverage under the  
164 provisions of this article who has twenty years of service  
165 with any agency or entity participating in the public  
166 employees insurance program or who has been covered  
167 by the public employees insurance program for twenty  
168 years may, upon leaving employment with a participating  
169 agency or entity, continue to be covered by the program if  
170 the employee pays one hundred and five percent of the  
171 cost of retiree coverage: *Provided*, That the employee  
172 shall elect to continue coverage under this subsection  
173 within two years of the date the employment with a  
174 participating agency or entity is terminated.

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## CHAPTER 211

(Com. Sub. for H. B. 4204—By Delegates Staton, Prezioso and Border)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections fifteen and seventeen, article eight, chapter five-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section twenty; to amend and reenact sections seven-a and seven-c, article one, chapter fifty-seven of said code; and to further amend said article by adding thereto a new section, designated section seven-d, all relating to management and preservation of government records; offering government records to director of the section of archives and history of the division of culture and history for historical or other preservation purposes prior to destruction or disposal; preservation of government records by state records administrator, courts and Legislature; and providing copies of government records in computer disk, optical disk or other format.

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

That sections fifteen and seventeen, article eight, chapter five-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section twenty; that sections seven-a and seven-c, article one, chapter fifty-seven of said code be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section seven-d, all to read as follows:

## **Chapter**

**5A. Department of Administration.**

**57. Evidence and Witnesses.**

## **CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.**

### **ARTICLE 8. PUBLIC RECORDS MANAGEMENT AND PRESERVATION ACT.**

§5A-8-15. Records management and preservation of local records.

§5A-8-17. Disposal of records.

§5A-8-20. Alternate storage of state records.

#### **§5A-8-15. Records management and preservation of local records.**

1 (a) The governing body of each county, city, town,  
2 authority or any public corporation or political entity,  
3 whether organized and existing under a charter or under  
4 general law, shall promote the principles of efficient  
5 records management and preservation of local records.  
6 Such governing body may, as far as practical, follow the  
7 program established for the management and preservation  
8 of state records. The administrator shall, upon the request  
9 of a local governing body, provide advice and assistance  
10 in the establishment of a local records management and  
11 preservation program.

12 (b) In the event any such governing body decides to  
13 destroy or otherwise dispose of a local record, the  
14 governing body may, prior to destruction or disposal  
15 thereof, offer the record to the director of the section of  
16 archives and history of the division of culture and history

17 for preservation of the record as a document of historical  
18 value.

**§5A-8-17. Disposal of records.**

1 Except as provided in section seven-a, article one,  
2 chapter fifty-seven of this code, no record shall be  
3 destroyed or otherwise disposed of by any agency of the  
4 state, unless it is determined by the administrator and the  
5 director of the section of archives and history of the  
6 division of culture and history that the record has no  
7 further administrative, legal, fiscal, research or historical  
8 value. In the event the administrator is of the opinion that  
9 the record has no further administrative, legal, fiscal,  
10 research or historical value, the administrator shall, prior  
11 thereto, give written notice of the administrator's intention  
12 to direct the destruction or other disposal of the record to  
13 the director. Upon the written request of the director,  
14 given to the administrator within ten days of receipt of  
15 said notice, the administrator shall direct the retention of  
16 the record for a period of thirty days. In the event the  
17 director fails to retrieve the original document from the  
18 administrator or the administrator's designee within the  
19 thirty day period, the administrator may direct the  
20 destruction or other disposal of the original without  
21 further notice to the director.

**§5A-8-20. Alternate storage of state records.**

1 (a) *Findings and purpose* — The Legislature finds  
2 that continuous advances in technology have resulted and  
3 will continue to result in the development of alternate  
4 formats for the nonerasable storage of state records, and  
5 that the use of such alternative storage formats, where  
6 deemed advisable, promote the efficient and economical  
7 administration of government and provide a means for the  
8 preservation of valuable records which are subject to  
9 decay or destruction. It is the purpose of the Legislature  
10 to authorize the storage of state records in such alternate  
11 formats, as may be determined by the various branches of  
12 the government of this state, that reasonably ensure that  
13 the originals of such records are copied into such formats

14 in a manner in which the image thereof may not be erased  
15 or altered, and from which true and accurate  
16 reproductions of the original state records may be  
17 retrieved.

18 (b) *Approved format* — In addition to those formats,  
19 processes and systems described in section ten of this  
20 article, sections seven-a and seven-c, article one, chapter  
21 fifty-seven of this code, and section twelve, article five of  
22 said chapter fifty-seven, which are otherwise authorized  
23 for the reproduction of state records, a preservation  
24 duplicate of a state record may be stored in any approved  
25 format where the image of the original state record is  
26 preserved in a form in which the image thereof is  
27 incapable of erasure or alteration, and from which a  
28 reproduction of the stored state record may be retrieved  
29 which truly and accurately depicts the image of the  
30 original state record.

31 (c) *Executive agency records* — (1) Except for those  
32 formats, processes and systems used for the storage of  
33 state records on the effective date of this section, no  
34 alternate format for the storage of state records described  
35 in this section is authorized for the storage of the state  
36 records of any agency of this state unless the particular  
37 format has been approved by the state records  
38 administrator pursuant to legislative rule promulgated in  
39 accordance with the provisions of chapter twenty-nine-a of  
40 this code. No provision of this section shall be construed  
41 to prohibit the state records administrator from  
42 prohibiting the use of any format, process or system used  
43 for the storage of executive state records upon his or her  
44 determination that the same is not reasonably adequate to  
45 preserve the state records from destruction, alteration or  
46 decay.

47 (2) Upon creation of a preservation duplicate which  
48 stores an original executive state record in an approved  
49 format in which the image thereof is incapable of erasure  
50 or alteration, and from which a reproduction of the stored  
51 state record may be retrieved which truly and accurately  
52 depicts the image of the original state record, the state

53 records administrator may destroy or otherwise dispose of  
54 the original in accordance with the provisions of section  
55 seventeen of this article for the destruction of records.

56 . (d) *Judicial records* — (1) Except for those formats,  
57 processes and systems used for the storage of state records  
58 on the effective date of this section, no alternate format for  
59 the storage of state records described in this section is  
60 authorized for the storage of the state records of any court  
61 of this state unless the particular format has been approved  
62 by the supreme court of appeals by rule. No provision of  
63 this section shall be construed to prohibit the supreme  
64 court of appeals from prohibiting the use of any format,  
65 process or system used for the storage of judicial state  
66 records upon its determination that the same is not  
67 reasonably adequate to preserve the state records from  
68 destruction, alteration or decay.

69 (2) Upon creation of a preservation duplicate which  
70 stores an original judicial state record in an approved  
71 format in which the image thereof is incapable of erasure  
72 or alteration, and from which a reproduction of the stored  
73 state record may be retrieved which truly and accurately  
74 depicts the image of the original state record, the court or  
75 the clerk thereof creating the same may destroy or  
76 otherwise dispose of the original in accordance with the  
77 provisions of section seven, article one, chapter fifty-seven  
78 of this code for the destruction of records.

79 (e) *Legislative records* — (1) Except for those  
80 formats, processes and systems used for the storage of  
81 state records on the effective date of this section, no  
82 alternate format for the storage of state records described  
83 in this section is authorized for the storage of the state  
84 records of the Legislature unless the particular format has  
85 been approved in a writing jointly by the speaker of the  
86 House of Delegates and the president of the Senate to the  
87 clerks of their respective houses. No provision of this  
88 section shall be construed to prohibit the presiding  
89 officers of the houses of the Legislature from prohibiting  
90 the use of any format, process or system used for the  
91 storage of legislative state records upon their

92 determination that the same is not reasonably adequate to  
93 preserve the state records from destruction, alteration or  
94 decay.

95 (2) Upon creation of a preservation duplicate which  
96 stores an original legislative state record in an approved  
97 format in which the image thereof is incapable of erasure  
98 or alteration, and from which a reproduction of the stored  
99 state record may be retrieved which truly and accurately  
100 depicts the image of the original state record, the clerks of  
101 the respective houses of the Legislature may destroy or  
102 otherwise dispose of the original. However, prior thereto,  
103 the clerks shall give written notice of their intention to do  
104 so to the director of the section of archives and history of  
105 the division of culture and history. Upon the written  
106 request of the director, given to the clerks within ten days  
107 of receipt of said notice, the clerks shall retain the original  
108 record for a period of thirty days. In the event the  
109 director fails to retrieve the original document from the  
110 clerks within the thirty day period, the clerks may destroy  
111 or otherwise dispose of the original without further notice  
112 to the director.

## CHAPTER 57. EVIDENCE AND WITNESSES.

### ARTICLE 1. LEGISLATIVE ACTS AND RESOLUTIONS; PUBLIC RECORDS.

§57-1-7a. Use of photographic copies in evidence; state records, papers or documents; destruction or transfer to archives of originals; destruction of canceled checks and paid and canceled bonds and coupons.

§57-1-7c. Use of microfilm or microcards to reproduce and preserve records; destruction or transfer of originals to archivist.

§57-1-7d. Records provided on computer or optical disc.

**§57-1-7a. Use of photographic copies in evidence; state records, papers or documents; destruction or transfer to archives of originals; destruction of canceled checks and paid and canceled bonds and coupons.**

1 Any public officer of the state may, with the approval  
2 of the state records administrator, cause any or all records,



3 papers or documents kept by him to be photographed,  
4 microphotographed, microfilmed or reproduced on film.  
5 Such photographic film shall be of durable material and  
6 the device used to reproduce such records on such film  
7 shall be one which accurately reproduces the original  
8 thereof in all details.

9       Such photographs, microphotographs, microfilms or  
10 photographic film shall be deemed to be an original  
11 record for all purposes, including introduction in evidence  
12 in all courts or administrative agencies. A transcript,  
13 exemplification or certified copy thereof shall, for all  
14 purposes recited herein, be deemed to be a transcript,  
15 exemplification or certified copy of the original.  
16 Whenever photographs, microphotographs, microfilms or  
17 reproductions on film have been made and put in  
18 conveniently accessible fireproof files, and provision has  
19 been made for preserving, examining and using the same,  
20 the respective heads of the departments, divisions,  
21 institutions and agencies of the state may, with the  
22 approval of the state records administrator, cause the  
23 records and papers so photographed, microphotographed  
24 or reproduced on film, or any part thereof, to be  
25 destroyed; but before any such records, papers or  
26 documents are authorized to be destroyed, the state  
27 records administrator shall obtain the advice and counsel  
28 of the state historian and archivist, or his designated  
29 representative, as to the desirability of placing the said  
30 records, papers and documents in the archives of that  
31 department. In the event the administrator is of the  
32 opinion that the record has no further administrative, legal,  
33 fiscal, research or historical value, the administrator may  
34 destroy or otherwise dispose of the record, paper or  
35 document if otherwise permitted to do so after complying  
36 with the provisions of section seventeen, article eight,  
37 chapter five-a of this code. Notwithstanding any other  
38 provisions of this code to the contrary, the state treasurer  
39 may at his discretion destroy any canceled checks of the  
40 state after ten years have elapsed since the date of the  
41 check, whether or not such checks have been  
42 photographed, microphotographed, microfilmed or repro-

43 duced on film: *Provided*, That any canceled bonds or  
44 interest coupons of any bond issues of this state in the  
45 custody of the treasurer, or for which the treasurer acts as  
46 fiscal agent or paying agent, may at his discretion be  
47 destroyed by one of the two methods described below:

48 **Method I** — The treasurer shall maintain a permanent  
49 record for the purpose of recording the destruction of  
50 bonds and coupons, showing the following: (1) With  
51 respect to bonds, the purpose of issuance, the date of issue,  
52 denomination, maturity date, and total principal amount;  
53 and (2) with respect to coupons, the purpose of issue and  
54 date of the bonds to which the coupons appertain, the  
55 maturity date of the coupons, and, as to each maturity  
56 date, the denomination, quantity and total amount of  
57 coupons.

58 After recording the specified information, the  
59 treasurer shall have the canceled bonds and coupons  
60 destroyed either by burning or shredding, in the presence  
61 of an employee of the treasurer and an employee of the  
62 legislative auditor, each of whom shall certify that he saw  
63 the canceled bonds and coupons destroyed. Such  
64 certificates shall be made a part of the permanent record.  
65 Canceled bonds or coupons shall not be destroyed until  
66 after one year from the date of payment.

67 **Method II** — The treasurer may contract with any  
68 bank or trust company acting as paying agent or copaying  
69 agent for a bond issue of the state for the destruction of  
70 bonds and interest coupons which have been canceled by  
71 the paying agent. The contract shall require that the  
72 paying agent give the treasurer a written certificate  
73 containing the same information required by Method I.  
74 Such certificate shall include a sworn statement that the  
75 described bonds or coupons have been destroyed. The  
76 certificate shall be made a part of the treasurer's  
77 permanent record.

78 Each contract shall also require that the paying agent  
79 be responsible for proper payment and disposition of all  
80 bonds and coupons, and for any duplicate payments to  
81 unauthorized persons and nonpayment to authorized

82 persons occurring as a result of destruction of bonds or  
83 coupons under this section. In addition, the treasurer may  
84 require the paying agent to submit an indemnity bond, in  
85 an amount to be determined by the treasurer, to assure  
86 performance of the duties specified in this section.  
87 Canceled bonds or coupons may not be destroyed until  
88 one year from the date of payment.

89 For purposes of this section, the term "bonds" shall  
90 include interim certificates.

**§57-1-7c. Use of microfilm or microcards to reproduce and  
preserve records; destruction or transfer of  
originals to archivist.**

1 The clerk of any court of record of the state may, with  
2 the approval of the court for which he or she is clerk,  
3 cause any or all records, papers, plats, or other documents  
4 kept by him or her to be reproduced on photographic  
5 microfilm or microcards and may, with the approval of the  
6 court for which he or she is clerk, record, keep and  
7 preserve any and all records, papers, plats, or other  
8 documents required by the laws of this state to be  
9 recorded or kept by said clerk or court exclusively upon  
10 photographic microfilm or microcards instead of in  
11 well-bound books or instead of by any other method  
12 heretofore prescribed by law.

13 Such photographic microfilm and microcards shall be  
14 of durable material and possess good, archival qualities.  
15 The device used to reproduce such records on such film  
16 and cards shall be one which accurately reproduces the  
17 original thereof in all details.

18 Such photographic microfilm and microcards shall be  
19 deemed to be an original record for all purposes,  
20 including introduction into evidence in all courts or  
21 administrative agencies. A transcript, exemplification, or  
22 photographic reproduction thereof shall, when properly  
23 authenticated by the clerk of such court, be deemed for all  
24 purposes to be a transcript, exemplification, or certified  
25 copy of the original.

26       Such photographic microfilm and microcards shall be  
27 put in convenient, accessible fireproof files and adequate  
28 provision shall be made for preserving, examining and  
29 using the same.

30       Any such records, papers, plats, or other documents  
31 not held for others by said clerk or court or required by  
32 law to be delivered to some other person, court,  
33 corporation or agency, may with the approval of the court  
34 keeping such records, papers, plats, or other documents be  
35 destroyed; but before any such records, papers, plats or  
36 other documents are authorized to be destroyed the court  
37 keeping them or the clerk thereof shall obtain the advice  
38 and counsel of the state historian or archivist, or his  
39 designated representatives, as to the desirability of placing  
40 the said records, papers, plats, or other documents in the  
41 department of archives and history. However, prior to  
42 destroying or otherwise disposing of the same, the court or  
43 clerk thereof shall give written notice of the intention to  
44 do so to the director of the section of archives and history  
45 of the division of culture and history. Upon the written  
46 request of the director, given to the court or clerk thereof  
47 within ten days of receipt of said notice, the court or clerk  
48 thereof shall retain the original record for a period of  
49 thirty days. In the event the director fails to retrieve the  
50 original document from the court or clerk thereof within  
51 the thirty-day period, the court or clerk thereof may  
52 destroy or otherwise dispose of the original without  
53 further notice to the director.

**§57-1-7d. Records provided on computer or optical disc.**

1       Notwithstanding any other provision of this code to  
2 the contrary, where any provision of this code requires  
3 that a copy of any record of any branch of the  
4 government of this state be provided or delivered, the  
5 custodian of said record is authorized to comply with the  
6 requirement by providing or delivering a true copy in the  
7 form of a computer or optical disc which is not subject to  
8 alteration, is formatted to write once read many, and is  
9 attested by the custodian thereof to be a true, accurate and  
10 complete copy of the record required to be provided or  
11 delivered.

# CHAPTER 212

(S. B. 559—By Senator Bailey)

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[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section two, article one-a, chapter fifteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to adjutant general; appointment; consent of Senate required for appointment; qualifications; and bond.

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

That section two, article one-a, chapter fifteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

## **ARTICLE 1A. ADJUTANT GENERAL.**

### **§15-1A-2. Appointment; qualifications; bond.**

1       The adjutant general shall be appointed by the  
2 governor, by and with the advice and consent of the  
3 Senate, for a term of four years. He or she shall have the  
4 rank of major general, or such other rank as is recognized  
5 by federal authority. No person may be appointed  
6 adjutant general unless he or she has had at least six years'  
7 commissioned service and attained field grade or higher  
8 rank in the organized militia of this or some other state or  
9 in the armed forces of the United States, or in all  
10 combined. The governor shall require the adjutant  
11 general to furnish bond as required by law, which bond  
12 shall be filed with the auditor of the state.

# CHAPTER 213

(Com. Sub. for S. B. 568—By Senator Wooton)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section twenty-five, article thirteen-a, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections one-b and three, article one, chapter twenty-four of said code; and to amend and reenact section two, article two of said chapter, all relating to the public service commission; decreasing the time period to prefile for a certificate of public convenience and necessity in advance of the formal application from sixty to thirty days; requiring the public service commission to advise and assist Class III cities and Class IV towns or villages; adjusting the salaries of the members of the public service commission; and allowing the public service commission to establish water and sewer rates based on the debt costs associated with new projects.

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

That section twenty-five, article thirteen-a, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that sections one-b and three, article one, chapter twenty-four of said code be amended and reenacted; and that section two, article two of said chapter be amended and reenacted, all to read as follows:

## **Chapter**

**16. Public Health.**

**24. Public Service Commission.**

## **CHAPTER 16. PUBLIC HEALTH.**

**ARTICLE 13A. PUBLIC SERVICE DISTRICTS FOR WATER,  
SEWERAGE AND GAS SERVICES.**

**§16-13A-25. Borrowing and bond issuance; procedure.**

1 Notwithstanding any other provisions of this article to  
2 the contrary, a public service district shall not borrow  
3 money, enter into contracts for the provision of engineer-  
4 ing, design or feasibility studies, issue or contract to issue  
5 revenue bonds or exercise any of the powers conferred by  
6 the provisions of section thirteen, twenty or twenty-four of  
7 this article, without the prior consent and approval of the  
8 public service commission. Unless the properties to be  
9 constructed or acquired represent ordinary extensions or  
10 repairs of existing systems in the usual course of business,  
11 a public service district must first obtain a certificate of  
12 public convenience and necessity from the public service  
13 commission in accordance with the provisions of chapter  
14 twenty-four of this code, when a public service district is  
15 seeking to acquire or construct public service property.

16 Thirty days prior to making formal application for the  
17 certificate, the public service district shall prefile with the  
18 public service commission its plans and supporting infor-  
19 mation for the project and shall publish a Class II legal  
20 advertisement in a newspaper or newspapers of general  
21 circulation in each city, incorporated town or municipal  
22 corporation if available in the public service district, which  
23 legal advertisement shall state:

24 (a) The amount of money to be borrowed, or the  
25 amount of revenue bonds to be issued: *Provided*, That if  
26 the amount is an estimate, the notice may be stated in  
27 terms of an amount "not to exceed" a specific amount;

28 (b) The interest rate and terms of the loan or bonds:  
29 *Provided*, That if the interest rate is an estimate, the notice  
30 may be stated in terms of a rate "not to exceed" a specific  
31 rate;

32 (c) The public service properties to be acquired or  
33 constructed, and the cost of the public service properties;

34 (d) The anticipated rates which will be charged by the  
35 public service district: *Provided*, That if the rates are an  
36 estimate, the notice may be stated in terms of rates "not to  
37 exceed" a specific rate; and

38 (e) The date that the formal application for a certifi-  
 39 cate of public convenience and necessity is to be filed with  
 40 the public service commission. The public service com-  
 41 mission may grant its consent and approval for the certifi-  
 42 cate, or any other request for approval under this section,  
 43 subject to such terms and conditions as may be necessary  
 44 for the protection of the public interest, pursuant to the  
 45 provisions of chapter twenty-four of this code, or may  
 46 withhold such consent and approval for the protection of  
 47 the public interest.

48 In the event of disapproval, the reasons for the disap-  
 49 proval shall be assigned in writing by the commission.

## CHAPTER 24. PUBLIC SERVICE COMMISSION.

### Article

1. General Provisions.
2. Powers and Duties of Public Service Commission.

### ARTICLE 1. GENERAL PROVISIONS.

§24-1-1b. Supplemental rule for reorganization.

§24-1-3. Commission continued; membership; chairman; compensation.

#### §24-1-1b. Supplemental rule for reorganization.

1 The public service commission shall, by general order,  
 2 create a division within its staff which shall provide legal,  
 3 engineering, financial and accounting advice and assis-  
 4 tance to public service districts and Class III cities and  
 5 Class IV towns or villages in operational, financial and  
 6 regulatory matters, and may perform or participate in the  
 7 studies required under section one-b, article thirteen-a,  
 8 chapter sixteen of this code: *Provided*, That advice and  
 9 assistance to a Class III city or Class IV town or village  
 10 shall only be given if such advice or assistance is specifi-  
 11 cally requested by the Class III city or the Class IV town  
 12 or village. The request may be withdrawn by the city or  
 13 town at any time, after which the commission shall not  
 14 provide further assistance or advice.

§24-1-3. Commission continued; membership; chairman;  
 compensation.



1 (a) The public service commission of West Virginia,  
2 heretofore established, is continued and directed as pro-  
3 vided by this chapter, chapter twenty-four-a and chapter  
4 twenty-four-b of this code. After having conducted a  
5 performance audit through its joint committee on govern-  
6 ment operations, pursuant to section nine, article ten, chap-  
7 ter four of this code, the Legislature hereby finds and  
8 declares that the public service commission should be  
9 continued and reestablished. Accordingly, notwithstand-  
10 ing the provisions of section four, article ten, chapter four  
11 of this code, the public service commission shall continue  
12 to exist until the first day of July, one thousand nine hun-  
13 dred ninety-nine. The public service commission may sue  
14 and be sued by that name. The public service commission  
15 shall consist of three members who shall be appointed by  
16 the governor with the advice and consent of the Senate.  
17 The commissioners shall be citizens and residents of this  
18 state and at least one of them shall be duly licensed to  
19 practice law in West Virginia, with not less than ten years'  
20 actual work experience in the legal profession as a mem-  
21 ber of a state bar. No more than two of the commissioners  
22 shall be members of the same political party. Each com-  
23 missioner shall, before entering upon the duties of his or  
24 her office, take and subscribe to the oath provided by  
25 section five, article IV of the constitution of this state. The  
26 oath shall be filed in the office of the secretary of state.  
27 The governor shall designate one of the commissioners to  
28 serve as chairman at the governor's will and pleasure. The  
29 chairman shall be the chief administrative officer of the  
30 commission. The governor may remove any commission-  
31 er only for incompetency, neglect of duty, gross immoral-  
32 ity, malfeasance in office or violation of subsection (c) of  
33 this section.

34 (b) The unexpired terms of members of the public  
35 service commission at the time this subsection becomes  
36 effective are continued. Upon expiration of the terms,  
37 appointments are for terms of six years, except that an  
38 appointment to fill a vacancy is for the unexpired term  
39 only. The commissioners whose terms are terminated by  
40 the provisions of this subsection are eligible for reappoint-  
41 ment.

42 (c) No person while in the employ of, or holding any  
43 official relation to, any public utility subject to the provi-  
44 sions of this chapter, or holding any stocks or bonds of a  
45 public utility subject to the provisions of this chapter, or  
46 who is pecuniarily interested in a public utility subject to  
47 the provisions of this chapter, may serve as a member of  
48 the commission or as an employee of the commission.  
49 Nor may any commissioner be a candidate for or hold  
50 public office, or be a member of any political committee,  
51 while acting as a commissioner; nor may any commission-  
52 er or employee of the commission receive any pass, free  
53 transportation or other thing of value, either directly or  
54 indirectly, from any public utility or motor carrier subject  
55 to the provisions of this chapter. In case any of the com-  
56 missioners becomes a candidate for any public office or a  
57 member of any political committee, the governor shall  
58 remove him or her from office and shall appoint a new  
59 commissioner to fill the vacancy created.

60 (d) The salaries of members of the public service com-  
61 mission and the manner in which they are paid established  
62 by the prior enactment of this section are continued.  
63 Effective the first day of July, one thousand nine hundred  
64 ninety-six, and in light of the assignment of new, substan-  
65 tial additional duties embracing new areas and fields of  
66 activity under certain legislative enactments, each commis-  
67 sioner shall receive an annual salary of sixty-five thousand  
68 dollars to be paid in monthly installments from the special  
69 funds in the amounts that follow:

70 (1) From the public service commission fund collected  
71 under the provisions of section six, article three of this  
72 chapter, fifty-two thousand dollars;

73 (2) From the public service commission motor carrier  
74 fund collected under the provisions of section six, article  
75 six, chapter twenty-four-a of this code, ten thousand eight  
76 hundred fifty dollars; and

77 (3) From the public service commission gas pipeline  
78 safety fund collected under the provisions of section three,  
79 article five, chapter twenty-four-b of this code, two thou-  
80 sand one hundred fifty dollars.

81       In addition to this salary provided for all commission-  
82       ers, the chairman of the commission shall receive five  
83       thousand dollars per annum to be paid in monthly install-  
84       ments from the public service commission fund collected  
85       under the provisions of section six, article three of this  
86       chapter on and after the first day of July, one thousand  
87       nine hundred ninety-six.

**ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COM-  
MISSION.**

**§24-2-2. General power of commission to regulate public  
utilities.**

1       (a) The commission is hereby given power to investi-  
2       gate all rates, methods and practices of public utilities  
3       subject to the provisions of this chapter; to require them to  
4       conform to the laws of this state and to all rules, regula-  
5       tions and orders of the commission not contrary to law;  
6       and to require copies of all reports, rates, classifications,  
7       schedules and timetables in effect and used by the public  
8       utility or other person, to be filed with the commission,  
9       and all other information desired by the commission relat-  
10      ing to the investigation and requirements, including inven-  
11      tories of all property in such form and detail as the com-  
12      mission may prescribe. The commission may compel  
13      obedience to its lawful orders by mandamus or injunction  
14      or other proper proceedings in the name of the state in  
15      any circuit court having jurisdiction of the parties or of  
16      the subject matter, or the supreme court of appeals direct,  
17      and the proceedings shall have priority over all pending  
18      cases. The commission may change any intrastate rate,  
19      charge or toll which is unjust or unreasonable or any in-  
20      terstate charge with respect to matters of a purely local  
21      nature which have not been regulated by or pursuant to an  
22      act of Congress and may prescribe a rate, charge or toll  
23      that is just and reasonable, and change or prohibit any  
24      practice, device or method of service in order to prevent  
25      undue discrimination or favoritism between persons and  
26      between localities and between commodities for a like and  
27      contemporaneous service. But in no case shall the rate,  
28      toll or charge be more than the service is reasonably  
29      worth, considering the cost of the service. Every order

30 entered by the commission shall continue in force until  
 31 the expiration of the time, if any, named by the commis-  
 32 sion in the order, or until revoked or modified by the  
 33 commission, unless the order is suspended, modified or  
 34 revoked by order or decree of a court of competent juris-  
 35 diction.

36 (b) Notwithstanding any other provision of this code  
 37 to the contrary, rates are not discriminatory if, when con-  
 38 sidering the debt costs associated with a future water or  
 39 sewer project which would not benefit existing customers,  
 40 the commission establishes rates which ensure that the  
 41 future customers to be served by the new project are solely  
 42 responsible for the debt costs associated with the project.

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## CHAPTER 214

(S. B. 285—By Senators Anderson, Wooton, Bowman, Buckalew, Deem, Dittmar, Grubb, Miller, Oliverio, Ross, Schoonover and Scott)

[Passed February 23, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact section six, article seven, chapter twenty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the enforcement of laws governing the public service commission; clarifying the duties of law-enforcement officers, prosecuting attorneys and motor carrier inspectors; authorizing motor carrier inspectors to carry handguns in the course of their official duties; establishing qualifications to carry such handguns; providing for the payment of handguns training; clarifying scope of authority of motor carrier inspectors; and making certain technical revisions.

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

That section six, article seven, chapter twenty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 7. COMPLAINTS, DAMAGES AND VIOLATIONS.

**§24A-7-6. Duty of prosecuting attorneys and law-enforcement officers to enforce chapter; regulatory authority of commission; qualifications of commission employees designated as motor carrier inspectors.**

1 It shall be the duty of the West Virginia state police  
2 and the sheriffs of the counties in West Virginia to make  
3 arrests and the duty of the prosecuting attorneys of the  
4 several counties to prosecute all violations of this chapter  
5 and of other chapters governing the regulatory authority  
6 of the commission. The commission employees designat-  
7 ed as motor carrier inspectors shall have the same authori-  
8 ty as law-enforcement officers to enforce the provisions of  
9 this chapter and the provisions of other chapters of this  
10 code governing the regulatory authority of the commis-  
11 sion as such provisions apply to entities and persons regu-  
12 lated by the commission in any county or city of this state.  
13 Notwithstanding any provision of this code to the con-  
14 trary, such motor carrier inspectors may carry handguns  
15 in the course of their official duties after meeting special-  
16 ized qualifications established by the governor's commit-  
17 tee on crime, delinquency and correction, which qualifica-  
18 tions shall include the successful completion of handgun  
19 training, including a minimum of four hours training in  
20 handgun safety, paid for by the commission and compara-  
21 ble to the handgun training provided to law-enforcement  
22 officers by the West Virginia state police: *Provided*, That  
23 nothing in this section shall be construed to include motor  
24 carrier inspectors within the meaning of law-enforcement  
25 officers as defined in section one, article twenty-nine,  
26 chapter thirty of this code.

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## CHAPTER 215

(H. B. 4637—By Delegates Kiss, Browning, Kelley,  
Petersen, Talbott, Tomblin and Wallace )

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section ten, article three, chapter twelve of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article by adding thereto two new sections, designated sections

ten-a and ten-b, all relating to the state auditor's office; providing itemized statements of claims against the state; authorizing promulgation of rules by the state auditor regarding specificity of statement; authorizing the use of a purchasing card for state purchases of five hundred dollars or less; providing limitations on use of purchasing card; requiring competitive bid for selection of purchasing card vendor; requiring the auditor and director of the purchasing division to promulgate legislative rules; and providing criminal penalties for violation of purchasing card program.

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

That section ten, article three, chapter twelve of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted and that said article be further amended by adding thereto two new sections, designated sections ten-a and ten-b, all to read as follows:

**ARTICLE 3. APPROPRIATIONS, EXPENDITURES AND DEDUCTIONS.**

§12-3-10. Itemized statement of claim against state; rules to be promulgated concerning same.

§12-3-10a. Purchasing card program.

§12-3-10b. Fraudulent or unauthorized use of purchasing card prohibited; penalties.

**§12-3-10. Itemized statement of claim against state; rules to be promulgated concerning same.**

1 It is unlawful for any state officer to issue his or her  
2 requisition on the state auditor in payment of any claim  
3 unless an itemized account is filed in the office of the  
4 officer issuing the requisition. The auditor shall propose  
5 rules for promulgation in accordance with the provisions  
6 of article three, chapter twenty-nine-a of this code, to gov-  
7 ern the form and manner by which claims shall be item-  
8 ized for payment.

**§12-3-10a. Purchasing card program.**

1 Notwithstanding the provisions of section ten of this  
2 article, payment of claims may be made through the use  
3 of the state purchasing card program authorized by the  
4 provisions of this section. The auditor may establish a

5 state purchasing card program for the purpose of autho-  
6 rizing all spending units of state government to use a pur-  
7 chasing card as an alternative payment method when mak-  
8 ing small purchases. The purchasing card program shall  
9 be conducted so that procedures and controls for the  
10 procurement and payment of goods and services are made  
11 more efficient. The program shall permit spending units  
12 to use a purchase charge card to purchase goods and ser-  
13 vices. The amount of any one purchase made with the  
14 purchase charge card shall not exceed five hundred dol-  
15 lars: *Provided*, That purchasing cards may not be utilized  
16 for the purpose of obtaining cash advances, whether the  
17 advances are made in cash or by other negotiable instru-  
18 ment. Purchases of goods and services must be received  
19 either in advance of or simultaneously with the use of a  
20 state purchasing card for payment for those goods or  
21 services. The auditor, by legislative rule, may eliminate  
22 the requirement for vendor invoices and provide a proce-  
23 dure for consolidating multiple vendor payments into one  
24 monthly payment to a charge card vendor. Selection of a  
25 charge card vendor to provide state purchase cards shall  
26 be accomplished by competitive bid. The purchasing  
27 division of the department of administration shall contract  
28 with the successful bidder for provision of state purchase  
29 charge cards. Purchase charge cards issued under the  
30 program shall be used for official state purchases only.  
31 The auditor and the director of the purchasing division of  
32 the department of administration shall jointly propose  
33 rules for promulgation in accordance with the provisions  
34 of article three, chapter twenty-nine-a of this code to gov-  
35 ern the implementation of the purchase card program.

**§12-3-10b. Fraudulent or unauthorized use of purchasing card prohibited; penalties.**

1 It is unlawful for any person to use a state purchase  
2 card, issued in accordance with the provisions of section  
3 ten-a of this article, to make any purchase of goods or  
4 services in a manner which is contrary to the provisions of  
5 section ten-a of this article or the rules promulgated pur-  
6 suant to that section. Any person who violates the provi-  
7 sions of this section is guilty of a felony and, upon convic-  
8 tion thereof, shall be confined in the penitentiary not less  
9 than one nor more than five years, or fined no more than  
10 five thousand dollars, or both fined and imprisoned.

## CHAPTER 216

(H. B. 4159—By Delegates Love and Pettit)

[Passed March 7, 1996; in effect ninety days from passage.  
Became law without signature of Governor.]

AN ACT to amend and reenact section three, article twenty-two-a, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to deleting a restriction on video lottery game themes depicting symbols on reels at licensed horse and dog racetracks.

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

That section three, article twenty-two-a, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 22A. RACETRACK VIDEO LOTTERY.

#### §29-22A-3. Definitions.

- 1 As used in this article:
- 2 (a) "Applicant" means any person applying for any
- 3 video lottery license or permit.
- 4 (b) "Associated equipment" means any hardware
- 5 located on a licensed racetrack's premises which is
- 6 connected to the video lottery system for the purpose of
- 7 performing communication, validation or other functions,
- 8 but not including the video lottery terminals or the
- 9 communication facilities of a regulated public utility.
- 10 (c) "Background investigation" means a security,
- 11 criminal and credit investigation of a person, as defined in
- 12 this section, who has applied for a video lottery license or
- 13 permit, or who has been granted a video lottery license or
- 14 permit.
- 15 (d) "Central computer," "central control computer" or
- 16 "central site system" means any central site computer



17 provided to and controlled by the commission to which  
18 video lottery terminals communicate for purposes of  
19 information retrieval and terminal activation and disable  
20 programs.

21 (e) "Commission" or "state lottery commission" means  
22 the West Virginia lottery commission created by article  
23 twenty-two of this chapter.

24 (f) "Control" means the authority to direct the  
25 management and policies of an applicant or a license or  
26 permit holder.

27 (g) "Costs" means the expenses incurred by the  
28 commission in the testing and examination of video  
29 lottery terminals and the performance of background  
30 investigations and other related activities which are  
31 charged to and collected from applicants or license or  
32 permit holders.

33 (h) "Director" means the individual appointed by the  
34 governor to provide management and administration  
35 necessary to direct the state lottery office.

36 (i) "Disable" or "terminal disable" means the process of  
37 executing a shutdown command from the central control  
38 computer which causes video lottery terminals to cease  
39 functioning.

40 (j) "Display" means the visual presentation of video  
41 lottery game features on the video display monitor or  
42 screen of a video lottery terminal.

43 (k) "Gross terminal income" means the total amount of  
44 cash inserted into the video lottery terminals operated by a  
45 licensee, minus the total value of game credits which are  
46 cleared from the video lottery terminals in exchange for  
47 winning redemption tickets.

48 (l) "License" or "video lottery license" means  
49 authorization granted by the commission to a racetrack  
50 which is licensed by the West Virginia racing commission  
51 to conduct thoroughbred or greyhound racing meetings  
52 pursuant to article twenty-three, chapter nineteen of this

53 code permitting the racetrack to operate video lottery  
54 terminals authorized by the commission.

55 (m) "Lottery" means the public gaming systems or  
56 games established and operated by the state lottery  
57 commission.

58 (n) "Manufacturer" means any person holding a  
59 permit granted by the commission to engage in the  
60 business of designing, building, constructing, assembling  
61 or manufacturing video lottery terminals, the electronic  
62 computer components thereof, the random number  
63 generator thereof, or the cabinet in which it is housed, and  
64 whose product is intended for sale, lease or other  
65 assignment to a licensed racetrack in West Virginia, and  
66 who contracts directly with the licensee for the sale, lease  
67 or other assignment to a licensed racetrack in West  
68 Virginia.

69 (o) "Net terminal income" means gross terminal  
70 income minus an amount deducted by the commission to  
71 reimburse the commission for its actual costs of  
72 administering racetrack video lottery at the licensed  
73 racetrack. No deduction for any or all costs and expenses  
74 of a licensee related to the operation of video lottery  
75 games shall be deducted from gross terminal income.

76 (p) "Own" means any beneficial or proprietary interest  
77 in any property or business of an applicant or licensed  
78 racetrack.

79 (q) "Pari-mutuel racing facility," "licensed racetrack,"  
80 "racetrack" or "track" means a facility where horse or dog  
81 race meetings are held and the pari-mutuel system of  
82 wagering is authorized pursuant to the provisions of article  
83 twenty-three, chapter nineteen of this code: *Provided,*  
84 That, for the purposes of this article, "pari-mutuel racing  
85 facility," "licensed racetrack," "racetrack" or "track"  
86 includes only a facility which was licensed prior to the first  
87 day of January, one thousand nine hundred ninety-four,  
88 to hold horse or dog race meetings, and which conducts  
89 not less than two hundred twenty live racing dates for each  
90 horse or dog race meeting or such other number of live  
91 racing dates as may be approved by the racing

92 commission in accordance with the provisions of section  
93 twelve-b, article twenty-three, chapter nineteen of this  
94 code.

95 (r) "Permit" means authorization granted by the  
96 commission to a person to function as either a video  
97 lottery manufacturer, service technician or validation  
98 manager.

99 (s) "Person" means any natural person, corporation,  
100 association, partnership, limited partnership, or other  
101 entity, regardless of its form, structure or nature.

102 (t) "Player" means a person who plays a video lottery  
103 game on a video lottery terminal at a racetrack licensed by  
104 the commission to conduct video lottery games.

105 (u) "Service technician" means a person, employed by  
106 a licensed racetrack, who holds a permit issued by the  
107 commission and who performs service, maintenance and  
108 repair on licensed video lottery terminals in this state.

109 (v) "Video lottery game" means a commission  
110 approved, owned and controlled electronically simulated  
111 game of chance which is displayed on the screen or video  
112 monitor of a video lottery terminal and which:

113 (1) Is connected to the commission's central control  
114 computer by an on-line or dial-up communication system;

115 (2) Is initiated by a player's insertion of coins or  
116 currency into a video lottery terminal, which causes game  
117 play credits to be displayed on the video lottery terminal  
118 and, with respect to which, each game play credit entitles a  
119 player to choose one or more symbols or numbers or to  
120 cause the video lottery terminal to randomly select  
121 symbols or numbers;

122 (3) Allows the player to win additional game play  
123 credits based upon game rules which establish the random  
124 selection of winning combinations of symbols or numbers  
125 or both and the number of free play credits to be awarded  
126 for each winning combination of symbols or numbers or  
127 both;

128 (4) Is based upon computer-generated random  
129 selection of winning combinations based totally or  
130 predominantly on chance;

131 (5) In the case of a video lottery game which allows  
132 the player an option to select replacement symbols or  
133 numbers or additional symbols or numbers after the game  
134 is initiated and in the course of play, either (A) signals the  
135 player, prior to any optional selection by the player of  
136 randomly generated replacement symbols or numbers, as  
137 to which symbols or numbers should be retained by the  
138 player to present the best chance, based upon probabilities,  
139 that the player may select a winning combination, (B)  
140 signals the player, prior to any optional selection by the  
141 player of randomly generated additional symbols or  
142 numbers, as to whether such additional selection presents  
143 the best chance, based upon probabilities, that the player  
144 may select a winning combination, or (C) randomly  
145 generates additional or replacement symbols and numbers  
146 for the player after automatically selecting the symbols  
147 and numbers which should be retained to present the best  
148 chance, based upon probabilities, for a winning  
149 combination, so that in any event, the player is not  
150 permitted to benefit from any personal skill, based upon a  
151 knowledge of probabilities, before deciding which  
152 optional numbers or symbols to choose in the course of  
153 video lottery game play;

154 (6) Allows a player at any time to simultaneously clear  
155 all game play credits and print a redemption ticket  
156 entitling the player to receive the cash value of the free  
157 plays cleared from the video lottery terminal; and

158 (7) Does not use the following game themes  
159 commonly associated with casino gambling: Roulette,  
160 dice, or baccarat card games: *Provided*, That games  
161 having a video display depicting symbols which appear to  
162 roll on drums to simulate a classic casino slot machine,  
163 game themes of other card games and keno may be used.

164 (w) "Validation manager" means a person who holds a  
165 permit issued by the commission and who performs video  
166 lottery ticket redemption services.

167 (x) "Video lottery" means a lottery which allows a  
168 game to be played utilizing an electronic computer and an  
169 interactive computer terminal device, equipped with a  
170 video screen and keys, a keyboard or other equipment  
171 allowing input by an individual player, into which terminal  
172 device the player inserts coins or currency as  
173 consideration in order for play to be available, and  
174 through which terminal device the player may receive free  
175 games or credit that can be redeemed for cash, or nothing,  
176 as may be determined wholly or predominantly by  
177 chance. "Video lottery" does not include a lottery game  
178 which merely utilizes an electronic computer and a video  
179 screen to operate a lottery game and communicate the  
180 results thereof, such as the game "Travel," and which does  
181 not utilize an interactive electronic terminal device  
182 allowing input by an individual player.

183 (y) "Video lottery terminal" means a commission-  
184 approved interactive electronic terminal device which is  
185 connected with the commission's central computer system,  
186 and which is used for the purpose of playing video lottery  
187 games authorized by the commission. A video lottery  
188 terminal may simulate the play of one or more video  
189 lottery games.

190 (z) "Wager" means a sum of money or thing of value  
191 risked on an uncertain occurrence.

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## CHAPTER 217

(H. B. 4739—By Delegates Kliss, Burke and Farris)

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[Passed March 8, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section eight, article twenty-two-a, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to local option elections to determine whether video lottery games shall be permitted at pari-mutuel racetracks; limiting the election on this question to general elections; and defining the term "two-years" for purposes of this section.

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

That section eight, article twenty-two-a, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 22A. RACETRACK VIDEO LOTTERY.**

**§29-22A-8. Form of application; local option elections; issuance of license; notice of incomplete application; notice of license or permit denial, suspension or revocation; procedure for review of license or permit denial, suspension or revocation; fees, renewal fees and renewal dates; bonding; renewal of licenses and permits; notice of change affecting license or permit; license or permit not transferrable or assignable.**

1 (a) The commission shall determine the form of  
2 applications to be used and shall not consider incomplete  
3 applications. The commission may consider an application  
4 when the applicant has completed and executed all forms  
5 and documents required by the commission and all  
6 application fees and costs have been paid.

7 (b) The question of whether video lottery games shall  
8 be permitted at pari-mutuel racetracks shall be determined  
9 by local option election in each county in which a  
10 pari-mutuel racetrack is located. The local option election  
11 on this question may be placed on the ballot in each  
12 county at the primary election to be held on the tenth day  
13 of May, one thousand nine hundred ninety-four, or at any  
14 general election to be held thereafter. The county  
15 commission of the county in which the racetrack is located  
16 shall give notice to the public of such election by  
17 publication thereof as a Class II-0 legal advertisement in  
18 compliance with the provisions of article three, chapter  
19 fifty-nine of this code, and the publication area for the  
20 publication shall be the county in which the election is to  
21 be held. The date of the last publication of the notice  
22 shall fall on a date within the period of the fourteen  
23 consecutive days next preceding the election.

24 On the local option election ballot shall be printed the  
25 following:

26 Shall West Virginia lottery commission video lottery  
27 games be permitted within an area at the [name of  
28 racetrack] in which pari-mutuel betting is authorized by  
29 law?

30 [ ] Yes [ ] No

31 (Place a cross mark in the square opposite your  
32 choice.)

33 The ballots shall be counted, returns made and  
34 canvassed as in general elections, and the results certified  
35 by the commissioners of election to the county com-  
36 mission. The county commission shall, without delay,  
37 certify the result of the election to the commission.

38 (c) Upon receipt of the results of the election from the  
39 county commission, and if a majority has voted "yes", the  
40 commission shall issue the requested license if the  
41 applicant is otherwise qualified for the license. If a  
42 majority has voted "no", the commission shall so notify the  
43 applicant, the application shall be denied, and another  
44 election on the issue shall not be held for a period of two  
45 years: *Provided*, That for purposes of this section, the  
46 term "two years" means the interval between a general  
47 election and the next general election, and in no event  
48 shall it mean or encompass a period of time in excess of  
49 one hundred four weeks. If a majority has voted "yes",  
50 another local option election on the issue shall not be held  
51 for a period of five years. A local option election may  
52 thereafter be held if a written petition of qualified voters  
53 residing within the county equal to at least five percent of  
54 the number of persons who were registered to vote in the  
55 next preceding general election is received by the county  
56 commission of the county in which the horse or dog  
57 racetrack is located. The petition may be in any number  
58 of counterparts.

59 The petition shall be in the following form:

60 Petition For Local Option Election

61 We, the undersigned legally qualified voters, resident  
 62 within the county of \_\_\_\_\_, do hereby  
 63 petition that a special election be held within the county of  
 64 \_\_\_\_\_ upon the following question: Shall  
 65 West Virginia lottery commission video lottery games be  
 66 permitted within an area at the [name of racetrack] in  
 67 which pari-mutuel betting is authorized by law?

68	Name	Address	Date
69	(Post office or street address)		

70 (d) If the commission, prior to the first day of  
 71 November, one thousand nine hundred ninety-three, has  
 72 authorized any racetrack to conduct video lottery games at  
 73 its pari-mutuel facility, the games may continue to operate  
 74 until the first day of January, one thousand nine hundred  
 75 ninety-five, pending the results of any local option  
 76 election held pursuant to the provisions of this section.

77 (e) The commission may not issue any license or  
 78 permit until background investigations are concluded.  
 79 The commission must make an affirmative determination  
 80 that the applicant is qualified and the applicable license or  
 81 permit fees have been paid prior to issuing any license or  
 82 permit.

83 (f) The commission shall notify the applicant if an  
 84 application is incomplete and the notification shall state  
 85 the deficiencies in the application.

86 (g) The commission shall notify applicants in writing  
 87 of the denial, suspension or revocation of a permit or  
 88 license and the reasons for the denial, suspension or  
 89 revocation in accordance with the provisions of section  
 90 fifteen of this article.

91 (h) An applicant may request a hearing to review a  
 92 license or permit denial, suspension or revocation in  
 93 accordance with section fifteen of this article.

94 (i) The following license or permit fees shall be paid  
 95 annually by each licensed racetrack, or permitted  
 96 manufacturer, service technician or validation manager:

97 (1) Racetrack: \$1,000.



98 (2) Manufacturer: \$10,000.

99 (3) Service technician: \$100.

100 (4) Validation manager: \$50.

101 The fees shall be paid to the commission at the time of  
102 license or permit application and on or before the first day  
103 of July of each year thereafter, at which time the license or  
104 permit may be renewed.

105 (j) An applicant for a video lottery license shall, prior  
106 to the issuance of the license, post a bond or irrevocable  
107 letter of credit in a manner and in an amount established  
108 by the commission. The bond shall be issued by a surety  
109 company authorized to transact business in West Virginia  
110 and the company shall be approved by the insurance  
111 commissioner of this state as to solvency and  
112 responsibility.

113 (k) The commission shall renew video lottery licenses  
114 and permits annually as of the first day of July of each  
115 year, if each person seeking license or permit renewal  
116 submits the applicable renewal fee, completes all renewal  
117 forms provided by the commission, and continues to meet  
118 all qualifications for a license or permit.

119 (l) License and permit holders shall notify the  
120 commission of any proposed change of ownership or  
121 control of the license or permit holder and of all other  
122 transactions or occurrences relevant to license or permit  
123 qualification. In order for a license or permit to remain in  
124 effect, commission approval is required prior to  
125 completion of any proposed change of ownership or  
126 control of a license or permit holder.

127 (m) A license or permit is a privilege personal to the  
128 license or permit holder and is not a legal right. A license  
129 or permit granted or renewed pursuant to this article may  
130 not be transferred or assigned to another person, nor may  
131 a license or a permit be pledged as collateral. The  
132 purchaser or successor of any license or permit holder  
133 must independently qualify for a license or permit. The  
134 sale of more than five percent of a license or permit  
135 holder's voting stock, or more than five percent of the

136 voting stock of a corporation which controls the license or  
137 permit holder or the sale of a license or permit holder's  
138 assets, other than those bought and sold in the ordinary  
139 course of business, or any interest therein, to any person  
140 not already determined to have met the qualifications of  
141 section seven of this article voids the license unless the sale  
142 has been approved in advance by the commission.

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## CHAPTER 218

(H. B. 4169—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)  
[By Request of the Executive]

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[Passed March 9, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section ten, article twenty-two-a, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating generally to race track video lottery; the division of net terminal income; the completion of the veterans memorial by deposit of income from video lottery terminals into the division of culture and history fund; providing for the annual payment of the bond indebtedness of the veterans memorial; providing that after the bonded indebtedness of the veterans memorial is paid that twenty thousand dollars be paid into a special revenue fund to provide markers for veterans graves; authorizing legislative rules; providing for the establishment of a veterans memorial archives within the division of culture and history; establishing the position of director of monuments; specifying effective dates; and providing for the restoration and maintenance of monuments located on the capitol grounds.

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

That section ten, article twenty-two-a, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 22A. RACETRACK VIDEO LOTTERY.**

**§29-22A-10. Accounting and reporting; commission to provide communications protocol data; distribution of net terminal income; remittance through electronic transfer of funds; establishment of accounts and nonpayment penalties; commission control of accounting for net terminal income; settlement of accounts; manual reporting and payment may be required; request for reports; examination of accounts and records.**

1 (a) The commission shall provide to manufacturers, or  
2 applicants applying for a manufacturer's permit, the proto-  
3 col documentation data necessary to enable the respective  
4 manufacturer's video lottery terminals to communicate  
5 with the commission's central computer for transmitting  
6 auditing program information and for activation and dis-  
7 abling of video lottery terminals.

8 (b) The gross terminal income of a licensed racetrack  
9 shall be remitted to the commission through the electronic  
10 transfer of funds. Licensed racetracks shall furnish to the  
11 commission all information and bank authorizations re-  
12 quired to facilitate the timely transfer of moneys to the  
13 commission. Licensed racetracks must provide the com-  
14 mission thirty days' advance notice of any proposed ac-  
15 count changes in order to assure the uninterrupted elec-  
16 tronic transfer of funds. From the gross terminal income  
17 remitted by the licensee to the commission, the commis-  
18 sion shall deduct an amount sufficient to reimburse the  
19 commission for its actual costs and expenses incurred in  
20 administering racetrack video lottery at the licensed race-  
21 track, and the resulting amount after such deduction shall  
22 be the net terminal income. The amount deducted for  
23 administrative costs and expenses of the commission may  
24 not exceed four percent of gross terminal income.

25 (c) Net terminal income shall be divided as set out in  
26 this subsection. The licensed racetrack's share shall be in  
27 lieu of all lottery agent commissions and is considered to  
28 cover all costs and expenses required to be expended by

29 the licensed racetrack in connection with video lottery  
30 operations. The division shall be made as follows:

31 (1) The commission shall receive thirty percent of net  
32 terminal income, which shall be paid into the general reve-  
33 nue fund of the state to be appropriated by the Legisla-  
34 ture;

35 (2) Fourteen percent of net terminal income at a li-  
36 censed racetrack shall be deposited in the special fund  
37 established by the licensee, and used for payment of regu-  
38 lar purses in addition to other amounts provided for in  
39 article twenty-three, chapter nineteen of this code;

40 (3) The county where the video lottery terminals are  
41 located shall receive two percent of the net terminal in-  
42 come;

43 (4) One half of one percent of net terminal income  
44 shall be paid for and on behalf of all employees of the  
45 licensed racing association by making a deposit into a  
46 special fund to be established by the racing commission to  
47 be used for payment into the pension plan for all employ-  
48 ees of the licensed racing association;

49 (5) The West Virginia thoroughbred development  
50 fund created under section thirteen-b, article twenty-three,  
51 chapter nineteen of this code and the West Virginia grey-  
52 hound breeding development fund created under section  
53 ten, article twenty-three, chapter nineteen of this code shall  
54 receive an equal share of a total of not less than one and  
55 one-half percent of the net terminal income: *Provided,*  
56 That for any racetrack which does not have a breeder's  
57 program supported by the thoroughbred development  
58 fund or the greyhound breeding development fund, the  
59 one and one-half percent provided for in this subdivision  
60 shall be deposited in the special fund established by the  
61 licensee and used for payment of regular purses, in addi-  
62 tion to other amounts provided for in subdivision (2) of  
63 this subsection and article twenty-three, chapter nineteen  
64 of this code;

65 (6) The West Virginia thoroughbred breeders classic  
66 shall receive one percent of the net terminal income which  
67 shall be used for purses. The moneys shall be deposited

68 in the separate account established for the classic under  
69 section thirteen, article twenty-three, chapter nineteen of  
70 this code;

71 (7) A licensee shall receive forty-seven percent of net  
72 terminal income;

73 (8) The tourism promotion fund established in section  
74 nine, article one, chapter five-b of this code shall receive  
75 three percent of the net terminal income; and

76 (9) The veterans memorial program shall receive one  
77 percent of the net terminal income until sufficient moneys  
78 have been received to complete the veterans memorial on  
79 the grounds of the state capitol complex in Charleston,  
80 West Virginia. The moneys shall be deposited in the state  
81 treasury in the division of culture and history special fund  
82 created under section three, article one-i, chapter  
83 twenty-nine of this code: *Provided*, That only after suffi-  
84 cient moneys have been deposited in the fund to complete  
85 the veterans memorial and to pay in full the annual bond-  
86 ed indebtedness on the veterans memorial, not more than  
87 twenty thousand dollars of the one percent of net terminal  
88 income provided for in this subdivision shall be deposited  
89 into a special revenue fund in the state treasury, to be  
90 known as the "John F. 'Jack' Bennett Fund". The moneys  
91 in this fund shall be expended by the division of veterans  
92 affairs to provide for the placement of markers for the  
93 graves of veterans in perpetual cemeteries in this state.  
94 The division of veterans affairs shall promulgate legislative  
95 rules pursuant to the provisions of article three, chapter  
96 twenty-nine-a of this code specifying the manner in which  
97 the funds are spent, determine the ability of the surviving  
98 spouse to pay for the placement of the marker, and setting  
99 forth the standards to be used to determine the priority in  
100 which the veterans grave markers will be placed in the  
101 event that there are not sufficient funds to complete the  
102 placement of veterans grave markers in any one year, or at  
103 all. The remainder of the one percent of terminal income  
104 shall then continue to be deposited in the special fund in  
105 the division of culture and history created under section  
106 three, article one-i, chapter twenty-nine of this code and be  
107 expended by the division of culture and history to estab-

108 lish a West Virginia veterans memorial archives within the  
109 cultural center to serve as a repository for the documents  
110 and records pertaining to the veterans memorial, to restore  
111 and maintain the monuments and memorial on the capitol  
112 grounds and to pay the salary and benefits of a director of  
113 monuments. The director of monuments shall be respon-  
114 sible for restoring and maintaining all monuments and  
115 memorials situated upon the grounds of the capitol in  
116 Charleston, West Virginia, and, to the extent there are  
117 moneys remaining in this fund thereafter, the director of  
118 monuments may use the balance to landscape the capitol  
119 grounds. The director of monuments shall be under the  
120 supervision of and report to the commissioner of the divi-  
121 sion of culture and history. The provisions of this subdi-  
122 vision relating to the creation of the position of director of  
123 monuments shall be effective the first day of January, one  
124 thousand nine hundred ninety-seven.

125 (d) Each licensed racetrack shall maintain in its ac-  
126 count an amount equal to or greater than the gross termi-  
127 nal income from its operation of video lottery machines,  
128 to be electronically transferred by the commission on  
129 dates established by the commission. Upon a licensed  
130 racetrack's failure to maintain this balance, the commission  
131 may disable all of a licensed racetrack's video lottery ter-  
132 minals until full payment of all amounts due is made.  
133 Interest shall accrue on any unpaid balance at a rate con-  
134 sistent with the amount charged for state income tax delin-  
135 quency under chapter eleven of this code, which interest  
136 shall begin to accrue on the date payment is due to the  
137 commission.

138 (e) The commission's central control computer shall  
139 keep accurate records of all income generated by each  
140 video lottery terminal. The commission shall prepare and  
141 mail to the licensed racetrack a statement reflecting the  
142 gross terminal income generated by the licensee's video  
143 lottery terminals. Each licensed racetrack must report to  
144 the commission any discrepancies between the commis-  
145 sion's statement and each terminal's mechanical and elec-  
146 tronic meter readings. The licensed racetrack is solely  
147 responsible for resolving income discrepancies between  
148 actual money collected and the amount shown on the

149 accounting meters or on the commission's billing state-  
150 ment.

151 (f) Until an accounting discrepancy is resolved in  
152 favor of the licensed racetrack, the commission may make  
153 no credit adjustments. For any video lottery terminal  
154 reflecting a discrepancy, the licensed racetrack shall sub-  
155 mit to the commission the maintenance log which includes  
156 current mechanical meter readings and the audit ticket  
157 which contains electronic meter readings generated by the  
158 terminal's software. If the meter readings and the commis-  
159 sion's records cannot be reconciled, final disposition of the  
160 matter shall be determined by the commission. Any ac-  
161 counting discrepancies which cannot be otherwise resolved  
162 shall be resolved in favor of the commission.

163 (g) Licensed racetracks shall remit payment by mail if  
164 the electronic transfer of funds is not operational or the  
165 commission notifies licensed racetracks that remittance by  
166 this method is required. The licensed racetracks shall  
167 report an amount equal to the total amount of cash insert-  
168 ed into each video lottery terminal operated by a licensee,  
169 minus the total value of game credits which are cleared  
170 from the video lottery terminal in exchange for winning  
171 redemption tickets, and remit such amount as generated  
172 from its terminals during the reporting period. The remit-  
173 tance shall be sealed in a properly addressed and stamped  
174 envelope and deposited in the United States mail no later  
175 than noon on the day when the payment would otherwise  
176 be completed through electronic funds transfer.

177 (h) Licensed racetracks may, upon request, receive  
178 additional reports of play transactions for their respective  
179 video lottery terminals and other marketing information  
180 not considered confidential by the commission. The com-  
181 mission may charge a reasonable fee for the cost of pro-  
182 ducing and mailing any report other than the billing state-  
183 ments.

184 (i) The commission has the right to examine all ac-  
185 counts, bank accounts, financial statements and records in  
186 a licensed racetrack's possession, under its control or in  
187 which it has an interest and the licensed racetrack must  
188 authorize all third parties in possession or in control of  
189 the accounts or records to allow examination of any of  
190 those accounts or records by the commission.

## CHAPTER 219

(H. B. 4745—By Delegates Kiss, Browning, Doyle,  
Warner, Border, Miller and Walters)

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[Passed March 9, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section two, article five, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section five, article two, chapter fifteen of said code, all relating to salary increases for state employees; providing incremental salary increases for state employees based upon years of service; a career progression system for the West Virginia state police; promulgation of rules; salaries for members of the West Virginia state police; salary increases for length of service; exclusion from state wage and hour laws; limitations of supplemental payments; bonds; leave for national guards or reserves; and increasing salaries of members of the West Virginia state police.

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

That section two, article five, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that section five, article two, chapter fifteen of said code be amended and reenacted, all to read as follows:

### Chapter

5. **General Powers and Authority of the Governor, Secretary of State and Attorney General; Board of Public Works; Miscellaneous Agencies, Commissions, Offices, Programs, Etc.**
15. **Public Safety.**

**CHAPTER 5. GENERAL POWERS AND AUTHORITY  
OF THE GOVERNOR, SECRETARY OF STATE AND  
ATTORNEY GENERAL; BOARD OF PUBLIC WORKS;  
MISCELLANEOUS AGENCIES, COMMISSIONS,  
OFFICES, PROGRAMS, ETC.**



**ARTICLE 5. SALARY INCREASE FOR STATE EMPLOYEES.****§5-5-2. Granting incremental salary increases based on years of service.**

1       Effective for the fiscal year beginning the first day of  
2 July, one thousand nine hundred ninety-six, every eligible  
3 employee with three or more years of service shall receive  
4 an annual salary increase equal to fifty dollars times the  
5 employees' years of service, not to exceed twenty years of  
6 service. In each fiscal year thereafter and on the first day  
7 of July, each eligible employee shall receive an annual  
8 increment increase of fifty dollars for that fiscal year.  
9 Every employee becoming newly eligible as a result of  
10 meeting the three years of service minimum requirement  
11 on the first day of July in any fiscal year subsequent to  
12 one thousand nine hundred ninety-six, is entitled to the  
13 annual salary increase equal to fifty dollars times the em-  
14 ployees' years of service, where he or she has not in a  
15 previous fiscal year received the benefit of an increment  
16 computation; and shall receive a single annual increment  
17 increase thereafter of fifty dollars for each subsequent  
18 fiscal year. These incremental increases shall be in addi-  
19 tion to any across-the-board, cost-of-living or percentage  
20 salary increases which may be granted in any fiscal year  
21 by the Legislature. This article shall not be construed to  
22 prohibit other pay increases based on merit, seniority,  
23 promotion or other reason, if funds are available for the  
24 other pay increases: *Provided*, That the executive head of  
25 each spending unit shall first grant the mandated increase  
26 in compensation in this section to all eligible employees  
27 prior to the consideration of any increases based on merit,  
28 seniority, promotion or other reason.

**CHAPTER 15. PUBLIC SAFETY.****ARTICLE 2. WEST VIRGINIA STATE POLICE.****§15-2-5. Career progression system; salaries; exclusion from wage and hour law, with supplemental payment; bond; leave time for members called to duty in guard or reserves.**

1       (a) The superintendent shall establish within the West  
2 Virginia state police a system to provide for: The promo-  
3 tion of members to the supervisory ranks of sergeant, first

4 sergeant, second lieutenant and first lieutenant; the classifi-  
 5 cation of nonsupervisory members within the field opera-  
 6 tions force to the ranks of trooper, senior trooper, trooper  
 7 first class or corporal; the classification of members as-  
 8 signed to the forensic laboratory as criminalist I-VII; and  
 9 the temporary reclassification of members assigned to  
 10 administrative duties as administrative support specialist  
 11 I-VIII.

12 (b) The superintendent is authorized to promulgate  
 13 legislative rules in accordance with article three, chapter  
 14 twenty-nine-a of this code for the purpose of ensuring  
 15 consistency, predictability and independent review of any  
 16 system developed under the provisions of this section.

17 (c) The superintendent shall provide to each member a  
 18 written manual governing any system established under  
 19 the provisions of this section and specific procedures shall  
 20 be identified for the evaluation and testing of members for  
 21 promotion or reclassification and the subsequent place-  
 22 ment of any members on a promotional eligibility or  
 23 reclassification recommendation list.

24 (d) Members shall receive annual salaries as follows:

25 ANNUAL SALARY SCHEDULE (BASE PAY)  
 26 SUPERVISORY AND NONSUPERVISORY RANKS

27	Cadet During Training . . . . .	\$1,684 Mo.	\$20,208
28	Cadet Trooper After Training . . . .	1,799 Mo.	21,588
29	Trooper Second Year . . . . .		21,984
30	Trooper Third Year . . . . .		22,308
31	Trooper Fourth & Fifth Year . . . . .		22,560
32	Senior Trooper . . . . .		24,360
33	Trooper First Class . . . . .		26,160
34	Corporal . . . . .		27,960
35	Sergeant . . . . .		31,560
36	First Sergeant . . . . .		33,360
37	Second Lieutenant . . . . .		35,160

38	First Lieutenant .....	36,960
39	Captain .....	38,760
40	Major .....	40,560
41	Lieutenant Colonel .....	42,360
42	ANNUAL SALARY SCHEDULE (BASE PAY)	
43	ADMINISTRATION	
44	SUPPORT SPECIALIST CLASSIFICATION	
45	I .....	22,560
46	II .....	24,360
47	III .....	26,160
48	IV .....	27,960
49	V .....	31,560
50	VI .....	33,360
51	VII .....	35,160
52	VIII .....	36,960
53	ANNUAL SALARY SCHEDULE (BASE PAY)	
54	CRIMINALIST CLASSIFICATION	
55	I .....	22,560
56	II .....	24,360
57	III .....	26,160
58	IV .....	27,960
59	V .....	31,560
60	VI .....	33,360
61	VII .....	35,160
62	(e) Each member of the West Virginia state police	
63	whose salary is fixed and specified pursuant to this section	
64	shall receive and is entitled to an increase in salary over	
65	that set forth in subsection (d) of this section, for grade in	
66	rank, based on length of service, including that service	
67	served before and after the effective date of this section	
68	with the West Virginia state police as follows: At the end	
69	of five years of service with the West Virginia state police,	

70 the member shall receive a salary increase of three hun-  
71 dred dollars to be effective during his or her next three  
72 years of service and a like increase at three-year intervals  
73 thereafter, with the increases to be cumulative.

74 (f) In applying the salary schedules set forth in this  
75 section where salary increases are provided for length of  
76 service, members of the West Virginia state police in ser-  
77 vice at the time the schedules become effective shall be  
78 given credit for prior service and shall be paid such sala-  
79 ries as the same length of service entitles them to receive  
80 under the provisions of this section.

81 (g) The Legislature finds and declares that because of  
82 the unique duties of members of the West Virginia state  
83 police, it is not appropriate to apply the provisions of state  
84 wage and hour laws to them. Accordingly, members of  
85 the West Virginia state police are hereby excluded from  
86 the provisions of state wage and hour law. This express  
87 exclusion shall not be construed as any indication that the  
88 members were or were not covered by the wage and hour  
89 law prior to this exclusion.

90 In lieu of any overtime pay they might otherwise have  
91 received under the wage and hour law, and in addition to  
92 their salaries and increases for length of service, members  
93 who have completed basic training and who are exempt  
94 from federal Fair Labor Standards Act guidelines may  
95 receive supplemental pay as provided in this section.

96 The superintendent shall, within thirty days after the  
97 effective date of this section, promulgate a legislative rule  
98 to establish the number of hours per month which consti-  
99 tute the standard work month for the members of the West  
100 Virginia state police. The rule shall further establish, on a  
101 graduated hourly basis, the criteria for receipt of a portion  
102 or all of supplemental payment when hours are worked in  
103 excess of the standard work month. The legislative rule  
104 shall be promulgated pursuant to the provisions of article  
105 three, chapter twenty-nine-a of this code. The superinten-  
106 dent shall certify monthly to the West Virginia state po-  
107 lice's payroll officer the names of those members who  
108 have worked in excess of the standard work month and the  
109 amount of their entitlement to supplemental payment.

110 The supplemental payment may not exceed two hun-  
 111 dred thirty-six dollars monthly. The superintendent and  
 112 civilian employees of the West Virginia state police are not  
 113 eligible for any supplemental payments.

114 (h) Each member of the West Virginia state police,  
 115 except the superintendent and civilian employees, shall  
 116 execute, before entering upon the discharge of his or her  
 117 duties, a bond with security in the sum of five thousand  
 118 dollars payable to the state of West Virginia, conditioned  
 119 upon the faithful performance of his or her duties, and the  
 120 bond shall be approved as to form by the attorney general  
 121 and as to sufficiency by the governor.

122 (i) Any member of the West Virginia state police who  
 123 is called to perform active duty for training or inactive  
 124 duty training in the national guard or any reserve compo-  
 125 nent of the armed forces of the United States annually  
 126 shall be granted, upon request, leave time not to exceed  
 127 thirty calendar days for the purpose of performing the  
 128 active duty for training or inactive duty training and the  
 129 time granted may not be deducted from any leave accu-  
 130 mulated as a member of the West Virginia state police.

131 (j) Beginning on the first day of July, one thousand  
 132 nine hundred ninety-six, and continuing thereafter mem-  
 133 bers shall receive annual salaries as follows:

134 AMENDED ANNUAL SALARY SCHEDULE		
135 (BASE PAY)		
136 SUPERVISORY AND NONSUPERVISORY RANKS		
137	Cadet During Training . . . . .	\$1,684 Mo. \$20,208
138	Cadet Trooper After Training . .	2,087 Mo. 25,044
139	Trooper Second Year . . . . .	25,500
140	Trooper Third Year . . . . .	25,872
141	Trooper Fourth & Fifth Year . . . . .	26,172
142	Senior Trooper . . . . .	28,260
143	Trooper First Class . . . . .	30,348
144	Corporal . . . . .	32,436
145	Sergeant . . . . .	36,612

146	First Sergeant .....	38,700
147	Second Lieutenant .....	40,788
148	First Lieutenant .....	42,876
149	Captain .....	44,964
150	Major .....	47,052
151	Lieutenant Colonel .....	49,140

152           **AMENDED ANNUAL SALARY SCHEDULE**  
 153                   **(BASE PAY) ADMINISTRATION**  
 154           **SUPPORT SPECIALIST CLASSIFICATION**

155	I .....	26,172
156	II .....	28,260
157	III .....	30,348
158	IV .....	32,436
159	V .....	36,612
160	VI .....	38,700
161	VII .....	40,788
162	VIII .....	42,876

163           **AMENDED ANNUAL SALARY SCHEDULE**  
 164                   **(BASE PAY)**  
 165           **CRIMINALIST CLASSIFICATION**

166	I .....	26,172
167	II .....	28,260
168	III .....	30,348
169	IV .....	32,436
170	V .....	36,612
171	VI .....	38,700
172	VII .....	40,788

173           Each member of the West Virginia state police whose  
 174 salary is fixed and specified in the amended annual salary  
 175 schedules is entitled to the length of service increases set  
 176 forth in subsection (f) of this section and supplemental  
 177 pay as provided in subsection (h) of this section.

## CHAPTER 220

(H. B. 4081—By Delegates J. Martin, Varner, Love,  
Nesbitt and Stalnaker)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section one, article six, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, continuing the state building commission until the first day of July, one thousand nine hundred ninety-seven.

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

That section one, article six, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 6. STATE BUILDING COMMISSION.

#### **§5-6-1. Name of state office building commission changed; composition; appointment, terms and qualifications of members; chairman and secretary; compensation and expenses; powers and duties generally; frequency of meetings; continuation.**

1 "The state office building commission of West  
2 Virginia," heretofore created, shall continue in existence  
3 but on and after the ninth day of February, one thousand  
4 nine hundred sixty-six, shall be known and designated as  
5 "The state building commission of West Virginia" and  
6 shall continue as a body corporate and as an agency of the  
7 state of West Virginia. On and after the date aforesaid, the  
8 commission shall consist of the governor, attorney general,  
9 state treasurer and four additional members to be  
10 appointed by the governor by and with the advice and  
11 consent of the Senate. The terms of office for said  
12 members to be appointed by the governor shall be four  
13 years, except that the terms of office of the first four  
14 members so appointed by the governor shall be for one,  
15 two, three and four years, respectively. No more than three  
16 of such members so appointed by the governor shall be

17 members of the same political party, nor shall any of said  
18 members be members or employees of the executive,  
19 legislative or judicial branches of government of West  
20 Virginia or any political subdivision thereof. The gov-  
21 ernor shall be chairman of the commission. The secretary  
22 of state shall be a member of the commission and serve as  
23 its secretary, but shall not have the right to vote upon  
24 matters before the commission. All members of the  
25 commission shall be citizens and residents of this state.  
26 The members of the commission shall be paid or  
27 reimbursed for their necessary expenses incurred under  
28 this article, but shall receive no compensation for their  
29 services as members or officers of the commission: *Pro-*  
30 *vided*, That each member of the commission appointed by  
31 the governor shall, in addition to such reimbursement for  
32 necessary expenses, receive an amount not to exceed the  
33 same compensation as is paid to members of the  
34 Legislature for their interim duties as recommended by  
35 the citizens legislative compensation commission and  
36 authorized by law for each day or substantial portion  
37 thereof that he is engaged in the work of the commission.  
38 Such expenses and per diem shall be paid solely from  
39 funds provided under the authority of this article, and the  
40 commission shall not proceed to exercise or carry out any  
41 authority or power herein given it to bind said commission  
42 beyond the extent to which money has been provided  
43 under the authority of this article. On or before the  
44 fifteenth day of each month, the commission shall prepare  
45 and transmit to the president and minority leader of the  
46 Senate and the speaker and the minority leader of the  
47 House of Delegates a report covering the activities of the  
48 said commission for the preceding calendar month.

49 Pursuant to the provisions of article ten, chapter four  
50 of this code, the Legislature hereby finds and declares that  
51 the state building commission should be continued and  
52 reestablished. Accordingly, notwithstanding the provisions  
53 of article ten, chapter four of this code, the state building  
54 commission shall continue to exist until the first day of  
55 July, one thousand nine hundred ninety-seven, to allow for  
56 completion of a preliminary performance review by the  
57 joint committee on government operations.



# CHAPTER 221

(S. B. 122—By Senators Wiedebusch, Yoder, Minear, Wagner,  
Bowman, Grubb, Sharpe and Blatnik)

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[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section four, article eleven, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the West Virginia human rights commission until the first day of July, one thousand nine hundred ninety-seven.

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

That section four, article eleven, chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

## ARTICLE 11. HUMAN RIGHTS COMMISSION.

### §5-11-4. Human rights commission continued; status, powers and objects.

1       The West Virginia human rights commission, hereto-  
2 fore created, is hereby continued. The commission shall  
3 have the power and authority and shall perform the func-  
4 tions and services as in this article prescribed and as other-  
5 wise provided by law. The commission shall encourage  
6 and endeavor to bring about mutual understanding and  
7 respect among all racial, religious and ethnic groups with-  
8 in the state and shall strive to eliminate all discrimination  
9 in employment and places of public accommodations by  
10 virtue of race, religion, color, national origin, ancestry, sex,  
11 age, blindness or handicap and shall strive to eliminate all  
12 discrimination in the sale, purchase, lease, rental or financ-  
13 ing of housing and other real property by virtue of race,  
14 religion, color, national origin, ancestry, sex, blindness,  
15 handicap or familial status.

16       Pursuant to the provisions of article ten, chapter four  
17 of this code, the West Virginia human rights commission  
18 shall continue to exist until the first day of July, one thou-

19 sand nine hundred ninety-seven, to allow for monitoring  
20 of compliance with recommendations contained in the  
21 preliminary performance review and to allow for further  
22 review by the joint committee on government operations.

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## CHAPTER 222

(S. B. 110—By Senators Wagner, Bowman, Wiedebusch, Yoder and Minear)

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[Passed March 5, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section eighteen, article six, chapter twelve of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the West Virginia board of investments until the first day of July, one thousand nine hundred ninety-seven.

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

That section eighteen, article six, chapter twelve of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 6. WEST VIRGINIA STATE BOARD OF INVESTMENTS.**

**§12-6-18. West Virginia board of investments continued.**

1 After having conducted a performance review through  
2 its joint committee on government operations, pursuant to  
3 article ten, chapter four of this code, the Legislature here-  
4 by finds and declares that the West Virginia board of in-  
5 vestments should be continued and reestablished. Accord-  
6 ingly, notwithstanding the provisions of article ten, chapter  
7 four of this code, the West Virginia board of investments  
8 shall continue to exist until the first day of July, one thou-  
9 sand nine hundred ninety-seven, to allow for monitoring  
10 of compliance with recommendations contained in the  
11 preliminary performance review and to allow for further  
12 review by the joint committee on government operations.

## CHAPTER 223

(S. B. 120—By Senators Wiedebusch, Yoder, Minear,  
Wagner, Bowman and Buckalew)

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[Passed February 21, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section two, article two, chapter fifteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the West Virginia state police until the first day of July, one thousand nine hundred ninety-seven.

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

That section two, article two, chapter fifteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 2. WEST VIRGINIA STATE POLICE.

#### §15-2-2. Superintendent; departmental headquarters; continuation of the state police.

1       The department of public safety, heretofore estab-  
2       lished, shall be continued and hereafter shall be known as  
3       the West Virginia state police. Wherever the words "de-  
4       partment of public safety" or "division of public safety"  
5       appear in this code, they shall mean the West Virginia state  
6       police. The governor shall nominate, and by and with the  
7       advice and consent of the Senate, appoint a superintendent  
8       to be the executive and administrative head of the depart-  
9       ment. Notwithstanding any provision of this code to the  
10      contrary, the superintendent shall be paid an annual salary  
11      of sixty thousand dollars. The superintendent shall hold  
12      the rank of colonel and is entitled to all rights, benefits  
13      and privileges of regularly enlisted members. On the date  
14      of his or her appointment, the superintendent shall be at  
15      least thirty years of age. Before entering upon the dis-  
16      charge of the duties of his or her office, he or she shall  
17      execute a bond in the penalty of ten thousand dollars,  
18      payable to the state of West Virginia and conditioned  
19      upon the faithful performance of his or her duties. Such

20 bond both as to form and security shall be approved as to  
21 form by the attorney general, and to sufficiency by the  
22 governor.

23 Before entering upon the duties of his or her office  
24 the superintendent shall subscribe to the oath hereinafter  
25 provided. The headquarters of the department shall be  
26 located in Kanawha County.

27 Pursuant to the provisions of article ten, chapter four  
28 of this code, the West Virginia state police shall continue  
29 to exist until the first day of July, one thousand nine hun-  
30 dred ninety-seven, to allow for the completion of a prelim-  
31 inary performance review through the joint committee on  
32 government operations.

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## CHAPTER 224

(S. B. 114—By Senators Wagner, Bowman, Wiedebusch, Yoder and Minear)

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[Passed March 5, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section one, article two-a, chapter seventeen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the division of highways until the first day of July, two thousand two.

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

That section one, article two-a, chapter seventeen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 2A. WEST VIRGINIA COMMISSIONER OF HIGHWAYS.**

**§17-2A-1. Duties of state road commissioner transferred to division of highways; department to act through commissioner of highways; termination of division; office of commissioner of highways created; appointment, etc.**

1 The office of state road commissioner heretofore  
2 existing is hereby continued in all respects as heretofore  
3 constituted, but is hereby designated as the West Virginia  
4 division of highways. All duties and responsibilities  
5 heretofore imposed upon the state road commissioner and  
6 the powers exercised by him are hereby transferred to the  
7 West Virginia division of highways and such duties and  
8 responsibilities shall be performed by the said division and  
9 the powers may be exercised thereby through the West  
10 Virginia commissioner of highways, who shall be the chief  
11 executive officer of the division.

12 Pursuant to the provisions of article ten, chapter four  
13 of this code, the West Virginia division of highways shall  
14 continue to exist until the first day of July, two thousand  
15 two.

16 There is hereby continued the office of West Virginia  
17 commissioner of highways, who shall be appointed by the  
18 governor, by and with the advice and consent of the  
19 Senate, subject to the provisions of section two-a, article  
20 seven, chapter six of this code.

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## CHAPTER 225

(S. B. 127—By Senators Wiedebusch, Yoder, Minear, Wagner and Bowman)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section eighteen, article nine-d, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the school building authority until the first day of July, one thousand nine hundred ninety-seven.

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

That section eighteen, article nine-d, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 9D. SCHOOL BUILDING AUTHORITY.**

**§18-9D-18. Continuation.**

1 Pursuant to the provisions of article ten, chapter four  
 2 of this code, the school building authority shall continue  
 3 to exist until the first day of July, one thousand nine  
 4 hundred ninety-seven, to allow for monitoring of  
 5 compliance with recommendations contained in the  
 6 full-performance audit and to allow for further review by  
 7 the joint committee on government operations.

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## CHAPTER 226

(S. B. 128—By Senators Wagner, Bowman, Wiedebusch, Yoder and Minear)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section two, article ten-a, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the division of rehabilitation services until the first day of July, one thousand nine hundred ninety-seven.

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

That section two, article ten-a, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 10A. VOCATIONAL REHABILITATION.****§18-10A-2. Division of rehabilitation services.**

1 The division of rehabilitation services is hereby trans-  
 2 ferred to the department of education and the arts created  
 3 in article one, chapter five-f of this code. The secretary  
 4 shall appoint any such board, commission or council over  
 5 the division to the extent required by federal law to quali-  
 6 fy for federal funds for providing rehabilitation services  
 7 for disabled persons. The secretary and such boards,  
 8 commissions or councils as he or she is required by feder-  
 9 al law to appoint are authorized and directed to cooperate  
 10 with the federal government to the fullest extent in an

11 effort to provide rehabilitation services for disabled  
12 persons.

13 References in this article or article ten-b of this  
14 chapter to the state board of vocational education, the state  
15 board of rehabilitation or the state board as the governing  
16 board of vocational or other rehabilitation services or  
17 facilities means the secretary of education and the arts.  
18 All references in the code to the division of vocational  
19 rehabilitation means the division of rehabilitation services  
20 and all references to the director of the division of  
21 vocational rehabilitation means the director of the division  
22 of rehabilitation services.

23 Notwithstanding the provisions of article ten, chapter  
24 four of this code, the division of rehabilitation services  
25 shall terminate on the first day of July, one thousand nine  
26 hundred ninety-seven to allow for monitoring of com-  
27 pliance with recommendations contained in the full per-  
28 formance audit and to allow for further review by the joint  
29 committee on government operations.

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## CHAPTER 227

(H. B. 4084—By Delegates J. Martin, Varner, Love,  
Nesbitt and Stalnaker)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section five, article one, chapter twenty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, continuing the division of labor until the first day of July, two thousand two.

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

That section five, article one, chapter twenty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**§21-1-5. Reestablishment of division; findings.**

1 After having conducted a performance audit through  
2 its joint committee on government operations, pursuant to  
3 article ten, chapter four of this code, the Legislature  
4 hereby finds and declares that the division of labor should  
5 be continued and reestablished. Accordingly, notwith-  
6 standing the provisions of article ten, chapter four of this  
7 code, the division of labor shall continue to exist until the  
8 first day of July, two thousand two.

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## CHAPTER 228

(S. B. 109—By Senators Wagner, Bowman, Wiedebusch, Yoder and Minear)

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[Passed March 5, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section four, article one, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the division of environmental protection until the first day of July, one thousand nine hundred ninety-seven.

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

That section four, article one, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### **ARTICLE 1. DIVISION OF ENVIRONMENTAL PROTECTION.**

#### **§22-1-4. Division of environmental protection continued; appointment of director.**

1 Pursuant to the provisions of article ten, chapter four  
2 of this code, the division of environmental protection shall  
3 continue to exist until the first day of July, one thousand  
4 nine hundred ninety-seven, to allow for the completion of  
5 a performance audit, monitoring of compliance with  
6 recommendations contained in the completed portions of  
7 the performance audit and further review by the joint  
8 committee on government operations.



## CHAPTER 229

(H. B. 4079—By Delegates J. Martin, Varner, Love,  
Nesbitt and Stalnaker)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section seven, article one, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, continuing the office of water resources within the division of environmental protection until the first day of July, one thousand nine hundred ninety-seven.

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

That section seven, article one, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 1. DIVISION OF ENVIRONMENTAL PROTECTION.

#### §22-1-7. Offices within division; continuation of the water resources section.

1 Consistent with the provisions of this article the  
2 director shall, at a minimum, maintain the following  
3 offices within the division:

4 (1) The office of abandoned mine lands and  
5 reclamation, which is charged, at a minimum, with  
6 administering and enforcing, under the supervision of the  
7 director, the provisions of article two of this chapter;

8 (2) The office of mining and reclamation, which is  
9 charged, at a minimum, with administering and enforcing,  
10 under the supervision of the director, the provisions of  
11 articles three and four of this chapter;

12 (3) The office of air quality, which is charged, at a  
13 minimum, with administering and enforcing, under the  
14 supervision of the director, the provisions of article five of  
15 this chapter;

16 (4) The office of oil and gas, which is charged, at a  
17 minimum, with administering and enforcing, under the  
18 supervision of the director, the provisions of articles six,  
19 seven, eight, nine and ten of this chapter;

20 (5) The office of water resources, which is charged, at  
21 a minimum, with administering and enforcing, under the  
22 supervision of the director, the provisions of articles  
23 eleven, twelve, thirteen and fourteen of this chapter; and

24 (6) The office of waste management, which is  
25 charged, at a minimum, with administering and enforcing,  
26 under the supervision of the director, the provisions of  
27 articles fifteen, sixteen, seventeen, eighteen, nineteen and  
28 twenty of this chapter.

29 Pursuant to the provisions of article ten, chapter four  
30 of this code, the office of water resources within the  
31 division of environmental protection shall continue to  
32 exist until the first day of July, one thousand nine hundred  
33 ninety-seven, to allow for monitoring of compliance with  
34 recommendations contained in the preliminary perform-  
35 ance review and to allow for further review by the joint  
36 committee on government operations.

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## CHAPTER 230

(H. B. 4082—By Delegates J. Martin, Varner, Love,  
Nesbitt and Stalnaker)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section four, article two, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, continuing the state geological and economic survey until the first day of July, two thousand two.

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

That section four, article two, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**§29-2-4. State geological and economic survey; director.**

1 Pursuant to the provisions of article ten, chapter four  
2 of this code, the state geological and economic survey  
3 shall continue to exist until the first day of July, two  
4 thousand two. The governor shall appoint as director of  
5 the survey a geologist of established reputation. The  
6 director may employ such assistants and employees as he  
7 may deem necessary. He shall also determine the com-  
8 pensation of all persons employed by the survey, and may  
9 remove them at pleasure.

10 The director may set such reasonable fees as may be  
11 necessary to recover additional costs incurred in per-  
12 forming geological and analytical analyses. These fees  
13 shall be deposited in the state treasury in a special revenue  
14 account, to be known as the "Geological and Analytical  
15 Services Fund". The director is hereby authorized to  
16 expend such funds, as are appropriated by the Legislature,  
17 from this fund for the purpose of defraying said costs.

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## CHAPTER 231

(S. B. 116—By Senators Wiedebusch, Yoder, Minear, Wagner and Bowman)

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[Passed March 5, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section five-a, article six, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the division of personnel until the first day of July, one thousand nine hundred ninety-seven.

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

That section five-a, article six, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 6. CIVIL SERVICE COMMISSION.****§29-6-5a. Termination of division.**

1 Pursuant to the provisions of article ten, chapter four  
2 of this code, the division of personnel shall continue to  
3 exist until the first day of July, one thousand nine hundred  
4 ninety-seven, to allow for monitoring of compliance with  
5 recommendations contained in the full-performance audit  
6 and to allow for further review by the joint committee on  
7 government operations.

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## CHAPTER 232

(S. B. 119—By Senators Wiedebusch, Yoder, Minear, Wagner and Bowman)

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[Passed March 5, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section fifteen, article thirty-one, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to continuing the West Virginia board of examiners in counseling until the first day of July, one thousand nine hundred ninety-seven.

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

That section fifteen, article thirty-one, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 31. LICENSED PROFESSIONAL COUNSELORS.

#### §30-31-15. Continuation of board.

1 After having conducted a preliminary performance  
2 review through its joint committee on government opera-  
3 tions, pursuant to article ten, chapter four of this code, the  
4 Legislature hereby finds and declares that the West Virgin-  
5 ia board of examiners in counseling should be continued  
6 and reestablished. Accordingly, notwithstanding the pro-  
7 visions of article ten, chapter four of this code, the West  
8 Virginia board of examiners in counseling shall continue  
9 to exist until the first day of July, one thousand nine hun-  
10 dred ninety-seven, to allow for monitoring of compliance  
11 with recommendations contained in the preliminary per-  
12 formance review and to allow for further review by the  
13 joint committee on government operations.

## CHAPTER 233

(Com. Sub. for H. B. 2354—By Delegates Jenkins, Kiss, Ashley,  
Thompson and Amores)

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[Passed March 8, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to repeal sections seven and thirty-two, article eleven, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend article one-c of said chapter by adding thereto two new sections, designated sections five-a and fourteen; to amend and reenact section fourteen, article ten of said chapter; to further amend said article by adding thereto four new sections, designated sections seven-b, seven-c, fourteen-c and fourteen-d; to amend and reenact sections three, seventeen, seventeen-a, nineteen, twenty and twenty-seven, article eleven of said chapter; and to further amend said article by adding thereto a new section, designated section forty-three, all relating generally to prohibiting the promulgation of emergency legislative rules relating to the valuation of real or personal property within the state; confidentiality and disclosure of return information to develop or maintain a mineral mapping or geographic information system; creating an offense for violation of confidentiality provisions and setting forth penalties; tax procedures and administration, abatement of interest attributable to errors and delays by tax division; abatement of any penalty or addition to tax attributable to written advice by tax commissioner; petition for reassessments; overpayments, credits and refunds; prompt payment of refunds of personal and corporate net income tax; imposition of estate tax; special lien for estate tax; discharge of nonresident decedent's real property in absence of ancillary administration; final accounting delayed until liability for tax determined; liability of personal representatives; and specifying effective dates.

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

That sections seven and thirty-two, article eleven, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that article one-c of said

chapter be amended by adding thereto two new sections, designated sections five-a and fourteen; that section fourteen, article ten of said chapter be amended and reenacted; that said article be further amended by adding thereto four new sections, designated sections seven-b, seven-c, fourteen-c and fourteen-d; that sections three, seventeen, seventeen-a, nineteen, twenty and twenty-seven, article eleven of said chapter be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section forty-three, all to read as follows:

### **CHAPTER 11. TAXATION.**

#### **Article**

- 1C. Fair and Equal Property Valuation.**
- 10. Procedure and Administration.**
- 11. Estate Taxes.**

#### **ARTICLE 1C. FAIR AND EQUITABLE PROPERTY VALUATION.**

##### **§11-1C-5a. Rules.**

**§11-1C-14. Confidentiality and disclosure of return information to develop or maintain a mineral mapping or geographic information system; offenses; penalties.**

##### **§11-1C-5a. Rules.**

- 1 After the first day of January, one thousand nine
- 2 hundred ninety-six, all rules proposed or promulgated by
- 3 the tax commissioner regarding the valuation of real or
- 4 personal property within the state shall be subject to review
- 5 by the legislative rule-making review committee as provid-
- 6 ed in section eleven, article three, chapter twenty-nine-a of
- 7 this code, and no such rules relating to the valuation of
- 8 real or personal property within the state shall be promul-
- 9 gated as emergency legislative rules pursuant to section
- 10 fifteen, article three, chapter twenty-nine-a of this code.

**§11-1C-14. Confidentiality and disclosure of return information to develop or maintain a mineral mapping or geographic information system; offenses; penalties.**

- 1 (a) All information provided by or on behalf of a
- 2 natural resources property owner or by or on behalf of an
- 3 owner of an interest in natural resources property to any
- 4 state or county representative for use in the valuation or
- 5 assessment of natural resources property or for use in the

6 development or maintenance of a legislatively funded  
7 mineral mapping or geologic information system shall be  
8 confidential. Such information shall be exempt from dis-  
9 closure under section four, article one of chapter  
10 twenty-nine-b of this code, and shall be kept, held and  
11 maintained confidential except to the extent such informa-  
12 tion is needed by the state tax commissioner to defend an  
13 appraisal challenged by the owner or lessee of the natural  
14 resources property subject to the appraisal: *Provided,*  
15 That this section may not be construed to prohibit the  
16 publication or release of information generated as a part  
17 of the minerals mapping or geologic information system,  
18 whether in the form of aggregated statistics, maps, articles,  
19 reports, professional talks or otherwise, presented in accor-  
20 dance with generally accepted practices and in a manner  
21 so as to preclude the identification or determination of  
22 information about particular property owners.

23 (b) Any state or county representative who violates this  
24 section by disclosing confidential information shall be  
25 guilty of a misdemeanor and, upon conviction thereof,  
26 shall be fined not more than one thousand dollars or im-  
27 prisoned for not more than one year, or both such fine  
28 and imprisonment, together with the cost of prosecution.  
29 As used in this section, the term "state or county represen-  
30 tative" includes any current or former state or county  
31 employee, officer, commission or board member, and any  
32 state or county agency, institution, organization, contractor  
33 or subcontractor, and any principal, officer, agent or em-  
34 ployee thereof.

#### ARTICLE 10. PROCEDURE AND ADMINISTRATION.

- §11-10-7b. Abatement of interest attributable to errors and by tax division.
- §11-10-7c. Abatement of any penalty or addition to tax attributable to written advice by tax commissioner.
- §11-10-14. Overpayments; credits; refunds and limitations.
- §11-10-14c. Prompt payment of refunds of personal income taxes.
- §11-10-14d. Prompt payment of refunds of corporation net income taxes.

#### §11-10-7b. Abatement of interest attributable to errors and by tax division.

- 1 (a) *In general.* — In the case of any interest due on:

2 (1) Any deficiency attributable, in whole or in part, to  
3 any error or delay determined by the tax commissioner to  
4 have been caused by an officer or employee of the tax  
5 division (acting in his or her official capacity) in perform-  
6 ing a ministerial act; or

7 (2) Any payment of any tax (or fee) assessed under  
8 section seven of this article to the extent that any error or  
9 delay in such payment is determined by the tax commis-  
10 sioner to be attributable to an officer or employee of the  
11 tax division (acting in his or her official capacity) being  
12 erroneous or dilatory in performing a ministerial act, the  
13 tax commissioner may abate all or any part of such inter-  
14 est for any period. For purposes of the preceding sen-  
15 tence, an error or delay shall be taken into account only if  
16 no significant aspect of such error or delay can be attrib-  
17 utable to the taxpayer (or feepayer) involved, and after the  
18 tax division has contacted the taxpayer (or feepayer) in  
19 writing with respect to such deficiency or payment.

20 (b) *Interest abated with respect to erroneous refund*  
21 *check.* — The tax commissioner may abate the interest  
22 that accrued under section seventeen of this article on any  
23 erroneous refund until the date demand for repayment is  
24 made, unless the taxpayer (or a related party) has in any  
25 way caused such erroneous refund.

**§11-10-7c. Abatement of any penalty or addition to tax attrib-  
utable to written advice by tax commissioner.**

1 (a) *In general.* — The tax commissioner shall abate  
2 any portion of any penalty or addition to tax (or fee)  
3 attributable to erroneous advice furnished to the taxpayer  
4 (or feepayer) in writing by an officer or employee of the  
5 tax division, acting in such officer's or employee's official  
6 capacity.

7 (b) *Limitations.* — Subsection (a) of this section shall  
8 apply only if the tax commissioner finds that all of the  
9 following conditions are satisfied:

10 (1) The written advice was reasonably relied upon by  
11 the taxpayer (or feepayer) and was in response to a specif-  
12 ic written request of the taxpayer (or feepayer); and



13           (2) The portion of the penalty or addition to tax (or  
14 fee) did not result from a failure by the taxpayer (or  
15 feepayer) to provide adequate or accurate information.

16           (c) Any person seeking relief under this section shall  
17 file with the commissioner all of the following:

18           (1) A copy of the person's written request to the com-  
19 missioner and a copy of the commissioner's written advice;

20           (2) A statement signed under penalty of perjury set-  
21 ting forth the facts on which the claim is based;

22           (3) Any other information which the commissioner  
23 may require.

**§11-10-14. Overpayments; credits; refunds and limitations.**

1           (a) *Refunds of credits of overpayments.* — In the case  
2 of overpayment of any tax (or fee), additions to tax, pen-  
3 alties or interest imposed by this article, or any of the  
4 other articles of this chapter, or of this code, to which this  
5 article is applicable, the tax commissioner shall, subject to  
6 the provisions of this article, refund to the taxpayer the  
7 amount of the overpayment or, if the taxpayer so elects,  
8 apply the same as a credit against the taxpayer's liability  
9 for the tax for other periods. The refund or credit shall  
10 include any interest due the taxpayer under the provisions  
11 of section seventeen of this article.

12           (b) *Refunds or credits of gasoline and special fuel*  
13 *excise tax or motor carrier road tax.* — Any person who  
14 seeks a refund or credit of gasoline and special fuel excise  
15 taxes under the provisions of section ten, eleven or twelve,  
16 article fourteen of this chapter, or section nine or eleven,  
17 article fourteen-a of this chapter, shall file his claim for  
18 refund or credit in accordance with the provisions of such  
19 sections. The ninety-day time period for determination of  
20 claims for refund or credit provided in subsection (d) of  
21 this section shall not apply to these claims for refund or  
22 credit.

23           (c) *Claims for refund or credit.* — No refund or credit  
24 shall be made unless the taxpayer has timely filed a claim  
25 for refund or credit with the tax commissioner. A person  
26 against whom an assessment or administrative decision has

27 become final shall not be entitled to file a claim for refund  
28 or credit with the tax commissioner as prescribed herein.  
29 The tax commissioner shall determine the taxpayer's claim  
30 and notify the taxpayer in writing of his determination.

31 (d) *Petition for refund or credit; hearing.* — (1) If the  
32 taxpayer is not satisfied with the tax commissioner's deter-  
33 mination of taxpayer's claim for refund or credit, or if the  
34 tax commissioner has not determined the taxpayer's claim  
35 within ninety days after the claim was filed, or six months  
36 in the case of claims for refund or credit of the taxes im-  
37 posed by articles twenty-one, twenty-three and twenty-four  
38 of this chapter, after the filing thereof, the taxpayer may  
39 file, with the tax commissioner, either personally or by  
40 certified mail, a petition for refund or credit: *Provided,*  
41 That no petition for refund or credit may be filed more  
42 than sixty days after the taxpayer is served with notice of  
43 denial of taxpayer's claim.

44 (2) The petition for refund or credit shall be in writ-  
45 ing, verified under oath by the said taxpayer, or by tax-  
46 payer's duly authorized agent having knowledge of the  
47 facts, and shall set forth with particularity the items of the  
48 determination objected to, together with the reasons for  
49 the objections.

50 (3) When a petition for refund or credit is properly  
51 filed, the procedures for hearing and for decision applica-  
52 ble when a petition for reassessment is timely filed shall be  
53 followed.

54 (e) *Appeal.* — An appeal from the tax commissioner's  
55 administrative decision upon the petition for refund or  
56 credit may be taken by the taxpayer in the same manner  
57 and under the same procedure as that provided for judicial  
58 review of an administrative decision on a petition for reas-  
59 sessment, but no bond shall be required of the taxpayer.

60 (f) *Decision of the court.* — Where the appeal is to  
61 review an administrative decision on a petition for refund  
62 or credit, the court may determine the legal rights of the  
63 parties but in no event shall it enter a judgment for mon-  
64 ey.

65 (g) *Refund made or credit established.* — The tax  
66 commissioner shall promptly issue his requisition on the  
67 treasury or establish a credit, as requested by the taxpayer,  
68 for any amount finally administratively or judicially deter-  
69 mined to be an overpayment of any tax (or fee) adminis-  
70 tered under this article. The auditor shall issue his warrant  
71 on the treasurer for any refund requisitioned under this  
72 subsection payable to the taxpayer entitled to the refund,  
73 and the treasurer shall pay the warrant out of the fund into  
74 which the amount so refunded was originally paid: *Pro-*  
75 *vided,* That refunds of personal income tax may also be  
76 paid out of the fund established pursuant to section  
77 ninety-three, article twenty-one of this chapter.

78 (h) *Forms for claim for refund or a credit; where re-*  
79 *turn shall constitute claim.* — The tax commissioner may  
80 prescribe by rule or regulation the forms for claims for  
81 refund or credit. Notwithstanding the foregoing, where  
82 the taxpayer has overpaid the tax imposed by article  
83 twenty-one, twenty-three or twenty-four of this chapter, a  
84 return signed by the taxpayer which shows on its face that  
85 an overpayment of such tax has been made shall constitute  
86 a claim for refund or credit.

87 (i) *Remedy exclusive.* — The procedure provided by  
88 this section shall constitute the sole method of obtaining  
89 any refund, or credit, or any tax (or fee) administered  
90 under this article, it being the intent of the Legislature that  
91 the procedure set forth in this article shall be in lieu of any  
92 other remedy, including the uniform declaratory judg-  
93 ments act embodied in article thirteen, chapter fifty-five of  
94 this code, and the provisions of section two-a, article one  
95 of this chapter.

96 (j) *Applicability of this section.* — The provisions of  
97 this section shall apply to refunds or credits of any tax (or  
98 fee), additions to tax, penalties or interest imposed by this  
99 article, or any article of this chapter, or of this code, to  
100 which this article is applicable.

101 (k) *Erroneous refund or credit.* — If the tax commis-  
102 sioner believes that an erroneous refund has been made or  
103 an erroneous credit has been established, he may proceed  
104 to investigate and make an assessment or institute civil

105 action to recover the amount of such refund or credit,  
106 within two years from date the erroneous refund was paid  
107 or the erroneous credit was established, except that the  
108 assessment may be issued or civil action brought within  
109 five years from such date if it appears that any portion of  
110 the refund or credit was induced by fraud or misrepresenta-  
111 tion of a material fact.

112 (l) *Limitation on claims for refund or credit.* —

113 (1) *General rule.* — Whenever a taxpayer claims to be  
114 entitled to a refund or credit of any tax (or fee), additions  
115 to tax, penalties or interest imposed by this article, or any  
116 article of this chapter, or of this code, administered under  
117 this article, paid into the treasury of this state, such taxpay-  
118 er shall, except as provided in subsection (d) of this sec-  
119 tion, file a claim for refund, or credit, within three years  
120 after the due date of the return in respect of which the tax  
121 (or fee) was imposed, determined by including any autho-  
122 rized extension of time for filing the return, or within two  
123 years from the date the tax, (or fee), was paid, whichever  
124 of such periods expires the later, or if no return was filed  
125 by the taxpayer, within two years from the time the tax (or  
126 fee) was paid, and not thereafter.

127 (2) *Extensions of time for filing claim by agreement.*  
128 — The tax commissioner and the taxpayer may enter into  
129 a written agreement to extend the period within which the  
130 taxpayer may file a claim for refund or credit, which peri-  
131 od shall not exceed two years. The period so agreed upon  
132 may be extended for additional periods not in excess of  
133 two years each by subsequent agreements in writing made  
134 before expiration of the period previously agreed upon.

135 (3) *Special rule where agreement to extend time for*  
136 *making an assessment.* — Notwithstanding the provisions  
137 of subdivisions (1) and (2) of this subsection, if an agree-  
138 ment is made under the provisions of section fifteen of  
139 this article extending the time period in which an assess-  
140 ment of tax can be made, then the period for filing a claim  
141 for refund or credit for overpayment of the same tax  
142 made during the periods subject to assessment under the  
143 extension agreement shall also be extended for the period  
144 of the extension agreement plus ninety days.

145 (4) *Overpayment of federal tax.* — Notwithstanding  
146 the provisions of subdivisions (1) and (2) of this subsec-  
147 tion, in the event of a final determination by the United  
148 States Internal Revenue Service or other competent au-  
149 thority of an overpayment in the taxpayer's federal in-  
150 come tax liability, the period of limitation upon claiming a  
151 refund reflecting the final determination in taxes imposed  
152 by articles twenty-one and twenty-four of this chapter  
153 shall not expire until six months after the determination is  
154 made by the United States Internal Revenue Service or  
155 other competent authority.

156 (5) *Tax paid to the wrong state.* — Notwithstanding  
157 the provisions of subdivisions (1) and (2) of this subsec-  
158 tion, when an individual, or the fiduciary of an estate, has  
159 in good faith erroneously paid personal income tax, estate  
160 tax or sales tax, to this state on income or a transaction  
161 which was lawfully taxable by another state and, therefore  
162 not taxable by this state, and no dispute exists as to the  
163 jurisdiction to which the tax should have been paid, then  
164 the time period for filing a claim for refund, or credit, for  
165 the tax erroneously paid to this state shall not expire until  
166 ninety days after the tax is lawfully paid to the other state.

167 (6) *Exception for gasoline and special fuel excise tax*  
168 *and motor carrier road tax.* — This subsection shall not  
169 apply to refunds of gasoline and special fuel excise tax or  
170 motor carrier road tax sought under the provisions of  
171 article fourteen or fourteen-a of this chapter.

172 (m) *Effective date.* — This section, as amended in the  
173 year one thousand nine hundred ninety-six, shall apply to  
174 claims for refund or credit filed on or after the first day of  
175 July, one thousand nine hundred ninety-six.

**§11-10-14c. Prompt payment of refunds of personal income taxes.**

1 (a) *General rule.* — The net amount of a lawful, math-  
2 ematically correct, uncontested claim for refund of any  
3 tax imposed by article twenty-one of this chapter shall be  
4 refunded to the taxpayer within ninety days after such a  
5 claim for refund is filed with the tax commissioner. If the  
6 fund is not made to a taxpayer within the ninety days, the

7 tax commissioner shall pay interest, at the rate specified in  
8 section seventeen-a of this article, for the period com-  
9 mencing with the date the claim for refund was received  
10 by the tax commissioner until the date the state warrant for  
11 the refund amount is issued, notwithstanding any provi-  
12 sions of section seventeen of this article to the contrary.

13 (b) *Definitions.* — For purposes of this section:

14 (1) A claim for refund is "filed with the tax commis-  
15 sioner" on the date it is physically received by the state tax  
16 division.

17 (2) A "lawful, mathematically correct, uncontested  
18 claim for refund" is one that is timely filed; is signed by  
19 the appropriate taxpayer or taxpayers; is mathematically  
20 correct; is supported by any necessary documentation;  
21 and appears on its face to be correct.

22 (c) The payment of a claim for refund under this  
23 section shall not bar the tax commissioner from later issu-  
24 ing an assessment to recover any amount erroneously  
25 refunded, plus statutory interest and any applicable addi-  
26 tions to tax, within two years after the date the refund was  
27 made: *Provided*, That if the refund or any part thereof  
28 was obtained by fraud, the assessment may be made at any  
29 time.

30 (d) This section shall apply only to claims for refund  
31 of personal income taxes filed after the first day of Janu-  
32 ary, one thousand nine hundred ninety-seven.

**§11-10-14d. Prompt payment of refunds of corporation net  
income taxes.**

1 (a) *General rule.* — The net amount of a lawful, math-  
2 ematically correct, uncontested claim for refund of any  
3 tax imposed by article twenty-four of this chapter shall be  
4 refunded to the taxpayer within six months after a claim  
5 for refund is filed with the tax commissioner. If the re-  
6 fund is not made to a taxpayer within this period, the tax  
7 commissioner shall pay interest, at the rate specified in  
8 section seventeen-a of this article, for the period com-  
9 mencing with the date the claim for refund was received  
10 by the tax commissioner until the date the state warrant for

11 the refund amount is issued, notwithstanding any provi-  
12 sions of section seventeen of this article to the contrary.

13 (b) *Definitions.* — For purposes of this section:

14 (1) A claim for refund is "filed with the tax commis-  
15 sioner" on the date it is physically received by the state tax  
16 division.

17 (2) A "lawful, mathematically correct, uncontested  
18 claim for refund" is one that is timely filed; is signed by  
19 the appropriate taxpayer or taxpayers; is mathematically  
20 correct; is supported by any necessary documentation;  
21 and appears on its face to be correct.

22 (c) The payment of a claim for refund under this  
23 section shall not bar the tax commissioner from later issu-  
24 ing an assessment to recover any amount erroneously  
25 refunded, plus statutory interest and any applicable addi-  
26 tions to tax, within two years after the date the refund was  
27 made: *Provided*, That if the refund or any part thereof  
28 was obtained by fraud, the assessment may be made at any  
29 time.

30 (d) This section shall apply only to claims for refund  
31 of corporation net income taxes filed after the first day of  
32 January, one thousand nine hundred ninety-seven.

#### ARTICLE 11. ESTATE TAXES.

§11-11-3. Imposition of tax.

§11-11-17. Special lien for estate tax.

§11-11-17a. Discharge of nonresident decedent's real property in absence of  
ancillary administration.

§11-11-19. Final accounting delayed until liability for tax determined.

§11-11-20. Liability of personal representatives; etc.

§11-11-27. Prima facie liability for tax.

§11-11-43. Effective date.

#### §11-11-3. Imposition of tax.

1 Whenever a federal estate tax is payable to the United  
2 States, there is hereby imposed a West Virginia estate tax  
3 equal to the portion, if any, of the maximum allowable  
4 amount of federal credit for state death taxes which is  
5 attributable to property located in this state, or within its  
6 taxing jurisdiction. In no event, however, shall the estate

7 tax hereby imposed result in a total death tax liability to  
8 this state and the United States in excess of the death tax  
9 liability to the United States which would result if this  
10 article were not in effect: *Provided*, That the estate tax  
11 hereby imposed shall not be affected by other credits  
12 properly allowable in computing the federal estate tax  
13 except that the unified credit established in Section 2010  
14 of the Internal Revenue Code of 1986, as amended, shall  
15 be applied before calculating the West Virginia estate tax.

**§11-11-17. Special lien for estate tax.**

1 (a) *Lien created.* — Unless the tax imposed by section  
2 three of this article is sooner paid in full, or becomes un-  
3 enforceable by reason of lapse of time, it shall be a lien  
4 for ten years after the death of the decedent upon all  
5 property, real or personal, of the decedent located in this  
6 state, except as provided in subsection (d) of this section.

7 (b) *Liability of transferees and others.* — If the tax  
8 imposed by this article is not paid when due, then the  
9 spouse, transferee, trustee (except the trustee of an em-  
10 ployees' trust which meets the requirements of Section  
11 401(a) of the Internal Revenue Code of 1986, as amend-  
12 ed), surviving tenant, person in possession of the property  
13 by reason of the exercise, nonexercise, or release of a  
14 power of appointment, or beneficiary, who receives, or  
15 possesses on the date of the decedent's death, property  
16 included in the gross estate for federal estate tax purposes,  
17 to the extent of the value at the time of the decedent's  
18 death of the property, shall be personally liable for the  
19 tax. Any part of the property transferred by (or trans-  
20 ferred by a transferee of) the spouse, transferee, trustee,  
21 surviving tenant, person in possession, or beneficiary, to a  
22 purchaser or holder of a security interest shall be divested  
23 of the lien provided in subsection (a) of this section and a  
24 like lien shall attach to all the property of such spouse,  
25 transferee, trustee, surviving tenant, person in possession,  
26 or beneficiary, or transferee of any person, except any  
27 part transferred to a purchaser or a holder of a security  
28 interest.

29 (c) *Continuance after discharge of fiduciary.* — The  
30 provisions of section twenty of this article eleven (relating



31 to discharge of fiduciary from personal liability) shall not  
32 operate as a release of any part of the gross estate from the  
33 lien provided in subsection (a) of this section for any  
34 deficiency that may thereafter be determined to be due,  
35 unless such part of the gross estate (or any interest therein)  
36 has been transferred to a purchaser or a holder of a securi-  
37 ty interest, in which case the part (or the interest) so trans-  
38 ferred shall not be subject to a lien or to any claim or  
39 demand for any such deficiency, but the lien shall attach  
40 to the consideration received from the purchaser or holder  
41 of a security interest, by the heirs, legatees, devisees, or  
42 distributees.

43 (d) *Exceptions.* —

44 (1) The part of the property of the decedent as may at  
45 the time be subject to the lien provided for in subsection  
46 (a) of this section shall be divested of such lien to the  
47 extent used for payment of charges against the estate or  
48 expenses of its administration allowed by the county com-  
49 mission or court having jurisdiction thereof.

50 (2) The part of the personal property of the decedent  
51 as may at the time be subject to the lien provided for in  
52 subsection (a) of this section shall be divested of the lien  
53 upon the conveyance or transfer of the property to a bona  
54 fide purchaser or holder of a security interest for an ade-  
55 quate and full consideration in money or money's worth.  
56 The liens shall then attach to the consideration received  
57 for the property from the purchaser or holder of a securi-  
58 ty interest.

59 (e) *Release of lien.* — Subject to such regulations as  
60 the tax commissioner may prescribe, the tax commissioner  
61 shall issue a certificate of release of any lien arising under  
62 this section not later than thirty days after the day on  
63 which the tax commissioner finds that the liability for the  
64 amount assessed, together with all interest and applicable  
65 penalties and additions to tax in respect thereof, has been  
66 fully satisfied or has become legally unenforceable.

67 (f) *Certificate of discharge.* — Subject to such regula-  
68 tions as the tax commissioner may prescribe, the tax com-  
69 missioner may issue a certificate of discharge of any or all

70 of the property subject to the lien imposed by this section  
71 if the tax commissioner finds that the liability secured by  
72 the lien has been fully satisfied or provided for.

73 (g) *Effect of certificate.* —

74 (1) *Conclusiveness.* — Except as provided in subdivi-  
75 sions (2) and (3) of this subsection, if a certificate is issued  
76 pursuant to subsection (f) of this section by the tax com-  
77 missioner and is filed in the same office as the notice of  
78 lien to which it relates (if such notice of lien has been  
79 filed), the certificate shall have the following effect:

80 (A) In the case of a certificate of release, the certificate  
81 shall be conclusive that the lien referred to in the certifi-  
82 cate is extinguished;

83 (B) In the case of a certificate of discharge, the certifi-  
84 cate shall be conclusive that the property covered by the  
85 certificate is discharged from the lien; and

86 (C) In the case of a certificate of nonattachment, the  
87 certificate shall be conclusive that the lien of the state of  
88 West Virginia does not attach to the property of the person  
89 referred to in the certificate.

90 (2) *Revocation of certification of release or*  
91 *nonattachment.* — If the tax commissioner determines  
92 that a certificate of release or nonattachment of a lien  
93 imposed by this section was issued erroneously or improv-  
94 idently, or if a certificate of release of the lien was issued  
95 pursuant to a collateral agreement entered into in connec-  
96 tion with a compromise under section five-q, article ten of  
97 this chapter, which has been breached, and if the period of  
98 limitation on collection after assessment has not expired,  
99 the tax commissioner may revoke the certificate and rein-  
100 state the lien:

101 (A) By mailing written notice, by certified mail, return  
102 receipt requested, of the revocation to the person against  
103 whom the tax was assessed at his or her last known ad-  
104 dress; and

105 (B) By filing notice of the revocation in the same  
106 office in which notice of lien to which it relates was filed  
107 (if the notice of lien had been filed).

108       Such reinstated lien: (i) Shall be effective on the date  
109 the notice of revocation is mailed to the taxpayer in accor-  
110 dance with the provisions of the foregoing paragraph (A),  
111 but not earlier than the date on which any required filing  
112 of notice of revocation is filed in accordance with the  
113 provisions of the foregoing paragraph (B); and (ii) shall  
114 have the same force and effect (as of the date), until the  
115 expiration of the period of limitation on collection after  
116 assessment, as a lien imposed by section eleven, article ten  
117 of this chapter, (relating to lien for taxes).

118       (3) *Certificates void under certain conditions.* — Not-  
119 withstanding any other provision of this article, any lien  
120 imposed by this section shall attach to any property with  
121 respect to which a certificate of discharge has been issued  
122 if the person liable for payment of the tax reacquires the  
123 property after the certificate has been issued.

**§11-11-17a. Discharge of nonresident decedent's real property  
in absence of ancillary administration.**

1       (a) The domiciliary personal representative of a non-  
2 resident decedent may apply to the tax commissioner for a  
3 certificate releasing all real property situate in this state  
4 included in decedent's gross estate from any lien imposed  
5 by section seventeen of this article. In the absence of  
6 ancillary administration in this state, the tax commissioner  
7 may consider reliable and satisfactory evidence furnished  
8 by the personal representative regarding the value of real  
9 property and the amount of tax due under this article, or  
10 that no tax liability exists under this article with respect to  
11 any real property.

12       (b) If the tax commissioner determines that reliable  
13 and satisfactory evidence exists, an affidavit of value sub-  
14 mitted by the personal representative made pursuant to  
15 and in conjunction with the evidence shall be marked as  
16 inspected by the commissioner and shall be filed by the  
17 estate in the county or counties of this state where the real  
18 property is situate.

19       (c) In determining tax liability, the tax commissioner  
20 may also consider an appraisal of the real property sub-  
21 mitted in writing to the tax commissioner, paid for by the

22 personal representative and made at the personal represen-  
23 tative's request. The appraisal shall be performed by a  
24 licensed real estate appraiser acceptable to the tax commis-  
25 sioner and it shall be filed in the county or counties where  
26 the real property is situate.

27 (d) If the tax commissioner is satisfied that no tax  
28 liability exists, or that the tax liability of the estate has  
29 been fully discharged, the tax commissioner may issue a  
30 certificate under subsection (f), section seventeen of this  
31 article.

**§11-11-19. Final accounting delayed until liability for tax determined.**

1 (a) If a personal representative is required to file a  
2 federal estate tax return for the estate of a decedent, then  
3 no final account of that personal representative shall be  
4 allowed or approved in any probate proceeding with re-  
5 spect to that estate, by the county commission, or the clerk  
6 thereof, before whom the proceeding is pending, unless  
7 the county commission finds that the tax imposed on the  
8 transfer of property by this article has been paid in full, or  
9 that no tax is due.

10 (b) No final account of a personal representative of an  
11 estate shall be allowed by any county commission, or clerk  
12 thereof, unless such account shows and the county com-  
13 mission, or clerk thereof, finds that all taxes imposed by  
14 this article upon the personal representative, which have  
15 become payable, have been paid.

16 (c) The certificate of release, discharge or nonattach-  
17 ment issued to the personal representative by the tax com-  
18 missioner under section seventeen of this article shall be  
19 conclusive in the proceeding as to the liability or the pay-  
20 ment of tax, to the extent provided in the certificate.

**§11-11-20. Liability of personal representatives; etc.**

1 (a) *Personal representative.* — Any personal represen-  
2 tative who distributes any property of an estate without  
3 first paying, securing another's payment of, or furnishing  
4 security for payment of the taxes due under this article, is  
5 personally liable for payment of the taxes due, to the ex-

6 tent of the value of any property that may come or that  
7 may have come into the possession of the personal repre-  
8 sentative. Security for payment of taxes due under this  
9 article shall be in an amount equal to or greater than the  
10 value of all property that is or has come into the posses-  
11 sion of the personal representative, determined as of the  
12 time the security is furnished.

13 (b) *Other person having control, custody or posses-*  
14 *sion of property.* — Any person in this state who has con-  
15 trol, custody or possession of any property includible in  
16 the gross estate of a decedent for federal estate tax purpos-  
17 es, and who delivers any of the property to the personal  
18 representative or other legal representative of the decedent  
19 outside this state without first paying, securing another's  
20 payment of, or furnishing security for payment of the  
21 taxes due under this article, is liable for the taxes due un-  
22 der this article to the extent of the value of the property  
23 delivered. Security for payment of the taxes due under  
24 this article shall be in an amount equal to or greater than  
25 the value of all property delivered to the personal repre-  
26 sentative or other legal representative of the decedent  
27 outside this state by such a person.

28 (c) *Persons not having control.* — For the purpose of  
29 this section, persons do not have control, custody or pos-  
30 session of a decedent's property if they are not responsible  
31 for paying the tax due under this article, such as  
32 transferees, which term includes, but is not limited to,  
33 stockbrokers or stock transfer agents, banks and other  
34 depositories of checking and savings accounts, safe depos-  
35 it companies and life insurance companies.

36 (d) *Reliance upon tax commissioner's certificates.* —  
37 For the purposes of this section, any person in this state  
38 who has the control, custody or possession of any proper-  
39 ty includible in the gross estate of the decedent for federal  
40 estate tax purposes, and who delivers any of the property  
41 to the personal representative or other legal representative  
42 of the decedent, may rely upon the release or certificate  
43 furnished by the tax commissioner under section seven-  
44 teen of this article to the personal representative as evi-  
45 dence of compliance with the requirements of this article,

46 and make the deliveries and transfers as the personal rep-  
47 resentative may direct without being liable for any taxes  
48 due under this article with respect to any property.

49 (e) *Discharge of personal liability for federal estate*  
50 *taxes.* — If a personal representative receives a discharge  
51 from personal liability for federal estate taxes pursuant to  
52 Section 2204 of the Internal Revenue Code of 1986, as  
53 amended, and if the personal representative makes written  
54 application to the tax commissioner for determination of  
55 the amount of the tax due under this article and for dis-  
56 charge from personal liability, the tax commissioner, with-  
57 in two months after receiving satisfactory evidence of the  
58 Section 2204 discharge, but not after the expiration of the  
59 period for issuance of a deficiency assessment, shall notify  
60 the personal representative of the amount of the tax due  
61 under this article, including the amount of any interest,  
62 additions to tax or penalties that are due. The personal  
63 representative, upon payment of the amount of which he is  
64 notified (other than any portion for which an extension of  
65 time for payment has been granted), and upon furnishing  
66 any bond that may be required by the tax commissioner  
67 to secure payment of any amount for which the time for  
68 payment has been extended, shall be discharged from  
69 personal liability for any deficiency in tax thereafter  
70 found to be due and shall be entitled to a receipt or writ-  
71 ing showing the discharge.

**§11-11-27. Prima facie liability for tax.**

1 (a) The estate of each decedent whose property is  
2 subject to the laws of this state and which is required to file  
3 a federal estate tax return shall be deemed prima facie  
4 liable for payment of estate taxes under this article and  
5 shall be subject to a lien therefor in the amount as may be  
6 later determined to be due and payable on the estate as  
7 provided in this article.

8 (b) This presumption of liability shall begin on the  
9 date of the death of the decedent and shall continue until  
10 the full settlement of all taxes which may be found to be  
11 due under this article, the settlement to be shown by re-  
12 ceipts for payment of all taxes due under this article, to be  
13 issued by the tax commissioner as provided for in this  
14 article.

15 (c) Whenever the tax commissioner determines that an  
16 estate described in subsection (a) of this section is not  
17 liable for payment of tax under this article, the tax com-  
18 missioner shall issue to the personal representative a certifi-  
19 cate in writing to that effect, showing the nonliability to  
20 tax, which certificate of nonliability shall have the same  
21 force and effect as a receipt showing payment of tax. This  
22 certificate of nonliability may be recorded and shall be  
23 admissible in evidence in like manner as receipts showing  
24 payment of taxes due under this article.

**§11-11-43. Effective date.**

1 The amendments to this article made by this act shall  
2 take effect as provided in the Constitution of this state and,  
3 upon the effective date, these amendments shall apply to  
4 the estates of all decedents dying after the thirtieth day of  
5 June, one thousand nine hundred eighty-five, for which no  
6 estate tax lien release has been issued by the tax commis-  
7 sioner prior to the effective date of these amendments in  
8 the year one thousand nine hundred ninety-six, and to  
9 estates of all decedents dying on or after the effective date  
10 of these amendments.

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## CHAPTER 234

(Com. Sub. for S. B. 363—By Senators Ross, Helmick, Sharpe and Schoonover)

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[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article six-d, relating to establishing an alternative-fuel motor vehicle tax credit which may be applied against personal net income tax and corporation net income tax; setting forth legislative findings; specifying definitions; specifying the mode and manner in which the credit may be taken; and specifying an effective date.

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

That chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article six-d, to read as follows:

**ARTICLE 6D. ALTERNATIVE-FUEL MOTOR VEHICLES TAX CREDIT.**

- §11-6D-1. Legislative findings and purpose.
- §11-6D-2. Definitions.
- §11-6D-3. Credit allowed for alternative-fuel motor vehicles; application against personal income tax or corporate net income tax; effective date.
- §11-6D-4. Eligibility for credit.
- §11-6D-5. Amount of credit.
- §11-6D-6. Credit to be apportioned over three-year period.
- §11-6D-7. Duration of availability of credit.
- §11-6D-8. Commissioner to design forms and schedules; promulgation of rules.

**§11-6D-1. Legislative findings and purpose.**

1 Consistent with the public policy as stated in section  
2 one, article two-d, chapter twenty-four of this code, the  
3 Legislature hereby finds that the use of alternative fuels is  
4 in the public interest and promotes the general welfare of  
5 the people of this state insofar as it addresses serious con-  
6 cerns for our environment and our state's and nation's  
7 dependence on foreign oil as a source of energy. The  
8 Legislature further finds that this state has an abundant  
9 supply of alternative fuels and an extensive supply net-  
10 work and that, by encouraging the use of alternatively-  
11 fueled motor vehicles, the state will be reducing its depen-  
12 dence on foreign oil and attempting to improve its air  
13 quality.

14 However, because the cost of motor vehicles which  
15 utilize alternative-fuel technologies remains high in rela-  
16 tion to motor vehicles that employ more traditional tech-  
17 nologies, citizens of this state who might otherwise choose  
18 an alternatively-fueled motor vehicle are forced by eco-  
19 nomic necessity to continue using motor vehicles that are  
20 fueled by more conventional means. Therefore, in order  
21 to encourage the use of alternatively-fueled motor vehicles



22 and possibly reduce unnecessary pollution of our environ-  
23 ment and reduce our dependence on foreign sources of  
24 energy, there is hereby created an alternative-fuel motor  
25 vehicles tax credit.

**§11-6D-2. Definitions.**

1 As used in this article, the following terms have the  
2 meanings ascribed to them in this section:

3 (a) "Alternative fuel" includes:

4 (1) Compressed natural gas;

5 (2) Liquified natural gas;

6 (3) Liquified petroleum gas;

7 (4) Methanol;

8 (5) Ethanol;

9 (6) Fuel mixtures that contain eighty-five percent or  
10 more by volume, when combined with gasoline or other  
11 fuels, of the following:

12 (A) Methanol;

13 (B) Ethanol; or

14 (C) Other alcohols;

15 (7) Coal-derived liquid fuels; and

16 (8) Electricity, including electricity from solar energy.

17 (b) "Alternative-fuel motor vehicle" means a motor  
18 vehicle that as a new or retrofitted or converted fuel:

19 (1) Operates solely on one alternative fuel;

20 (2) Is capable of operating on one or more alternative  
21 fuels, singly or in combination; or

22 (3) Is capable of operating on an alternative fuel and  
23 is also capable of operating on gasoline or diesel fuel.

**§11-6D-3. Credit allowed for alternative-fuel motor vehicles;  
application against personal income tax or cor-  
porate net income tax; effective date.**

1           The tax credit provided in this article may be applied  
2 against the tax liability of a taxpayer imposed by the pro-  
3 visions of either article twenty-one or article twenty-four  
4 of this chapter, but in no case may more than one credit  
5 be granted for the same alternative-fuel motor vehicle as  
6 defined in subdivision (b), section two of this article. This  
7 credit shall be available for those tax years beginning after  
8 the thirtieth day of June, one thousand nine hundred  
9 ninety-seven.

**§11-6D-4. Eligibility for credit.**

1           A taxpayer is eligible to claim the credit against tax  
2 provided in this article if he or she:

3           (a) Converts a motor vehicle that is presently regis-  
4 tered in West Virginia to operate:

5           (1) Exclusively on an alternative fuel as defined in  
6 subdivision (a), section two of this article; or

7           (2) In a dual fuel mode, as defined in paragraph (6),  
8 subdivision (a), section two of this article; or

9           (b) Purchases from an original equipment manufac-  
10 turer or an after-market conversion facility a new dedicat-  
11 ed or dually fueled alternative-fuel motor vehicle for  
12 which the taxpayer then obtains a valid West Virginia  
13 registration.

14           (c) The credit provided in this article is not available to  
15 and may not be claimed by any taxpayer under any obli-  
16 gation pursuant to any federal or state law, policy or regu-  
17 lation to convert to the use of alternative fuels for any  
18 motor vehicle.

**§11-6D-5. Amount of credit.**

1           (a) The total amount of any credit allowed under this  
2 article is limited by and subject to the provisions set forth  
3 in this subsection and subsections (b), (c) and (d) of this  
4 section and may not exceed: (1) In the case of a motor  
5 vehicle conversions or retrofitting, the actual cost of con-  
6 verting from a traditionally-fueled motor vehicle to an  
7 alternatively-fueled motor vehicle; or (2) in the case of a  
8 new purchase, the incremental difference in cost between

9 an alternative-fuel motor vehicle and a comparably  
10 equipped motor vehicle that employs traditional fuel tech-  
11 nology.

12 (b) The maximum total credit allowed for an  
13 alternative-fuel motor vehicle is:

14 (1) For a vehicle with a gross vehicle weight of not  
15 more than ten thousand pounds, three thousand seven  
16 hundred fifty dollars;

17 (2) For a vehicle with a gross vehicle weight of more  
18 than ten thousand pounds up to twenty-six thousand  
19 pounds, nine thousand two hundred fifty dollars;

20 (3) For a truck or van with a gross vehicle weight of  
21 more than twenty-six thousand pounds, fifty thousand  
22 dollars; and

23 (4) For a bus capable of seating at least twenty adults,  
24 fifty thousand dollars.

25 (c) Subject to the limitations set forth in subsection (a)  
26 of this section, a taxpayer who is otherwise entitled to a  
27 credit against tax who claims the credit provided for in this  
28 article on the basis of any alternative-fuel motor vehicle  
29 that operates exclusively on electricity is entitled to an  
30 additional credit of ten percent of the credit which is oth-  
31 erwise allowed under subsection (b) of this section.

32 (d) The maximum incremental credit allowed per year  
33 is one third of the credit attributable to five vehicles with  
34 the cumulative credit over a three-year period not to ex-  
35 ceed one third of the credit attributable to fifteen vehicles.

#### **§11-6D-6. Credit to be apportioned over three-year period.**

1 The credit against tax for any alternative-fuel motor  
2 vehicle provided for in this article may be taken by a tax-  
3 payer claiming the credit only in three equal increments  
4 over a three-consecutive tax-year period, so that in any tax  
5 year in which a taxpayer is entitled to the credit, only one  
6 third of the total credit allowed for a certain alternative-  
7 fuel motor vehicle under section five may be taken.

#### **§11-6D-7. Duration of availability of credit.**

1       The tax credit provided in this article shall expire by  
2 operation of law ten years after the effective date of this  
3 article: *Provided*, That any eligible taxpayer who makes a  
4 valid claim for the credit before that expiration is entitled  
5 to claim and receive the remaining one-third increment or  
6 increments of the total credit allowed under section five of  
7 this article for the tax year or years ensuing after the expi-  
8 ration of this article until the total amount of credit al-  
9 lowed has been exhausted.

**§11-6D-8. Commissioner to design forms and schedules; pro-  
mulgation of rules.**

1       (a) The tax commissioner shall design and provide to  
2 the public simplified forms and schedules to implement  
3 and effectuate the provisions of this article.

4       (b) The tax commissioner is authorized to promulgate  
5 rules for the administration of this article consistent with  
6 its provisions and in accordance with article three, chapter  
7 twenty-nine-a of this code.

8       (c) Within one year following the expiration of the  
9 credit established in this article the state tax commissioner  
10 shall provide a written report to the Legislature setting  
11 forth the utilization of the credit, the benefit of the credit  
12 and the overall cost of the credit.

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## CHAPTER 235

(H. B. 4834—By Delegates Kiss, Clements, Compton,  
Farris, Talbott, Miller and Walters)

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[Passed March 9, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section two-o, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, providing for an exemption from the business and occupation tax for municipally owned hydro-electric or wood-waste generating units.

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

That section two-o, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 13. BUSINESS AND OCCUPATION TAX.**

**§11-13-2o. Business of generating or producing or selling electricity on and after the first day of June, one thousand nine hundred ninety-five; definitions; rate of tax; exemptions; effective date.**

1 (a) *Definitions.* — As used in this section:

2 (1) "Average four-year generation" is computed by  
3 dividing by four the sum of a generating unit's net genera-  
4 tion, expressed in kilowatt hours, for calendar years one  
5 thousand nine hundred ninety-one, one thousand nine  
6 hundred ninety-two, one thousand nine hundred  
7 ninety-three, and one thousand nine hundred ninety-four.  
8 For any generating unit which was newly installed and  
9 placed into commercial operation after the first day of  
10 January, one thousand nine hundred ninety-one and prior  
11 to the effective date of this section, "average four-year  
12 generation" is computed by dividing such unit's net genera-  
13 tion for the period beginning with the month in which  
14 the unit was placed into commercial operation and ending  
15 with the month preceding the effective date of this section  
16 by the number of months in such period and multiplying  
17 the resulting amount by twelve with the result being a  
18 representative twelve-month average of the unit's net gen-  
19 eration while in an operational status.

20 (2) "Capacity factor" means a fraction, the numerator  
21 of which is average four-year generation and the denomi-  
22 nator of which is the maximum possible annual genera-  
23 tion.

24 (3) "Generating unit" means a mechanical apparatus or  
25 structure which through the operation of its component  
26 parts is capable of generating or producing electricity and  
27 is regularly used for this purpose.

28 (4) "Inactive reserve" means the removal of a generat-  
29 ing unit from commercial service for a period of not less  
30 than twelve consecutive months as a result of lack of need

31 for generation from the generating unit or as a result of  
32 the requirements of state or federal law or the removal of a  
33 generating unit from commercial service for any period as  
34 a result of any physical exigency which is beyond the  
35 reasonable control of the taxpayer.

36 (5) "Maximum possible annual generation" means the  
37 product, expressed in kilowatt hours, of official capability  
38 times eight thousand seven hundred sixty hours.

39 (6) "Official capability" means the nameplate capacity  
40 rating of a generating unit expressed in kilowatts.

41 (7) "Peaking unit" means a generating unit designed  
42 for the limited purpose of meeting peak demands for  
43 electricity or filling emergency electricity requirements.

44 (8) "Retired from service" means the removal of a  
45 generating unit from commercial service for a period of at  
46 least twelve consecutive months with the intent that the unit  
47 will not thereafter be returned to active service.

48 (9) "Taxable generating capacity" means the product,  
49 expressed in kilowatts, of the capacity factor times the  
50 official capability of a generating unit, subject to the mod-  
51 ifications set forth in subdivisions (2) and (3), subsection  
52 (c) of this section.

53 (10) "Net generation" for a period means the kilowatt  
54 hours of net generation available for sale generated or  
55 produced by the generating unit in this state during such  
56 period less the following:

57 (A) Twenty-one twenty-sixths of the kilowatt hours of  
58 electricity generated at the generating unit and sold during  
59 such period to a plant location of a customer engaged in  
60 manufacturing activity if the contract demand at such  
61 plant location exceeds two hundred thousand kilowatts per  
62 hour in a year or where the usage at such plant location  
63 exceeds two hundred thousand kilowatts per hour in a  
64 year;

65 (B) Twenty-one twenty-sixths of the kilowatt hours of  
66 electricity produced or generated at the generating unit  
67 during such period by any person producing electric  
68 power and an alternative form of energy at a facility locat-

69 ed in this state substantially from gob or other mine refuse;

70 (C) The total kilowatt hours of electricity generated at  
71 the generating unit exempted from tax during such period  
72 by subsection (b), section two-n of this article.

73 (b) *Rate of tax.* — Upon every person engaging or  
74 continuing within this state in the business of generating  
75 or producing electricity for sale, profit or commercial use,  
76 either directly or indirectly through the activity of others,  
77 in whole or in part, or in the business of selling electricity  
78 to consumers, or in both businesses, the tax imposed by  
79 section two of this article shall be equal to:

80 (1) For taxpayers who generate or produce electricity  
81 for sale, profit or commercial use, the product of  
82 twenty-two dollars and seventy-eight cents multiplied by  
83 the taxable generating capacity of each generating unit in  
84 this state owned or leased by the taxpayer, subject to the  
85 modifications set forth in subsection (c) of this section:  
86 *Provided,* That with respect to each generating unit in this  
87 state which has installed a flue gas desulfurization system,  
88 the tax imposed by section two of this article shall, on and  
89 after the thirty-first day of January, one thousand nine  
90 hundred ninety-six, be equal to the product of twenty  
91 dollars and seventy cents multiplied by the taxable gener-  
92 ating capacity of the units, subject to the modifications set  
93 forth in subsection (c) of this section: *Provided, however,*  
94 That with respect to kilowatt hours sold to or used by a  
95 plant location engaged in manufacturing activity in which  
96 the contract demand at such plant location exceeds two  
97 hundred thousand kilowatts per hour per year or if the  
98 usage at such plant location exceeds two hundred thou-  
99 sand kilowatts per hour in a year, in no event shall the tax  
100 imposed by this article with respect to the sale or use of  
101 such electricity exceed five hundredths of one cent times  
102 the kilowatt hours sold to or used by a plant engaged in  
103 such a manufacturing activity; and

104 (2) For taxpayers who sell electricity to consumers in  
105 this state that is not generated or produced in this state by  
106 the taxpayer, nineteen hundredths of one cent times the  
107 kilowatt hours of electricity sold to consumers in this state  
108 that were not generated or produced in this state by the  
109 taxpayer, except that the rate shall be five hundredths of

110 one cent times the kilowatt hours of electricity not gener-  
111 ated or produced in this state by the taxpayer which is sold  
112 to a plant location in this state of a customer engaged in  
113 manufacturing activity if the contract demand at such  
114 plant location exceeds two hundred thousand kilowatts per  
115 hour per year or if the usage at such plant location ex-  
116 ceeds two hundred thousand kilowatts per hour in a year.  
117 The measure of tax under this subdivision (2) shall be  
118 equal to the total kilowatt hours of electricity sold to con-  
119 sumers in the state during the taxable year, that were not  
120 generated or produced in this state by the taxpayer, to be  
121 determined by subtracting from the total kilowatt hours of  
122 electricity sold to consumers in the state the net kilowatt  
123 hours of electricity generated or produced in the state by  
124 the taxpayer during the taxable year. The provisions of  
125 this subdivision (2) shall not apply to those kilowatt hours  
126 exempt under subsection (b), section two-n of this article.  
127 Any person taxable under this subdivision (2) shall be  
128 allowed a credit against the amount of tax due under this  
129 subdivision (2) for any electric power generation taxes or  
130 a tax similar to the tax imposed by subdivision (1) of this  
131 subsection (b) paid by the taxpayer with respect to such  
132 electric power to the state in which such power was gener-  
133 ated or produced. The amount of credit allowed shall not  
134 exceed the tax liability arising under this subdivision (2)  
135 with respect to the sale of such power.

136 (c) The following provisions are applicable to taxpay-  
137 ers subject to tax under subdivision (1), subsection (b) of  
138 this section:

139 (1) *Retired units; inactive reserve.* — If a generating  
140 unit is retired from service or placed in inactive reserve, a  
141 taxpayer shall not be liable for tax computed with respect  
142 to the taxable generating capacity of the unit for the peri-  
143 od that the unit is inactive or retired. The taxpayer shall  
144 provide written notice to the joint committee on govern-  
145 ment and finance, as well as to any other entity as may be  
146 otherwise provided by law, eighteen months prior to retir-  
147 ing any generating unit from service in this state.

148 (2) *New generating units.* — If a new generating unit,  
149 other than a peaking unit, is placed in initial service on or  
150 after the effective date of this section, the generating unit's  
151 taxable generating capacity shall equal forty percent of



152 the official capability of the unit: *Provided*, That the tax-  
153 able generating capacity of a municipally-owned wood-  
154 waste fired generating unit and of a municipally-owned  
155 hydro-electric generating unit shall equal zero percent of  
156 the official capability of the unit.

157 (3) *Peaking units*. — If a peaking unit is placed in  
158 initial service on or after the effective date of this section,  
159 the generating unit's taxable generating capacity shall  
160 equal five percent of the official capability of the unit:  
161 *Provided*, That the taxable generating capacity of a mu-  
162 nicipally owned hydro-electric generating plant shall  
163 equal zero percent of the official capability of the unit.

164 (4) *Transfers of interests in generating units*. — If a  
165 taxpayer acquires an interest in a generating unit, the tax-  
166 payer shall include the computation of taxable generating  
167 capacity of said unit in the determination of the taxpayer's  
168 tax liability as of the date of the acquisition. Conversely,  
169 if a taxpayer transfers an interest in a generating unit, the  
170 taxpayer shall not for periods thereafter be liable for tax  
171 computed with respect to the taxable generating capacity  
172 of such transferred unit.

173 (5) *Proration, allocation*. — The tax commissioner  
174 shall promulgate rules in conformity with the provisions  
175 of article three, chapter twenty-nine-a of this code to pro-  
176 vide for the administration of this section and to equitably  
177 prorate taxes for a taxable year in which a generating unit  
178 is first placed in service, retired or placed in inactive re-  
179 serve, or in which a taxpayer acquires or transfers an inter-  
180 est in a generating unit, to equitably allocate and reallocate  
181 adjustments to net generation, and to equitably allocate  
182 taxes among multiple taxpayers with interests in a single  
183 generating unit, it being the intent of the Legislature to  
184 prohibit multiple taxation of the same taxable generating  
185 capacity.

186 So as to provide for an orderly transition with respect  
187 to the rate making effect of this section, those electric light  
188 and power companies which, as of the effective date of this  
189 section, are permitted by the West Virginia public service  
190 commission to utilize deferred accounting for purposes of  
191 recovery from ratepayers of any portion of business and  
192 occupation tax expense under this article shall be permit-  
193 ted, until such time that action pursuant to a rate applica-

194 tion or order of the commission provides for appropriate  
195 alternative rate making treatment for such expense, to  
196 recover the tax expense imposed by this section by means  
197 of deferred accounting to the extent that the tax expense  
198 imposed by this section exceeds the level of business and  
199 occupation tax under this article currently allowed in rates.

200 (6) *Electricity generated by manufacturer or affiliate*  
201 *for use in manufacturing activity.* — When electricity used  
202 in a manufacturing activity is generated in this state by the  
203 person who owns the manufacturing facility in which the  
204 electricity is used and the electricity generating unit or  
205 units producing the electricity so used are owned by such  
206 manufacturer, or by a member of the manufacturer's con-  
207 trolled group, as defined in section 267 of the Internal  
208 Revenue Code of 1986, as amended, the generation of the  
209 electricity shall not be taxable under this article: *Provid-*  
210 *ed,* That any electricity generated or produced at the gen-  
211 erating unit or units which is sold or used for purposes  
212 other than in the manufacturing activity shall be taxed  
213 under this section and the amount of tax payable shall be  
214 adjusted to be equal to an amount which is proportional to  
215 the electricity sold for purposes other than the manufac-  
216 turing activity. The department of tax and revenue shall  
217 promulgate rules in accordance with article three, chapter  
218 twenty-nine-a of this code: *Provided, however,* That the  
219 rules shall be promulgated as emergency rules.

220 (d) Beginning the first day of June, one thousand nine  
221 hundred ninety-five, electric light and power companies  
222 that actually paid tax based on the provisions of subdivi-  
223 sion (3), subsection (a), section two-d of this article or  
224 section two-m of this article for every taxable month in  
225 one thousand nine hundred ninety-four shall determine  
226 their liability for payment of tax under this article in ac-  
227 cordance with subdivisions (1) and (2) of this subsection.  
228 All other electric light and power companies shall deter-  
229 mine their liability for payment of tax under this article  
230 exclusively under this section beginning the first day of  
231 June, one thousand nine hundred ninety-five and thereaf-  
232 ter.

233 (1) If for taxable months beginning on or after the  
234 first day of June, one thousand nine hundred ninety-five,  
235 liability for tax under section two-o of this article is equal

236 to or greater than the sum of the power company's liability  
237 for payment of tax under subdivision (3), subsection (a),  
238 section two-d of this article and this section, then the com-  
239 pany shall pay the tax due under section two-o of this  
240 article and not the tax due under subdivision (3), subsec-  
241 tion (a), section two-d of this article and section two-m of  
242 this article. If tax liability under this section is less, then  
243 the tax shall be paid under subdivision (3), subsection (a),  
244 section two-d of this article and section two-m and the tax  
245 due under this section shall not be paid.

246 (2) Notwithstanding subdivision (1) of this subsection,  
247 for taxable years beginning on or after the first day of  
248 January, one thousand nine hundred ninety-eight, all elec-  
249 tric light and power companies shall determine their liabil-  
250 ity for payment of tax under this article exclusively under  
251 this section.

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## CHAPTER 236

(S. B. 78—By Senator Craigo)

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[Passed February 14, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section five-a, article thirteen-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to dedication of oil and gas severance tax for benefit of counties and municipalities; distribution of dedicated tax; promulgation of rules; creation of special funds; methods and formulae for distribution of the dedicated tax; expenditure of funds by counties and municipalities; and requirements for special budgets and reports.

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

That section five-a, article thirteen-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 13A. SEVERANCE TAXES.**

**§11-13A-5a. Dedication of ten percent of oil and gas severance tax for benefit of counties and municipalities; distribution of major portion of such dedicated tax to oil and gas producing counties; distribution of minor portion of such dedicated tax to all counties and municipalities; reports; rules; creation of special funds in the office of state treasurer; methods and formulae for distribution of such dedicated tax; expenditure of funds by counties and municipalities for public purposes; and requiring special county and municipal budgets and reports thereon.**

1           (a) Effective the first day of July, one thousand nine  
2 hundred ninety-six, five percent of the tax attributable to  
3 the severance of oil and gas imposed by section three-a of  
4 this article is hereby dedicated for the use and benefit of  
5 counties and municipalities within this state and shall be  
6 distributed to the counties and municipalities as provided  
7 in this section. Effective the first day of July, one thou-  
8 sand nine hundred ninety-seven, and thereafter, ten per-  
9 cent of the tax attributable to the severance of oil and gas  
10 imposed by section three-a of this article is hereby dedi-  
11 cated for the use and benefit of counties and municipali-  
12 ties within this state and shall be distributed to the counties  
13 and municipalities as provided in this section.

14           (b) Seventy-five percent of this dedicated tax shall,  
15 after appropriation of the tax by the Legislature, be dis-  
16 tributed by the state treasurer in the manner specified in  
17 this section, to the various counties of this state in which  
18 the oil and gas upon which this additional tax is imposed  
19 was located at the time it was removed from the ground.  
20 Those counties are referred to in this section as the "oil  
21 and gas producing counties". The remaining twenty-five  
22 percent of the net proceeds of this additional tax on oil  
23 and gas shall be distributed, after appropriation, among all  
24 the counties and municipalities of this state in the manner  
25 specified in this section.

26 (c) The tax commissioner is hereby granted plenary  
27 power and authority to promulgate reasonable rules re-  
28 quiring the furnishing by oil and gas producers of such  
29 additional information as may be necessary to compute  
30 the allocation required under the provisions of subsection  
31 (f) of this section. The tax commissioner is also hereby  
32 granted plenary power and authority to promulgate such  
33 other reasonable rules as may be necessary to implement  
34 the provisions of this section.

35 (d) In order to provide a procedure for the distribu-  
36 tion of seventy-five percent of the dedicated tax on oil and  
37 gas to the oil and gas producing counties, there is hereby  
38 created in the state treasurer's office the special fund  
39 known as the "oil and gas county revenue fund"; and in  
40 order to provide a procedure for the distribution of the  
41 remaining twenty-five percent of the dedicated tax on oil  
42 and gas to all counties and municipalities of the state,  
43 without regard to oil and gas having been produced in  
44 those counties or municipalities, there is also hereby creat-  
45 ed in the state treasurer's office the special fund known as  
46 the "all counties and municipalities revenue fund".

47 Seventy-five percent of the dedicated tax on oil and  
48 gas shall be deposited in the "oil and gas county revenue  
49 fund" and twenty-five percent of the dedicated tax on oil  
50 and gas shall be deposited in the "all counties and munici-  
51 palities revenue fund", from time to time, as the proceeds  
52 are received by the tax commissioner. The moneys in the  
53 funds shall, after appropriation of the moneys by the Leg-  
54 islature, be distributed to the respective counties and mu-  
55 nicipalities entitled to the moneys in the manner set forth  
56 in subsection (e) of this section.

57 (e) The moneys in the "oil and gas county revenue  
58 fund" and the moneys in the "all counties and municipali-  
59 ties revenue fund" shall be allocated among and distribut-  
60 ed annually to the counties and municipalities entitled to  
61 the moneys by the state treasurer in the manner specified  
62 in this section. On or before each distribution date, the  
63 state treasurer shall determine the total amount of moneys

64 in each fund which will be available for distribution to the  
65 respective counties and municipalities entitled to the mon-  
66 eys on that distribution date. The amount to which an oil  
67 and gas producing county is entitled from the "oil and gas  
68 county revenue fund" shall be determined in accordance  
69 with subsection (f) of this section, and the amount to  
70 which every county and municipality shall be entitled  
71 from the "all counties and municipalities revenue fund"  
72 shall be determined in accordance with subsection (g) of  
73 this section. After determining, as set forth in subsections  
74 (f) and (g) of this section, the amount each county and  
75 municipality is entitled to receive from the respective fund  
76 or funds, a warrant of the state auditor for the sum due to  
77 the county or municipality shall issue and a check drawn  
78 thereon making payment of the sum shall thereafter be  
79 distributed to the county or municipality.

80 (f) The amount to which an oil and gas producing  
81 county is entitled from the "oil and gas county revenue  
82 fund" shall be determined by:

83 (1) In the case of moneys derived from tax on the  
84 severance of gas:

85 (A) Dividing the total amount of moneys in the fund  
86 derived from tax on the severance of gas then available for  
87 distribution by the total volume of cubic feet of gas ex-  
88 tracted in this state during the preceding year; and

89 (B) Multiplying the quotient thus obtained by the  
90 number of cubic feet of gas taken from the ground in the  
91 county during the preceding year; and

92 (2) In the case of moneys derived from tax on the  
93 severance of oil:

94 (A) Dividing the total amount of moneys in the fund  
95 derived from tax on the severance of oil then available for  
96 distribution by the total number of barrels of oil extracted  
97 in this state during the preceding year; and

98 (B) Multiplying the quotient thus obtained by the  
99 number of barrels of oil taken from the ground in the  
100 county during the preceding year.

101 (g) The amount to which each county and municipali-  
102 ty is entitled from the "all counties and municipalities  
103 revenue fund" shall be determined in accordance with the  
104 provisions of this subsection. For purposes of this subsec-  
105 tion, "population" means the population as determined by  
106 the most recent decennial census taken under the authority  
107 of the United States:

108 (1) The treasurer shall first apportion the total amount  
109 of moneys available in the "all counties and municipalities  
110 revenue fund" by multiplying the total amount in the fund  
111 by the percentage which the population of each county  
112 bears to the total population of the state. The amount thus  
113 apportioned for each county is the county's "base share".

114 (2) Each county's "base share" shall then be subdivid-  
115 ed into two portions. One portion is determined by multi-  
116 plying the "base share" by that percentage which the total  
117 population of all unincorporated areas within the county  
118 bears to the total population of the county, and the other  
119 portion is determined by multiplying the "base share" by  
120 that percentage which the total population of all municipa-  
121 lities within the county bears to the total population of  
122 the county. The former portion shall be paid to the coun-  
123 ty and the latter portion shall be the "municipalities' por-  
124 tion" of the county's "base share". The percentage of the  
125 latter portion to which each municipality in the county is  
126 entitled shall be determined by multiplying the total of the  
127 latter portion by the percentage which the population of  
128 each municipality within the county bears to the total  
129 population of all municipalities within the county.

130 (h) Moneys distributed to any county or municipality  
131 under the provisions of this section, from either or both  
132 special funds, shall be deposited in the county or municipa-  
133 l general fund and may be expended by the county  
134 commission or governing body of the municipality for  
135 such purposes as the county commission or governing

136 body shall determine to be in the best interest of its re-  
137 spective county or municipality: *Provided*, That in coun-  
138 ties with population in excess of two hundred thousand at  
139 least seventy-five percent of the funds received from the  
140 oil and gas county revenue fund shall be apportioned to,  
141 and expended within, the oil and gas producing area or  
142 areas of the county, the oil and gas producing areas of  
143 each county to be determined generally by the state tax  
144 commissioner: *Provided, however*, That the moneys dis-  
145 tributed to any county or municipality under the provi-  
146 sions of this section shall not be budgeted for personal  
147 services in an amount to exceed one fourth of the total  
148 amount of the moneys.

149 (i) On or before the twenty-eighth day of March, one  
150 thousand nine hundred ninety-seven, and each  
151 twenty-eighth day of March thereafter, each county com-  
152 mission or governing body of a municipality receiving  
153 any such moneys shall submit to the tax commissioner on  
154 forms provided by the tax commissioner a special budget,  
155 detailing how the moneys are to be spent during the sub-  
156 sequent fiscal year. The budget shall be followed in ex-  
157 pending the moneys unless a subsequent budget is ap-  
158 proved by the state tax commissioner. All unexpended  
159 balances remaining in the county or municipality general  
160 fund at the close of a fiscal year shall remain in the gener-  
161 al fund and may be expended by the county or municipi-  
162 pality without restriction.

163 (j) On or before the fifteenth day of December, one  
164 thousand nine hundred ninety-six, and each fifteenth day  
165 of December thereafter, the tax commissioner shall deliver  
166 to the clerk of the Senate and the clerk of the House of  
167 Delegates a consolidated report of the budgets, created by  
168 subsection (i) of this section, for all county commissions  
169 and municipalities as of the fifteenth day of July of the  
170 current year.

171 (k) The state tax commissioner shall retain for the  
172 benefit of the state from the dedicated tax attributable to  
173 the severance of oil and gas the amount of thirty-five  
174 thousand dollars annually as a fee for the administration  
175 of the additional tax by the tax commissioner.



## CHAPTER 237

(Com. Sub. for S. B. 153—By Senators Tomblin, Mr. President, and Manchin)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirteen-j, relating to the establishment of a neighborhood investment program; specifying a short title; setting forth a legislative finding and purpose; defining terms; setting forth requirements for eligibility for tax credits; requiring certification of project plans by the West Virginia development office; requiring payment of a project certification fee to the West Virginia development office; specifying sanctions, procedures, penalties, interest and notice requirements relating to failure to timely pay the project certification fee; creating revolving fund; specifying accumulation and administration of fund; appropriating funds out of general revenue; specifying deemed disapproval for applications not certified by the West Virginia development office within a given time; specifying prompt notification to applicants of certification or denial of certification of project plans; specifying that qualified charitable organizations which receive certification of a project may receive eligible contributions; specifying that taxpayers who make eligible contributions may gain entitlement to the tax credit; specifying that all applications for certification of a project plan filed under the article shall be public information; creating the neighborhood investment program advisory board; specifying powers and duties of the neighborhood investment program advisory board; specifying that the director of the West Virginia development office or the designee thereof shall be the ex officio chairperson of the neighborhood investment program advisory board; specifying qualifications for membership on the neighborhood investment program advisory board; specifying appointment terms for members of the neighborhood investment program advisory board; specifying limitations on selections of appointees to the neighborhood investment program advisory board; specifying terms of members of the neighborhood

investment program advisory board; specifying the method of selection and appointment for members of the neighborhood investment program advisory board; specifying quorum requirements, meeting requirements and funding requirements for the neighborhood investment program advisory board; requiring that the neighborhood investment program advisory board make an annual report; specifying duties of the neighborhood investment program advisory board; prohibiting assistance by the neighborhood investment program advisory board of project sponsors to solicit support or donations; prohibiting voting by members of the neighborhood investment program advisory board who are affiliated with an applicant for project certification; setting forth criteria for project evaluation of proposed neighborhood investment program project applications by the neighborhood investment program advisory board; specifying requirements for approval or disapproval of a proposed neighborhood investment program project by the neighborhood investment program advisory board; specifying requirements for certification of approved projects by the director of the West Virginia development office; specifying the amount of credit allowed to eligible taxpayers; specifying application of the credit over a period of five years beginning with the tax year of the taxpayer when the contribution is made; specifying annual application of the credit; prohibiting application of the credit against employer withholding taxes; specifying that unused credit shall be forfeited; specifying the manner in which modifications to federal taxable income shall affect application of credit; specifying the method for asserting the credit against tax; setting forth annual filing requirements; specifying that a tax credit reporting schedule be filed; authorizing disallowance of the credit; specifying the total maximum aggregate tax credit; specifying the beginning date for filing and the manner of filing of applications for certification of project plans with the West Virginia development office requiring that such applications be considered for approval or disapproval by the neighborhood investment program advisory board in a timely manner; requiring that when the total amount of credits certified by the West Virginia development office under the article equals the maximum amount of tax credit allowed in any state fiscal year, no further certifications shall be issued for

that fiscal year; specifying that applications for certification of project plans shall be void on the last day of the fiscal year; specifying recapture of the tax credit; specifying the statute of limitations for the issuance of assessments; specifying that the tax commissioner shall annually publish the name and address of every taxpayer asserting the credit on a tax return and the amount of any credit asserted under the article; specifying that statutory information confidentiality provisions do not apply to information which is required to be published; authorizing the performance of audits and examinations by the tax commissioner and performance of joint audits and examinations by the tax commissioner and the West Virginia development office; authorizing the sharing of information between the tax commissioner and the West Virginia development office; requiring program evaluation on or before the thirtieth day of September, one thousand nine hundred ninety-eight, to be presented to the Legislature; specifying review and issuance of a recommendation by the joint committee on governmental operations not later than the first day of March, one thousand nine hundred ninety-nine, as to whether the program should continue; specifying procedures for the continuation of the program; and specifying procedures for taxpayers to obtain entitlement to credit in the event program is discontinued.

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

That chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article thirteen-j, to read as follows:

#### **ARTICLE 13J. NEIGHBORHOOD INVESTMENT PROGRAM.**

- §11-13J-1. Short title.
- §11-13J-2. Legislative finding and purpose.
- §11-13J-3. Definitions.
- §11-13J-4. Eligibility for tax credits; creation of neighborhood investment fund; certification of project plans by the West Virginia development office.
- §11-13J-4a. Neighborhood investment program advisory board.
- §11-13J-5. Amount of credit allowed.
- §11-13J-6. Application of annual credit allowance.
- §11-13J-7. Assertion of the tax credit against tax.

- §11-13J-8. Total maximum aggregate tax credit amount.
- §11-13J-9. Credit recapture; interest; penalties; additions to tax; statute of limitations.
- §11-13J-10. Public information relating to tax credit.
- §11-13J-11. Audits and examinations; information sharing.
- §11-13J-12. Program evaluation; expiration of credit; preservation of entitlements.

**§11-13J-1. Short title.**

- 1 This article shall be known as the "Neighborhood  
2 Investment Program Act".

**§11-13J-2. Legislative finding and purpose.**

1 It is the finding of the Legislature that community-  
2 based organizations can be a powerful force in communi-  
3 ty development. However, in West Virginia their effective-  
4 ness has historically been weakened by meager resources.  
5 Private corporations and individuals in West Virginia pos-  
6 sess the resources to aid community-based organizations  
7 in their efforts to assist neighborhoods and communities.  
8 Due to the lack of clear incentives, the private and  
9 not-for-profit sectors have often not taken advantage of  
10 opportunities to collaborate with community-based orga-  
11 nizations to the full extent possible by investment and  
12 participation in local programs.

13 Therefore, the neighborhood investment program act  
14 is hereby enacted with the intent that it provide incentives  
15 for contributions to qualifying charitable projects. It is  
16 the intent of the Legislature that this act encourage private  
17 sector businesses and individuals to contribute capital to  
18 community-based organizations which establish projects  
19 to assist neighborhoods and local communities through  
20 such services as health care, counseling, emergency assis-  
21 tance, crime prevention, education, housing, job training  
22 and physical and environmental improvements.

**§11-13J-3. Definitions.**

- 1 (a) *General*. — When used in this article, or in the  
2 administration of this article, terms defined in subsection  
3 (b) of this section shall have the meanings ascribed to  
4 them by this section, unless a different meaning is clearly

5 required by either the context in which the term is used, or  
6 by specific definition in this article.

7 (b) *Terms defined.*

8 (1) *Affiliate.* — The terms "affiliate" or "affiliates"  
9 include all concerns which are affiliates of each other  
10 when either directly or indirectly:

11 (A) One concern controls or has the power to control  
12 the other; or

13 (B) A third party or third parties control or have the  
14 power to control both. In determining whether concerns  
15 are independently owned and operated and whether or not  
16 affiliation exists, consideration shall be given to all appro-  
17 priate factors, including common ownership, common  
18 management and contractual relationships.

19 (2) *Capacity building.* — The term "capacity build-  
20 ing" means to generally enhance the capacity of the com-  
21 munity to achieve improvements and to obtain the com-  
22 munity services described in items (i) through (v), inclu-  
23 sive of the definition of that term, as set forth in subdivi-  
24 sion (4) of this subsection. Capacity building includes,  
25 but is not limited to, improvement of the means, or capaci-  
26 ty, to:

27 (i) Access, obtain and use private, charitable and gov-  
28 ernmental assistance programs, administrative assistance,  
29 and private, charitable and governmental resources or  
30 funds;

31 (ii) Fulfill legal, bureaucratic and administrative re-  
32 quirements and qualifications for accessing assistance,  
33 resources or funds; and

34 (iii) Attract and direct political and community atten-  
35 tion to needs of the community for the purpose of in-  
36 creasing access to and use of assistance, resources or funds  
37 for a given purpose, goal or need.

38 (3) *Commissioner or tax commissioner.* — The terms  
39 "commissioner" and "tax commissioner" are used inter-  
40 changeably herein and mean the tax commissioner of the  
41 state of West Virginia, or his or her delegate.

41           (4) *Community services.* — "Community services"  
42 means services, provided at no charge whatsoever, of:

43           (i) Providing any type of health, personal finance,  
44 psychological or behavioral, religious, legal, marital, edu-  
45 cational or housing counseling and advice to economical-  
46 ly disadvantaged citizens or a specifically designated  
47 group of economically disadvantaged citizens, or in an  
48 economically disadvantaged area; or

49           (ii) Providing emergency assistance or medical care to  
50 economically disadvantaged citizens or to a specifically  
51 designated group of economically disadvantaged citizens,  
52 or in an economically disadvantaged area; or

53           (iii) Establishing, maintaining or operating recreation-  
54 al facilities, or housing facilities for economically disad-  
55 vantaged citizens or a specifically designated group of  
56 economically disadvantaged citizens, or in an economical-  
57 ly disadvantaged area; or

58           (iv) Providing economic development assistance to  
59 economically disadvantaged citizens or a specifically des-  
60 ignated group of economically disadvantaged citizens  
61 without regard to whether they are located in an economi-  
62 cally disadvantaged area, or to individuals, groups or  
63 neighborhood or community organizations, in an eco-  
64 nomically disadvantaged area; or

65           (v) Providing community technical assistance and  
66 capacity building to economically disadvantaged citizens  
67 or a specifically designated group of economically disad-  
68 vantaged citizens or to individuals, groups or neighbor-  
69 hood or community organizations in an economically  
70 disadvantaged area.

71           (5) *Compensation.* — The term "compensation" means  
72 wages, salaries, commissions and any other form of remu-  
73 neration paid to employees for personal services.

74           (6) *Corporation.* — The term "corporation" means  
75 any corporation, joint-stock company or association, and  
76 any business conducted by a trustee or trustees wherein  
77 interest or ownership is evidenced by a certificate of inter-  
78 est or ownership or similar written instrument.

79       (7) *Crime prevention.* — "Crime prevention" means  
80 any activity which aids in the reduction of crime.

81       (8) *Delegate.* — The term "delegate" in the phrase "or  
82 his or her delegate", when used in reference to the tax  
83 commissioner, means any officer or employee of the tax  
84 division of the department of tax and revenue duly autho-  
85 rized by the tax commissioner directly, or indirectly by  
86 one or more redelegations of authority, to perform the  
87 functions mentioned or described in this article.

88       (9) *Director or director of the West Virginia develop-*  
89 *ment office.* — The term "director" or "director of the West  
90 Virginia development office" means the director of the  
91 West Virginia office.

92       (10) *Economically disadvantaged area.* — The term  
93 "economically disadvantaged area" means:

94       (A) In a municipality - any area not exceeding fifteen  
95 square miles in West Virginia which contains any portion  
96 of an incorporated municipality and:

97       (i) In which area the average annual gross personal  
98 income of residents living therein is not more than one  
99 hundred twenty-five percent of the federal designated  
100 poverty level for personal incomes; and

101       (ii) That is certified as an economically disadvantaged  
102 area by the West Virginia development office.

103       (B) In a rural area - any area not exceeding  
104 twenty-five square miles in West Virginia:

105       (i) Which area is located in a rural area and which  
106 contains no incorporated municipalities or portions there-  
107 of;

108       (ii) In which area the average annual gross personal  
109 income of residents living therein is not more than one  
110 hundred twenty-five percent of the federal designated  
111 poverty level for personal incomes; and

112       (iii) That is certified as an economically disadvantaged  
113 area by the West Virginia development office.

114 (C) An economically disadvantaged area shall qualify  
115 as such only pursuant to a certification issued by the West  
116 Virginia development office. Such certifications issued by  
117 the West Virginia development office shall expire after the  
118 passage of five calendar years, unless specifically limited  
119 to a shorter time by specific order of the West Virginia  
120 development office, and no area shall hold the status of a  
121 certified economically disadvantaged area for a period of  
122 time greater than ten years, either consecutively or in the  
123 aggregate.

124 (D) The certification of an economically disadvan-  
125 taged area shall be made on the basis of current indices of  
126 social and economic conditions, which shall include, but  
127 not be limited to, the median per capita income of the area  
128 in relation to the median per capita income of the state or  
129 standard metropolitan statistical area in which the area is  
130 located.

131 (E) No economically disadvantaged area may be certi-  
132 fied within twenty-five miles of any other certified eco-  
133 nomically disadvantaged area. Not more than six eco-  
134 nomically disadvantaged areas may hold the status of  
135 certified economically disadvantaged areas at any one  
136 time in this state.

137 (F) At least a majority of all economically disadvan-  
138 taged areas holding designations as economically disad-  
139 vantaged areas at any one time shall be located in rural  
140 areas.

141 (G) Such certification shall be filed with the secretary  
142 of state and shall specifically set forth the boundaries of  
143 the economically disadvantaged area by both description  
144 and map, the date of certification of the area as an eco-  
145 nomically disadvantaged area, the date on which such  
146 certification will terminate and a statement of the director's  
147 findings as to the average annual gross personal income of  
148 residents living in the certified economically disadvan-  
149 taged area.

150 (11) *Economically disadvantaged citizen.* — The term  
151 "economically disadvantaged citizen" means a natural  
152 person, who during the current taxable year has, or during



153 the immediately preceding taxable year had, an annual  
154 gross personal income not exceeding one hundred  
155 twenty-five percent of the federal designated poverty level  
156 for personal incomes, and who is a domiciliary and resi-  
157 dent of this state.

158       (12) *Education*. — "Education" means any type of  
159 scholastic instruction to, or scholarship by, an individual  
160 that enables such individual to prepare for better life op-  
161 portunities. Education does not include courses in physi-  
162 cal training, physical conditioning, physical education,  
163 sports training, sports camps and similar training or condi-  
164 tioning courses (except for physical therapy prescribed by  
165 a physician or other person licensed to prescribe courses  
166 of medical treatment under West Virginia law).

167       (13) *Eligible contribution*. —

168       (A) An eligible contribution consists of cash, tangible  
169 personal property valued at its fair market value, real  
170 property valued at its fair market value or a contribution  
171 of in kind professional services valued at seventy-five  
172 percent of fair market value.

173       (B) For purposes of this definition, the value of in  
174 kind professional services will not qualify as an eligible  
175 contribution unless the services are:

176       (i) Reasonably priced and valued, and reasonably  
177 necessary services customarily and normally provided by  
178 the contributor in the normal course of business to cus-  
179 tomers, clients or patients other than those encompassed  
180 by the project plan;

181       (ii) Not reimbursable, in whole or in part, from sources  
182 other than the tax credit provided under this article; and

183       (iii) Are services which are not available elsewhere in  
184 the community.

185       (C) The term "professional services" means only those  
186 services provided directly by a physician licensed to prac-  
187 tice in this state, those services provided directly by a den-  
188 tist licensed to practice in this state, those services provided  
189 directly by a lawyer licensed to practice in this state, those

190 services provided directly by a registered nurse, licensed  
191 practical nurse, dental hygienist, or other health care pro-  
192 fessional licensed to practice in this state and those services  
193 provided directly by a certified public accountant or pub-  
194 lic accountant licensed to practice in this state.

195 (D) *Minimum contribution.* — No contribution of  
196 cash, property or professional services or any combination  
197 thereof contributed in any tax year by any taxpayer hav-  
198 ing a fair market value of less than five hundred dollars  
199 qualifies as an eligible contribution.

200 (E) *Maximum contribution.* — No contribution of  
201 cash, property or professional services or any combination  
202 thereof contributed in any tax year by any taxpayer hav-  
203 ing a fair market value in excess of two hundred thousand  
204 dollars qualifies as an eligible contribution.

205 (F) *Limitations.* — Not more than fifty percent of total  
206 eligible contributions to a certified project may be in kind  
207 contributions. Not more than twenty-five percent of total  
208 eligible contributions made by any taxpayer to any certi-  
209 fied project may be in kind contributions.

210 (14) *Eligible taxpayer.* —

211 (A) The term "eligible taxpayer" means any person  
212 subject to the taxes imposed by article twenty-one,  
213 twenty-three or twenty-four of this chapter which makes  
214 an eligible contribution to a qualified charitable organiza-  
215 tion pursuant to the terms of a certified project plan for  
216 the purpose of providing neighborhood assistance, com-  
217 munity services, or crime prevention, or for the purpose of  
218 providing job training or education for individuals not  
219 employed by the contributing taxpayer or an affiliate of  
220 the contributing taxpayer or a person related to the con-  
221 tributing taxpayer.

222 (B) "Eligible taxpayer" also includes an affiliated  
223 group of taxpayers if such group elects to file a consoli-  
224 dated corporation net income tax return under article  
225 twenty-four of this chapter and if one or more affiliates  
226 included in such affiliated group would qualify as an  
227 eligible taxpayer under part (A) of this paragraph.

228 (15) *Includes and including.* — The terms "includes"  
229 and "including", when used in a definition contained in  
230 this article, shall not be deemed to exclude other things  
231 otherwise within the meaning of the term defined.

232 (16) *Job training.* — "Job training" means instruction  
233 to an individual that enables the individual to acquire  
234 vocational skills so as to become employable or to be able  
235 to seek a higher grade of employment.

236 (17) *Natural person or individual.* — The term "natu-  
237 ral person" and the term "individual" mean a human be-  
238 ing. The terms "natural person" and "individual" do not  
239 mean, and specifically exclude any corporation, limited  
240 liability company, partnership, joint venture, trust, organi-  
241 zation, association, agency, governmental subdivision,  
242 syndicate, affiliate or affiliation, group, unit or any entity  
243 other than a human being.

244 (18) *Neighborhood assistance.* — "Neighborhood  
245 assistance" means either:

246 (A) Furnishing financial assistance, labor, material and  
247 technical advice to aid in the physical or economic im-  
248 provement of any part or all of an economically disadvan-  
249 tagged area; or

250 (B) Furnishing technical advice to promote higher  
251 employment in an economically disadvantaged area.

252 (19) *Neighborhood organization.* — "Neighborhood  
253 organization" means any organization:

254 (A) Which is performing community services, as de-  
255 fined in this section; and

256 (B) Which is exempt from income taxation under  
257 Sections 501(c)(3) or (4) of the Internal Revenue Code..

258 (20) *West Virginia development office.* — The term  
259 "West Virginia development office" means the West Vir-  
260 ginia development office.

261 (21) *Partnership and partner.* — The term "partner-  
262 ship" includes a syndicate, group, pool, joint venture or  
263 other unincorporated organization through or by means

264 of which any business, financial operation or venture is  
265 carried on, and which is not a trust or estate, a corporation  
266 or a sole proprietorship. The term "partner" includes a  
267 member in such a syndicate, group, pool, joint venture or  
268 organization.

269 (22) *Person*. — The term "person" includes any natu-  
270 ral person, corporation, limited liability company or part-  
271 nership.

272 (23) *Project transferee*. — The term "project transfer-  
273 ee" means any neighborhood organization, qualified char-  
274 itable organization, charitable organization or other orga-  
275 nization, entity or person that receives an eligible contri-  
276 bution or part of an eligible contribution from an eligible  
277 taxpayer for the purpose of directly or indirectly provid-  
278 ing neighborhood assistance, community services, or  
279 crime prevention, or for the purpose of providing job  
280 training or education or other services or assistance pursu-  
281 ant to a project plan. The project transferee is typically  
282 the first entity or person receiving eligible contributions  
283 from eligible taxpayers under a project plan. However, in  
284 the case of eligible contributions of in-kind services or  
285 other eligible contributions or portions thereof made pur-  
286 suant to a certified project plan directly to indigent, disad-  
287 vantaged or needy persons, economically disadvantaged  
288 citizens, or other persons or organizations under the spon-  
289 sorship or auspices of any neighborhood organization,  
290 qualified charitable organization, charitable organization  
291 or other organization, entity or person as a certified pro-  
292 ject participant, such eligible contributions shall be  
293 deemed to have been made to the entity, organization or  
294 person under whose sponsorship or auspices such eligible  
295 contributions are made, and that entity, organization or  
296 person is deemed to be the project transferee with relation  
297 to those eligible contributions. The project transferee is  
298 the entity, organization or person that is liable under this  
299 article for payment of the project certification fee to the  
300 West Virginia development office. The term "project  
301 transferee" shall mean and include any deemed project  
302 transferee, deemed as such under the provisions of this  
303 article.

304       (24) *Qualified charitable organization.* — The term  
305 "qualified charitable organization" means a neighborhood  
306 organization, as defined in this section, which is the spon-  
307 sor of a project which has received certification by the  
308 director of the West Virginia development office pursuant  
309 to the requirements of this article: *Provided*, That no  
310 organization may qualify as a qualified organization for  
311 purposes of this article if such organization is not regis-  
312 tered with this state as required under the solicitation of  
313 charitable funds act.

314       (25) *Related person.* — The term "related person" or  
315 "person related to" a stated taxpayer means:

316       (A) An individual, corporation, partnership, affiliate,  
317 association or trust or any combination or group thereof  
318 controlled by the taxpayer; or

319       (B) An individual, corporation, partnership, affiliate,  
320 association or trust or any combination or group thereof  
321 that is in control of the taxpayer; or

322       (C) An individual, corporation, partnership, affiliate,  
323 association or trust or any combination or group thereof  
324 controlled by an individual, corporation, partnership, affil-  
325 iate, association or trust or any combination or group  
326 thereof that is in control of the taxpayer; or

327       (D) A member of the same controlled group as the  
328 taxpayer.

329       For purposes of this article, "control", with respect to a  
330 corporation means ownership, directly or indirectly, of  
331 stock possessing fifty percent or more of the total com-  
332 bined voting power of all classes of the stock of such cor-  
333 poration which entitles its owner to vote. "Control", with  
334 respect to a trust, means ownership, directly or indirectly,  
335 of fifty percent or more of the beneficial interest in the  
336 principal or income of such trust. The ownership of stock  
337 in a corporation, of a capital or profits interest in a part-  
338 nership or association or of a beneficial interest in a trust  
339 shall be determined in accordance with the rules for con-  
340 structive ownership of stock provided in Section 267(c),

341 other than paragraph (3) of such section, of the United  
342 States Internal Revenue Code, as amended.

343 (26) *State fiscal year.* — "State fiscal year" means a  
344 twelve-month period beginning on the first day of July  
345 and ending on the thirtieth day of June.

346 (27) *Taxpayer.* — The term "taxpayer" means any  
347 person subject to the tax imposed by article twenty-one,  
348 twenty-three or twenty-four of this chapter (or any one or  
349 combination of such articles of this chapter).

350 (28) *Technical assistance.* —

351 (A) The term "technical assistance" means assistance in  
352 understanding, using and fulfilling the legal, bureaucratic  
353 and administrative requirements and qualifications which  
354 must be negotiated for the purpose of effectively access-  
355 ing, obtaining and using private, charitable, not-for-profit  
356 or governmental assistance, resources or funds, and maxi-  
357 mizing the value thereof.

358 (B) "Technical assistance" also means assistance pro-  
359 vided by any person holding a license under West Virginia  
360 law to practice any licensed profession or occupation,  
361 whereby such person, in the practice of such profession or  
362 occupation, assists economically disadvantaged citizens or  
363 the persons in an economically disadvantaged area by:

364 (i) Providing any type of health, personal finance,  
365 psychological or behavioral, religious, legal, marital, edu-  
366 cational or housing counseling and advice to economical-  
367 ly disadvantaged citizens or a specifically designated  
368 group of economically disadvantaged citizens, or in an  
369 economically disadvantaged area; or

370 (ii) Providing emergency assistance or medical care to  
371 economically disadvantaged citizens or to a specifically  
372 designated group of economically disadvantaged citizens,  
373 or in an economically disadvantaged area; or

374 (iii) Establishing, maintaining or operating recreation-  
375 al facilities, or housing facilities for economically disad-  
376 vantaged citizens or a specifically designated group of

377 economically disadvantaged citizens, or in an economical-  
378 ly disadvantaged area; or

379 (iv) Providing economic development assistance to  
380 economically disadvantaged citizens or a specifically des-  
381 ignated group of economically disadvantaged citizens  
382 without regard to whether they are located in an economi-  
383 cally disadvantaged area, or to individuals, groups or  
384 neighborhood or community organizations, in an eco-  
385 nomically disadvantaged area; or

386 (v) Providing community technical assistance and  
387 capacity building to economically disadvantaged citizens  
388 or a specifically designated group of economically disad-  
389 vantaged citizens or to individuals, groups or neighbor-  
390 hood or community organizations in an economically  
391 disadvantaged area.

392 (29) *This code.* — The term "this code" means the  
393 code of West Virginia, one thousand nine hundred  
394 thirty-one, as amended.

395 (30) *This state.* — The term "this state" means the state  
396 of West Virginia.

**§11-13J-4. Eligibility for tax credits; creation of neighbor-  
hood investment fund; certification of project  
plans by the West Virginia development office.**

1 (a) A neighborhood organization which seeks to spon-  
2 sor a project and have that project certified pursuant to  
3 this article shall submit to the director of the West Virginia  
4 development office an application for certification of a  
5 project plan, in such form as the director shall prescribe,  
6 setting forth the project to be implemented, the identity of  
7 all project participant organizations, the economically  
8 disadvantaged citizens or a specifically designated group  
9 of economically disadvantaged citizens, to be assisted by  
10 the project or the economically disadvantaged area or  
11 areas selected for assistance by the project, the amount of  
12 total tax credits to be created by the proposed project  
13 pursuant to the receipt of eligible contributions from eligi-  
14 ble taxpayers under this article, the amount of the total

15 estimated eligible contributions to be received pursuant to  
16 the project, and the schedule for implementing the project.

17 (b) *Project certification fee; payment of costs; revolving*  
18 *fund.* —

19 (1) (A) *Project certification fee.* — Any project transferee that receives eligible contributions under or pursuant  
20 to a certified project plan shall pay to the West Virginia  
21 development office a project certification fee in the  
22 amount of three percent of the amount of the total eligible  
23 contributions received by such project transferee pursuant  
24 to the certified project plan. The project certification fee  
25 shall be paid to the West Virginia development office  
26 within thirty days of the receipt of any eligible contribu-  
27 tion, or portion thereof.  
28

29 (B) *Eligible contributions made through direct service*  
30 *to end users or recipients, or contributions to end users or*  
31 *recipients.* — In the case of eligible contributions of  
32 in-kind services or other eligible contributions or portions  
33 thereof made pursuant to a certified project plan and con-  
34 tributed or provided directly to indigent, disadvantaged or  
35 needy persons, economically disadvantaged citizens or  
36 other persons or organizations made under the sponsor-  
37 ship or auspices of any neighborhood organization, quali-  
38 fied charitable organization, charitable organization or  
39 other organization, entity or person as a certified project  
40 participant, such eligible contributions shall be deemed to  
41 have been made to the entity, organization or person un-  
42 der whose sponsorship or auspices such eligible contribu-  
43 tions are made, and that entity, organization or person is  
44 deemed to be the project transferee with relation to those  
45 eligible contributions. Such deemed project transferee  
46 shall be liable for the project certification fee due for such  
47 eligible contributions.

48 (C) *Computation of fee based on fair market value.* —  
49 In the case of eligible contributions consisting of in-kind  
50 services, tangible personal property or realty, the project  
51 transferee shall pay to the West Virginia development  
52 office a project certification fee in the amount of three  
53 percent of the fair market value of eligible contributions  
54 received pursuant to the certified project plan.



55           (2) *Sanctions for failure to timely pay the project cer-*  
56 *tification fee.* — Failure to timely pay the project certifica-  
57 tion fee imposed by this section shall be grounds for im-  
58 position of any of the following sanctions, to be imposed  
59 by the director of the West Virginia development office at  
60 the discretion of the director:

61           (A) Prospective revocation of the project certification.

62           No tax credit shall be allowed for any project for  
63 which certification has been revoked for periods subse-  
64 quent to the effective date of revocation. Credit taken by  
65 any taxpayer in accordance with this article pursuant to  
66 the making of an eligible contribution to a project trans-  
67 feree pursuant to a certified project plan prior to the effec-  
68 tive date of revocation of project certification shall not be  
69 subject to recapture by reason of revocation of the certifi-  
70 cation. However, such credit shall otherwise be subject to  
71 audit and adjustment or recapture in accordance with the  
72 requirements of this article.

73           (B) Retroactive withdrawal of the project certification.

74           No tax credit shall be allowed for any project for  
75 which certification has been withdrawn. Credit taken by  
76 any taxpayer in accordance with this article pursuant to  
77 the making of an eligible contribution to a project trans-  
78 feree pursuant to a certified project plan for which certifi-  
79 cation is later withdrawn pursuant to the provisions of this  
80 section shall be subject to recapture upon withdrawal of  
81 the certification.

82           (C) Suspension of the project certification for a stated  
83 period of time.

84           No tax credit shall be allowed for contributions made  
85 during the suspension period for a project. Credit taken  
86 by any taxpayer in accordance with this article pursuant to  
87 the making of an eligible contribution to a project trans-  
88 feree pursuant to a certified project plan prior to or subse-  
89 quent to the suspension period shall not be subject to  
90 recapture by reason of the suspension. However, such  
91 credit shall otherwise be subject to audit and adjustment or

92 recapture in accordance with the requirements of this  
93 article.

94 (D) Temporary or permanent disqualification of one  
95 or more project transferees, neighborhood organizations,  
96 qualified charitable organizations, charitable organizations  
97 or other organizations, entities or persons from participa-  
98 tion in a particular specified certified project.

99 No tax credit shall be allowed under this article for  
100 any contribution made during the disqualification period  
101 to any project transferee, neighborhood organization,  
102 qualified charitable organization, charitable organization  
103 or other organization, entity or person disqualified under  
104 this section from participation in a certified project. Tax  
105 credit taken by any taxpayer in accordance with this arti-  
106 cle pursuant to the making of an eligible contribution to  
107 any project transferee, neighborhood organization, quali-  
108 fied charitable organization, charitable organization or  
109 other organization, entity or person pursuant to a certified  
110 project plan prior to or subsequent to the disqualification  
111 period shall not be subject to recapture by reason of the  
112 disqualification of the recipient thereof. However, such  
113 credit shall otherwise be subject to audit and adjustment or  
114 recapture in accordance with the requirements of this  
115 article.

116 (E) Temporary or permanent disqualification of any  
117 project transferee, neighborhood organization, qualified  
118 charitable organization, charitable organization or other  
119 organization, entity or person, or group thereof, from  
120 participation in any and all certified projects currently in  
121 existence or to be formed, proposed or certified under this  
122 article:

123 (i) No tax credit shall be allowed under this article for  
124 any contribution made during the disqualification period  
125 to any project transferee, neighborhood organization,  
126 qualified charitable organization, charitable organization  
127 or other organization, entity or person disqualified under  
128 this section from participation in any and all certified  
129 projects under this article. Tax credit taken by any eligi-  
130 ble taxpayer in accordance with this article pursuant to the  
131 making of an eligible contribution to the project transfer-

132 ee, neighborhood organization, qualified charitable orga-  
133 nization, charitable organization or other organization,  
134 entity or person disqualified from participation in any and  
135 all certified projects under this article, pursuant to a certi-  
136 fied project plan prior to or subsequent to the disqualifica-  
137 tion period shall not be subject to recapture by reason of  
138 the disqualification. However, such credit shall otherwise  
139 be subject to audit and adjustment or recapture in accord-  
140 dance with the requirements of this article; and

141 (ii) No certification shall be issued during the disquali-  
142 fication period for any proposed project in which a pro-  
143 ject transferee, neighborhood organization, qualified char-  
144 itable organization, charitable organization or other orga-  
145 nization, entity or person disqualified under this section  
146 from participation in any and all certified projects is listed  
147 as a proposed project participant.

148 (F) Any combination of the aforementioned sanctions.

149 (3) *Audits and investigations.* — The West Virginia  
150 development office or the department of tax and revenue,  
151 or both, may initiate and carry out investigations or audits  
152 of any recipient of any eligible contribution under this  
153 article, any eligible taxpayer or any project transferee to  
154 determine whether the project certification fee imposed by  
155 this section has been paid in accordance with the require-  
156 ments of this article.

157 (4) *Procedures, failure to timely pay the project certifi-*  
158 *cation fee upon written demand.* —

159 (A) *Written demand.* — The director of the West Vir-  
160 ginia development office shall, upon a reasonable belief  
161 that a project transferee has failed to timely pay the fee  
162 imposed by this section, issue a written demand for pay-  
163 ment thereof, plus interest determined at the interest rate  
164 prescribed under section seventeen, article ten of this  
165 chapter, in such form as the director of the West Virginia  
166 development office may specify. The director of the West  
167 Virginia development office may also impose a penalty  
168 for failure to timely pay the project certification fee in the  
169 amount of twenty percent of the amount of the project  
170 certification fee due and interest due. Such demand shall

171 notify the project transferee of the opportunity to show  
172 that the project certification fee is not due and owing.

173 (B) *Failure to pay pursuant to written demand.* —

174 Failure of the project transferee to pay any project  
175 certification fee due, with interest and penalties, as stated in  
176 the written demand for payment of the project certifica-  
177 tion fee, within thirty days of service of such demand, and  
178 failure of the project transferee to prove to the satisfaction  
179 of the director of the West Virginia development office  
180 that the fee imposed by this section is not due and owing,  
181 shall result in a determination by the director of the West  
182 Virginia development office that sanctions shall apply.

183 (C) *Notice of pending sanctions.* — Upon the making  
184 of a determination by the director of the West Virginia  
185 development office that sanctions for failure to pay the  
186 project certification fee apply, the director of the West  
187 Virginia development office shall serve upon the project  
188 transferee from which the project certification fee, or some  
189 portion thereof, is due and owing, a notice of pending  
190 sanctions. If the project transferee from which the certi-  
191 fied project fee, or some portion thereof, is due and owing  
192 is not the applicant for project certification, then an infor-  
193 mational copy of the notice of pending sanctions shall  
194 also be served upon the applicant for project certification.

195 (D) *Service of notice, content of notice.* — The notice  
196 of pending sanctions shall be served upon the delinquent  
197 project transferee in the same manner as an assessment of  
198 tax in accordance with article ten of this chapter. Such  
199 notice of pending sanctions shall state the sanctions to be  
200 applied in accordance with this section, the effective date  
201 or dates of such sanctions, with specific statements of  
202 whether any sanction is to be applied retroactively or in  
203 part retroactively, and the commencement and termination  
204 dates for any suspensions of certification or temporary  
205 disqualifications of any program transferee, neighborhood  
206 organization, qualified charitable organization, charitable  
207 organization or other organization, entity or person to be  
208 disqualified under this section from participation in certi-  
209 fied projects. The notice of pending sanctions shall state  
210 that sanctions shall be imposed sixty days after service of

211 the notice of pending sanctions upon the delinquent pro-  
212 ject transferee, unless the delinquent project transferee  
213 pays the amount of the project certification fee due and  
214 owing, plus interest and penalties.

215 (E) *Appeals.* — The project transferee may file an  
216 appeal of pending sanctions as if the notice of pending  
217 sanctions were an assessment of tax under article ten of  
218 this chapter, and the matter on appeal shall be subject to  
219 the procedures set forth in article ten of this chapter. On  
220 appeal, the burden of proof shall be on the project trans-  
221 feree to prove that the project certification fee and associ-  
222 ated interest and penalties are not due and owing. The  
223 review on appeal shall be limited to:

224 (i) The issue of whether a failure to timely pay the  
225 project certification fee or any portion thereof has oc-  
226 curred, the time period or periods over which such failure  
227 occurred, and whether such failure continues to occur;

228 (ii) The amount of the project certification fee and  
229 interest due; and

230 (iii) The mathematical and methodological accuracy  
231 of the computation of the project certification fee, interest  
232 and penalties.

233 (F) *Statutory confidentiality.* — No information, docu-  
234 ment or proceeding brought pursuant to this section, relat-  
235 ing to the liability of any project transferee for the project  
236 certification fee, interest or penalties imposed under this  
237 section is subject to the confidentiality provisions of article  
238 ten of this chapter or any other confidentiality provision  
239 of this code. However, any proceeding relating to any  
240 amount of tax due or the recapture of tax credit taken  
241 under this article or any adjustment of the amount of tax  
242 credit taken under this article is subject to the provisions  
243 of article ten of this chapter, including all statutory confi-  
244 dentiality provisions, and shall be subject to all other ap-  
245 plicable statutory tax confidentiality provisions of this  
246 code.

247 (G) *Effect of a final determination, waiver of penalties*  
248 *or sanctions.* — The notice of pending sanctions shall

249 become final sixty days after service, unless an appeal is  
250 filed under this section, and shall not be subject to further  
251 appeal by the recipient thereof. When a determination has  
252 become final that a project transferee has failed to timely  
253 pay the project certification fee, or any part thereof, the  
254 sanctions described in the notice of pending sanctions  
255 shall apply, effective as of the date set forth in that notice,  
256 unless the project certification fee, interest and penalties  
257 due are paid to the West Virginia development office with-  
258 in thirty days of the date on which the determination has  
259 become final. The twenty percent penalty authorized  
260 under this section may be imposed, adjusted, withdrawn or  
261 waived, in whole or in part, at the discretion of the director  
262 of the West Virginia development office. However, pay-  
263 ment of the project certification fee and interest due shall  
264 not be subject to waiver. The sanctions for failure to pay  
265 the project certification fee authorized under this section  
266 may be imposed, adjusted, withdrawn or waived, in whole  
267 or in part, at the discretion of the director of the West  
268 Virginia development office.

269 (c) Within sixty days after the close of the regular  
270 meeting of the neighborhood investment advisory board  
271 next succeeding the date of receipt of a complete applica-  
272 tion for approval of a proposed project, the director of the  
273 West Virginia development office shall certify, or deny  
274 certification of, the proposed project for which such appli-  
275 cation has been filed. Those applications not approved by  
276 the director within sixty days as aforesaid shall be deemed  
277 disapproved by operation of law.

278 (d) The West Virginia development office shall  
279 promptly notify an applicant as to whether an application  
280 for certification of a project plan has been approved or  
281 disapproved.

282 (e) Those prospective qualified charitable organiza-  
283 tions which receive certification of a project plan, and  
284 which otherwise comply with the requirements of this  
285 article so as to become qualified charitable organizations,  
286 as defined in section three of this article, may receive eligi-  
287 ble contributions, as defined in said section. Eligible tax-  
288 payers which make eligible contributions shall receive a

289 tax credit as provided in section five of this article. No tax  
290 credit may be granted under this article for any contribu-  
291 tion except eligible contributions made to a project which  
292 has been certified in accordance with the requirements of  
293 this article prior to the making of the contribution. No tax  
294 credit may be granted under this article for any contribu-  
295 tion which, if allowed, would cause the amount of tax  
296 credit generated by the project to exceed the maximum  
297 amount of tax credit for which the project was certified as  
298 stated in the application for project certification filed with  
299 the West Virginia development office.

300 (f) All applications for certification of a project filed  
301 with the West Virginia development office, whether such  
302 project is certified or denied certification, are public infor-  
303 mation which may be viewed and copied by the public  
304 and, at the discretion of the West Virginia development  
305 office, published by the West Virginia development office.

306 (g) *Revolving fund.* —

307 (1) For the purpose of permitting payments to be  
308 made and costs to be met for operation of the program  
309 established by this article, there is hereby created a revolv-  
310 ing fund for the West Virginia development office, which  
311 shall be known as the neighborhood investment fund. All  
312 money received by the West Virginia development office  
313 under this article shall be paid into the state treasury, and  
314 shall be deposited to the credit of the neighborhood in-  
315 vestment fund, and shall be expended only for the purpos-  
316 es of defraying the costs of the neighborhood investment  
317 program advisory board and the West Virginia develop-  
318 ment office in administering the program established  
319 pursuant to this article, unless otherwise directed by the  
320 Legislature.

321 (2) The neighborhood investment fund shall be accu-  
322 mulated and administered as follows:

323 (A) There shall be appropriated from the general  
324 revenue fund the sum of sixty thousand dollars to be  
325 transferred to the neighborhood investment fund to create  
326 a revolving fund which, together with other payments into  
327 this fund as provided in this article, shall be utilized to

328 defray the costs of the neighborhood investment program  
329 advisory board and the West Virginia development office  
330 in administering the program established pursuant to this  
331 article, unless otherwise directed by the Legislature.

332 (B) Payments received under this article shall be de-  
333 posited into the neighborhood investment fund.

334 (C) Any appropriations made to the neighborhood  
335 investment fund shall not be deemed to have expired at  
336 the end of any fiscal period.

**§11-13J-4a. Neighborhood investment program advisory board.**

1 (a) There is hereby created a neighborhood invest-  
2 ment advisory board, which shall consist of twelve voting  
3 members and the chairperson.

4 (b) *Chairperson.* —

5 (1) The director of the West Virginia development  
6 office, or the designee of the director of the West Virginia  
7 development office, shall be the ex officio chairperson of  
8 the neighborhood investment program advisory board.

9 (2) The chairperson shall vote on actions of the board  
10 only in the event of a tie vote, in which case the chairper-  
11 son's vote shall be the deciding vote.

12 (c) *Board members.* —

13 (1) Four of the members shall each be officers or  
14 members of the boards of directors of unrelated corpora-  
15 tions which are not affiliated with one another and which  
16 are currently licensed to do business in West Virginia.

17 (2) Four of the members shall each be executive direc-  
18 tors, officers or members of the boards of directors, of  
19 unrelated not-for-profit organizations which are not affili-  
20 ated with one another, which currently hold charitable  
21 organization status under Section 501(c)(3) of the Internal  
22 Revenue Code and which are currently licensed to do  
23 business in West Virginia.



24 (3) Four of the members shall be economically disad-  
25 vantaged citizens of the state:

26 (i) An appointee will qualify as an economically dis-  
27 advantaged citizen of this state if the appointee is an eco-  
28 nomically disadvantaged person who, for the taxable year  
29 immediately preceding the year of the member's appoint-  
30 ment to the board, had an annual gross personal income  
31 that was not more than one hundred twenty-five percent of  
32 the federal designated poverty level for personal incomes,  
33 and who has been a domiciliary and resident of this state  
34 for at least one year at the time of the appointment;

35 (ii) *Continued qualification and reappointment.* — An  
36 appointee or member appointed under this subdivision is  
37 not disqualified from appointment to the board or from  
38 completion of the member's ongoing term of service on  
39 the board if the appointee's or member's income in the  
40 year of appointment or in any year subsequent to the year  
41 of appointment exceeds one hundred twenty-five percent  
42 of the federal designated poverty level. However, a serv-  
43 ing member shall not qualify under this subdivision for  
44 reappointment to the board unless such member has had,  
45 for the taxable year immediately preceding the year of the  
46 member's reappointment to the board, an annual gross  
47 personal income that was not more than one hundred  
48 twenty-five percent of the federal designated poverty level  
49 for personal incomes, and has been a domiciliary and  
50 resident of this state for at least one year at the time of the  
51 member's reappointment to the board: *Provided*, That  
52 such member may be reappointed pursuant to qualifica-  
53 tion under subdivision (1) or (2) of this subsection, not-  
54 withstanding disqualification under this subdivision, if  
55 such member meets the requirements of subdivision (1) or  
56 (2), respectively, of this subsection at the time of reap-  
57 pointment.

58 (d) *Limitations; terms of members; appointments.* —

59 (1) Not more than four members (exclusive of the  
60 chairperson) shall be appointed from any one congressio-  
61 nal district. Not more than seven of the members (exclu-  
62 sive of the chairperson) may belong to the same political  
63 party. Members shall be eligible for reappointment.

64 However, no member may serve for more than three con-  
65 secutive terms.

66 (2) *Appointment terms.* —

67 (A) Except for initial appointments described under  
68 subdivision (3) of this subsection, and except for midterm  
69 special appointments made to fill irregular vacancies on  
70 the board, members shall be appointed for terms of three  
71 years each.

72 (B) Except for midterm special appointments made to  
73 fill irregular vacancies on the board, appointment terms  
74 shall begin on the first day of July of the beginning year.  
75 All appointment terms, special and regular, shall end on  
76 the thirtieth day of June of the ending year.

77 (3) *Initial appointments.* — The members first ap-  
78 pointed shall be appointed for a term commencing on the  
79 first day of July, one thousand nine hundred ninety-six.  
80 In order that the terms may be staggered so that four  
81 members are appointed each year:

82 (A) Four of the members first appointed shall, for the  
83 first term, be appointed for terms of one year. Those four  
84 members shall be appointed so that at least one appointee  
85 is appointed from each of the three member appointee  
86 groups specified in subdivisions (1), (2) and (3), subsec-  
87 tion (c) of this section.

88 (B) Four of the members first appointed shall, for the  
89 first term, be appointed for terms of two years. Those  
90 four members shall be appointed so that at least one ap-  
91 pointee is appointed from each of the three member ap-  
92 pointee groups specified in subdivisions (1), (2) and (3),  
93 subsection (c) of this section.

94 (C) Four of the members first appointed shall, for the  
95 first term, be appointed for terms of three years. Those  
96 four members shall be appointed so that at least one ap-  
97 pointee is appointed from each of the three member ap-  
98 pointee groups specified in subdivisions (1), (2) and (3),  
99 subsection (c) of this section.

100 (D) Subsequent appointments of members, except for  
101 midterm special appointments made to fill irregular vacan-  
102 cies on the board, shall be for terms of three years in ac-  
103 cordance with subdivision (2) of this subsection.

104 (4) *Selection of members.* —

105 (A) For the initial appointment of members under  
106 subdivision (3) of this subsection, members shall be select-  
107 ed by the director of the West Virginia development of-  
108 fice.

109 (B) At the end of a member's term, the chairperson  
110 shall solicit new member nominations from the board and  
111 appoint the most appropriate person to serve, in compli-  
112 ance with the requirements set forth in this section.

113 (C) Vacancies on the board shall be filled in the same  
114 manner as the original appointments for the duration of  
115 the unexpired term.

116 (e) *Quorum; meetings; funding.* —

117 (1) The presence of a majority of the members of the  
118 board constitutes a quorum for the transaction of business.  
119 The board shall elect from among its members a vice  
120 chairperson and such other officers as are necessary.

121 (2) The board shall meet not less than six times during  
122 the fiscal year, and additional meetings may be held upon  
123 a call of the chairperson or of a majority of the members.

124 (3) Board members shall be reimbursed by the West  
125 Virginia development office for sums necessary to carry  
126 out responsibilities of the board and for reasonable travel  
127 expenses to attend board meetings.

128 (f) *Annual report.* — The board shall make a report to  
129 the governor and the Legislature within thirty days of the  
130 close of each fiscal year. The report shall include summa-  
131 ries of all meetings of the board, an analysis of the overall  
132 progress of the program, fiscal concerns, the relative im-  
133 pact the program is having on the state and any sugges-  
134 tions and policy recommendations that the board may  
135 have. The report shall be public information made avail-  
136 able to the general public for examination and copying.

137 The board is authorized to publish the annual report,  
138 should the board elect to do so.

139 (g) *Duties of the board.* —

140 (1) *Administrative duties.* —

141 (A) The board shall be responsible for advising the  
142 West Virginia development office concerning the adminis-  
143 trative obligations of the program.

144 (B) The board shall approve application forms, track-  
145 ing systems and program record-keeping systems and  
146 methods.

147 (2) *Project evaluation and approval; prohibition on*  
148 *project promotion.* —

149 (A) The board shall select and approve projects, which  
150 may then be certified by the director of the West Virginia  
151 development office pursuant to section four of this article.

152 (B) Only projects sponsored by qualified charitable  
153 organizations, as defined in section three of this article,  
154 may be approved by the board or certified by the director  
155 of the West Virginia development office. An applicant  
156 that does not hold current status as a charitable organiza-  
157 tion under Section 501(c)(3) of the Internal Revenue  
158 Code may not receive project approval from the board, or  
159 project certification from the director of the West Virginia  
160 development office, for any proposed project. Failure of  
161 any applicant to provide convincing documentation prov-  
162 ing such status as a charitable organization under Section  
163 501(c)(3) of the Internal Revenue Code shall result in  
164 automatic denial of project approval and denial of project  
165 certification under this article.

166 (C) The board may not assist project sponsors or oth-  
167 ers in their efforts to solicit support or donations from any  
168 governmental, corporate or individual source for projects  
169 certified under this article.

170 (3) *Criteria for evaluation.* — In evaluating projects  
171 for approval, the board shall give priority to projects based  
172 upon the following criteria. A proposed project shall be  
173 favored if:

174 (A) The project is community-based. A project is  
175 community-based if:

176 (i) The project is to be managed locally, without na-  
177 tional, state, multi-state or international affiliations;

178 (ii) The project will benefit local citizens in the imme-  
179 diate geographic area where the project is to operate; and

180 (iii) The sponsor of the project is a local entity, rather  
181 than a statewide, national or international organization or  
182 an affiliate of a statewide, national or international organi-  
183 zation.

184 (B) The proposed project will primarily serve low  
185 income persons.

186 (C) The proposed project will serve highly distressed  
187 neighborhoods or communities.

188 (D) The project plan incorporates collaborative part-  
189 nerships among nonprofit groups, businesses, government  
190 organizations and other community organizations.

191 (E) The applicant or sponsor of the project has dem-  
192 onstrated a proven capacity to deliver the proposed servic-  
193 es.

194 (F) The applicant or sponsor of the project historically  
195 maintains low administrative costs.

196 (G) The applicant produces a strong showing of need  
197 for the services which the proposed project would provide,  
198 and produces convincing documentation of that need.

199 (H) The proposed project is innovative, novel, creative  
200 or unique in program approach.

201 (4) In the event that an applicant is directly or indi-  
202 rectly affiliated with one or more board members, those  
203 members may discuss the proposals with the board, but  
204 may not have a vote when that project is considered for  
205 final approval or disapproval.

206 (5) *Project approval by the board.* — Proposed pro-  
207 jects shall be approved or denied approval by a majority

208 vote of the board after competitive comparison with pro-  
209 posed projects of other applicants.

210 (h) *Project certification by the director of the West*  
211 *Virginia development office.* —

212 (1) Upon issuance of approval for a project by the  
213 board, the approved project shall be certified by the direc-  
214 tor of the West Virginia development office: *Provided,*  
215 That no certification may issue for any project, even  
216 though the project may have been approved by the board,  
217 if the issuance of certification for such project will cause  
218 the aggregate amount of tax credits certified to exceed the  
219 limitation set forth in section eight of this article or else-  
220 where in this article. No certification may be issued by the  
221 director of the West Virginia development office for any  
222 project which has not been approved by the board.

223 (2) The West Virginia development office shall  
224 promptly notify applicants of the issuance of certification  
225 for their projects, and shall issue tax credit vouchers to  
226 certified project applicants in the amount of the tax credit  
227 represented by the project.

228 (3) The West Virginia development office may pro-  
229 vide incidental technical support and guidance to projects  
230 certified under this article and may monitor the progress  
231 of the projects. The West Virginia development office  
232 shall make a quarterly report to the board on the progress  
233 of certified projects and the program generally.

#### **§11-13J-5. Amount of credit allowed.**

1 (a) *Credit allowed.* — Eligible taxpayers shall be al-  
2 lowed a credit against taxes imposed by this state, the ap-  
3 plication of which and the amount of which shall be deter-  
4 mined as provided in this article.

5 (b) *Amount of credit.* — The amount of credit allow-  
6 able is fifty percent of the amount of the taxpayer's "eligi-  
7 ble contribution".

8 (c) *Application of credit over five years.* — The  
9 amount of credit allowable must be taken over a five-year  
10 period, at the rate of one fifth of the amount thereof per

11 tax year, beginning with the tax year in which the taxpayer  
12 irrevocably transfers its eligible contribution to the project  
13 plan transferee. Notwithstanding any other provision of  
14 this article to the contrary, the tax credit which a taxpayer  
15 receives under this article may not exceed one hundred  
16 thousand dollars in any tax year of the eligible taxpayer.  
17 A tax credit shall be allowable under this article only for  
18 the tax year of the eligible taxpayer in which the eligible  
19 contribution is irretrievably transferred to the project plan  
20 transferee, and for the next succeeding four tax years.

### §11-13J-6. Application of annual credit allowance.

1 (a) *In general.* — The aggregate annual credit allow-  
2 ance for a current tax year is an amount equal to the sum  
3 of the following:

4 (1) The one-fifth part allowed under section five of  
5 this article for an eligible contribution placed into service  
6 or use during a prior tax year; plus

7 (2) The one-fifth part allowed under section five of  
8 this article for an eligible contribution placed into service  
9 or use during the current tax year.

10 (b) *Application of current year annual credit allow-*  
11 *ance.* — The amount determined under subsection (a) of  
12 this section shall be allowed as a credit for tax years end-  
13 ing on and after the first day of July, one thousand nine  
14 hundred ninety-six, as follows:

15 (1) *Business franchise taxes.* —

16 The amount determined under subsection (a) of this  
17 section shall be applied to reduce up to fifty percent of the  
18 taxes imposed by article twenty-three of this chapter for  
19 the tax year (determined after application of the credits  
20 against tax provided in section seventeen of said article,  
21 but before application of any other allowable credits  
22 against tax).

23 (2) *Corporation net income taxes.* — After application  
24 of subdivision (1) of this subsection, any unused credit  
25 shall next be applied to reduce up to fifty percent of the

26 taxes imposed by article twenty-four of this chapter, for  
27 the tax year (determined before application of allowable  
28 credits against tax).

29 (3) *Personal income taxes.* —

30 (A) If the eligible taxpayer is an electing small busi-  
31 ness corporation (as defined in Section 1361 of the United  
32 States Internal Revenue Code), a limited liability company  
33 treated as a partnership for purposes of the federal income  
34 tax, a partnership or a sole proprietorship, then any un-  
35 used credit (after application of subdivisions (1) and (2)  
36 of this subsection) shall be allowed as a credit against up  
37 to fifty percent of the taxes imposed by article twenty-one  
38 of this chapter on income of proprietors, partners or  
39 shareholders, subject to the limitations set forth in parts  
40 (B) and (C) of this subdivision.

41 (B) Electing small business corporations, partnerships  
42 and other unincorporated organizations shall allocate the  
43 credit allowed by this article among the members thereof  
44 in the same manner as profits and losses are allocated for  
45 the tax year.

46 (C) No credit may be allowed under this section  
47 against any tax due under article twenty-one of this chap-  
48 ter on any wage, salary or other compensation paid to any  
49 employee of any electing small business corporation,  
50 limited liability company, partnership, other unincorporat-  
51 ed organization or sole proprietorship or against any  
52 amount of tax due on any wage, salary or other compen-  
53 sation reported on federal form W2.

54 (c) *Unused credit forfeited.* — If any annual credit  
55 remains after application of subsections (a) and (b) of this  
56 section, the amount thereof shall be forfeited. No carry-  
57 over to a subsequent tax year or carryback to a prior tax  
58 year shall be allowed for the amount of any unused por-  
59 tion of any annual credit allowance under this article.

60 (d) *Addition of deductions, decreasing adjustments or*  
61 *decreasing modifications taken in determining taxable*  
62 *income for which credit is taken.* — Any deduction, de-



63 creasing adjustment or decreasing modification taken by  
64 any taxpayer in determining federal taxable income which  
65 affects West Virginia taxable income or in determining  
66 West Virginia taxable income under article twenty-one or  
67 twenty-four of this chapter for the taxable year for any  
68 charitable contribution, or payment or portion thereof,  
69 which qualifies as an eligible contribution under this arti-  
70 cle and for which credit is claimed, shall be added to West  
71 Virginia taxable income in determining the tax liability of  
72 the taxpayer under article twenty-one or twenty-four of  
73 this chapter, as appropriate, before application of the cred-  
74 it allowed under this article for the taxable year.

**§11-13J-7. Assertion of the tax credit against tax.**

1 (a) Any eligible taxpayer which desires to claim a tax  
2 credit as provided in this article shall file with the West  
3 Virginia tax commissioner, in such form as the tax com-  
4 missioner may prescribe, an annual tax credit reporting  
5 schedule stating the amount of the eligible contribution  
6 which the taxpayer has made. The eligible taxpayer shall  
7 file with the tax credit reporting schedule a certificate,  
8 issued by the director of the West Virginia development  
9 office, evidencing approval of the project plan by the  
10 director of the West Virginia development office, pursuant  
11 to which the contribution was made.

12 (b) In the tax credit reporting schedule required under  
13 this section, the taxpayer shall provide all information  
14 required by the tax commissioner's prescribed form.

15 (c) The tax credit reporting schedule shall be filed  
16 with the annual return for the taxes imposed by article  
17 twenty-four of this chapter for the tax year in which the  
18 eligible contribution is first irrevocably transferred to a  
19 transferee pursuant to a certified project plan: *Provided,*  
20 That, if the eligible taxpayer is not required to file a tax  
21 return under article twenty-four of this chapter, then such  
22 tax credit reporting schedule shall be filed with the annual  
23 return for the taxes imposed by article twenty-three of this  
24 chapter for such year: *Provided, however,* That, if the  
25 eligible taxpayer is not required to file a tax return under

26 article twenty-three or twenty-four of this chapter, then  
27 such tax credit reporting schedule shall be filed with the  
28 annual return for the taxes imposed by article twenty-one  
29 of this chapter for such year.

30 (d) The tax credit reporting schedule shall be accom-  
31 panied by such proof of payment as the tax commissioner  
32 may prescribe, showing that the amount to be contributed  
33 under the certified project plan has been paid to the trans-  
34 feree designated in the certified plan solely for the certi-  
35 fied project.

36 (e) The tax commissioner may disallow any credit  
37 claimed under this article for which a properly completed  
38 tax credit reporting schedule or a properly completed and  
39 valid statement or proof of payment of the eligible contri-  
40 bution, or other required documentation, statements or  
41 proofs are not timely filed.

**§11-13J-8. Total maximum aggregate tax credit amount.**

1 (a) The amount of tax credits allowed under this arti-  
2 cle may not exceed two million dollars in any state fiscal  
3 year.

4 (b) Applications for project certification shall be filed  
5 with the West Virginia development office beginning on  
6 and after the first day of July, one thousand nine hundred  
7 ninety-six. The West Virginia development office shall  
8 record the time of filing of each application for certifica-  
9 tion of a project plan required under section four of this  
10 article. All complete and valid applications filed shall be  
11 considered for approval or disapproval in a timely manner  
12 by the neighborhood assistance advisory board at the  
13 regular meeting of the board next succeeding the date  
14 when such applications are filed, and at such continuing  
15 meetings as may be necessary to dispose of business in a  
16 timely manner. The board may, in its discretion, consider  
17 applications for approval or disapproval at special or inter-  
18 im meetings for expedited processing.

19 (c) When the total amount of tax credits certified un-  
20 der this article equals the maximum amount of tax credits

21 allowed, as specified in subsection (a) of this section, in  
22 any state fiscal year, no further certifications shall be is-  
23 sued in that same fiscal year. Upon approval of a project  
24 by the board, the director of the West Virginia develop-  
25 ment office shall certify the approved project unless certif-  
26 ication is prohibited by the limitations and requirements  
27 set forth in this article.

28 (d) All applications filed in any state fiscal year and  
29 not certified during the state fiscal year in which they are  
30 filed shall be null and void by operation of law on the last  
31 day of the state fiscal year in which they are filed, and all  
32 applicants which elect to seek certification of a project  
33 plan shall file anew on and after the first day of the imme-  
34 diately succeeding state fiscal year without regard to  
35 whether such applicants have previously filed and failed to  
36 obtain certification for their application, or have never  
37 before filed.

**§11-13J-9. Credit recapture; interest; penalties; additions to tax; statute of limitations.**

1 If it appears upon audit or otherwise that an eligible  
2 taxpayer has not made contribution as represented, or  
3 should it appear that contributions made by an eligible  
4 taxpayer were made to the direct or indirect benefit of the  
5 eligible taxpayer making the contribution or to the direct  
6 or indirect benefit of any person related to the eligible  
7 taxpayer making the contribution, the credit previously  
8 allowed under this article shall be recaptured, and amend-  
9 ed returns shall be filed for any tax year for which the  
10 credit was taken. Any additional taxes due under this  
11 chapter shall be remitted with the amended return or re-  
12 turns filed with the tax commissioner, along with interest,  
13 as provided in section seventeen, article ten of this chapter,  
14 and a ten percent penalty, which may be waived by the tax  
15 commissioner if the taxpayer shows that the overclaimed  
16 amount was due to reasonable cause and not due to willful  
17 neglect, and such other penalties and additions to tax as  
18 may be applicable pursuant to the provisions of article ten  
19 of this chapter. Notwithstanding the provisions of article

20 ten of this chapter, the statute of limitations for the issu-  
21 ance of an assessment of tax by the tax commissioner shall  
22 be five years from the date of the filing of any tax return  
23 on which this credit was taken or five years from the date  
24 of payment of any tax liability calculated pursuant to the  
25 assertion of this credit, whichever is later.

**§11-13J-10. Public information relating to tax credit.**

1 The tax commissioner shall annually publish in the  
2 state register the name and address of every taxpayer as-  
3 serting this credit on a tax return, and the amount of any  
4 credit asserted on a tax return under this article by each  
5 such taxpayer, and the confidentiality provisions of sec-  
6 tion four-a, article one, or section five-d, article ten of this  
7 chapter, or of any other provision of this code, do not  
8 apply to such information.

**§11-13J-11. Audits and examinations; information sharing.**

1 (a) In addition to, or instead of, discretionary audits of  
2 eligible taxpayers which may be carried out by the tax  
3 commissioner, the tax commissioner may, at the tax com-  
4 missioner's discretion, perform joint audits or examina-  
5 tions in concert with the West Virginia development office,  
6 of, or independently audit or examine, the books and  
7 records and other information, as appropriate, of any  
8 taxpayer, or of any person, organization or entity which  
9 has filed an application for certification of a project plan  
10 under section four of this article with the West Virginia  
11 development office, or of any taxpayer which has asserted  
12 this credit on a tax return, or of any person, organization  
13 or entity believed to have relevant information.

14 (b) For purposes of joint audits, or any administrative  
15 or judicial proceeding or procedure relating to any tax  
16 credit taken, asserted or sought under this article, the tax  
17 commissioner may share such tax information as the tax  
18 commissioner may deem appropriate with the West Vir-  
19 ginia development office, notwithstanding the provisions  
20 of section four-a, article one, or section five-d, article ten

21 of this chapter, or any other provision of this code to the  
22 contrary.

**§11-13J-12. Program evaluation; expiration of credit; preservation of entitlements.**

1 On or before the thirtieth day of September, one thou-  
2 sand nine hundred ninety-eight, the board shall secure an  
3 independent review of the program created under this  
4 article and shall present the findings of that review to the  
5 Legislature. Pursuant to this report, and any independent  
6 evaluation that the Legislature or the joint committee on  
7 government operations may wish to initiate, the joint com-  
8 mittee on government operations shall issue a recommen-  
9 dation to the Legislature, not later than the first day of  
10 March, one thousand nine hundred ninety-nine, as to  
11 whether the program should continue. Should the joint  
12 committee on government operations recommend that the  
13 program not be terminated, appropriate legislation shall be  
14 prepared specifying that the program shall continue in  
15 such manner as the joint committee on government opera-  
16 tions may recommend, and the same shall be submitted to  
17 the Legislature by the joint committee on government  
18 operations in a timely manner for consideration by the  
19 Legislature during the then ongoing legislative session.  
20 Should the joint committee on government operations fail  
21 to recommend the continuation of the program, as afore-  
22 said, then, notwithstanding any other provision of this  
23 article to the contrary, no entitlement to the tax credit  
24 under this article shall result from any contribution made  
25 to any certified project after the first day of July, one  
26 thousand nine hundred ninety-nine, and no credit shall be  
27 available to any taxpayer for any such contribution made  
28 after that date. However, taxpayers which have gained  
29 entitlement to the credit pursuant to the requirements of  
30 this article for eligible contributions made to certified  
31 projects prior to the first day of July, one thousand nine  
32 hundred ninety-nine, shall retain that entitlement and  
33 apply the credit in due course pursuant to the require-  
34 ments and limitations of this article, and subject to all  
35 provisions thereof.

## CHAPTER 238

(Com. Sub. for H. B. 4530—By Delegates Kiss, Burke, J. Martin,  
Mezzatesta, Michael, Ashley and Clements)

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[Passed March 9, 1996; in effect July 1, 1996. Approved by the Governor.]

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AN ACT to amend chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirteen-k; to amend article twenty-three of said chapter by adding thereto a new section, designated section twenty-four-a; and to amend article twenty-four of said chapter by adding thereto a new section, designated section twenty-two-a, all relating generally to agricultural products; relating to income tax credits for purchases of qualified agricultural equipment; defining terms; setting forth the amount of credit; providing for legislative rules; setting forth an effective date; providing credits against business franchise tax and corporate net income tax on value added products; and authorizing promulgation of rules.

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

That chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article thirteen-k; that article twenty-three of said chapter be amended by adding thereto a new section, designated section twenty-four-a; and that article twenty-four of said chapter be amended by adding thereto a new section, designated section twenty-two-a, all to read as follows:

### CHAPTER 11. TAXATION.

#### Article

- 13K. Tax Credit for Agricultural Equipment.
- 23. Business Franchise Tax.
- 24. Corporation Net Income Tax.

**ARTICLE 13K. TAX CREDIT FOR AGRICULTURAL EQUIPMENT.**

§11-13K-1. Findings and purpose.

§11-13K-2. Definitions.

§11-13K-3. Amount of credit.

§11-13K-4. Proration of credit.

§11-13K-5. Legislative rules.

§11-13K-6. Effective date.

### §11-13K-1. Findings and purpose.

1       The Legislature finds that it is an important public  
2 policy to promote environmentally sound practices within  
3 the agricultural industry in this state. Therefore, a credit  
4 against the taxes imposed by articles twenty-one and  
5 twenty-four of this chapter shall be allowed in an amount  
6 equaling twenty-five percent of all expenditures for the  
7 purchase and installation of agricultural equipment and  
8 structures for agricultural operations within this state  
9 which serve to protect the environment.

### §11-13K-2. Definitions.

1       As used in this section the following terms shall have  
2 the meanings ascribed in this section:

3       (a) "Advanced technology pesticide and fertilizer  
4 application equipment" means machinery certified by the  
5 West Virginia division of environmental protection as  
6 providing precise pesticide and fertilizer application. The  
7 agriculture commission and the West Virginia division of  
8 environmental protection shall provide technical assistance  
9 to the tax commissioner to determine appropriate  
10 specifications for machinery which would provide for  
11 more precise pesticide and fertilizer application to reduce  
12 the potential for adverse environmental impacts for  
13 purposes of application of the credit provided by this  
14 article. The machinery shall include, but not be limited to:  
15 (1) Sprayers for pesticides and liquid fertilizers; (2)  
16 pneumatic fertilizer applicators; (3) monitors, computer  
17 regulators, and heights adjustable booms for sprayers and  
18 liquid fertilizer applicators; (4) manure applicators; and  
19 (5) tramline adapters.

20       (b) "Conservation tillage equipment" means a planter  
21 or drill commonly known as a "no-till" planter or drill,

22 designed to minimize disturbance of the soil in planting  
23 crops, including such planters or drills which may be  
24 attached to equipment already owned by the taxpayer.

25 (c) "Dead poultry composting facility" is a structure  
26 consisting of a roof, an impervious weight bearing  
27 foundation, such as concrete and rot resistant building  
28 materials such as pressure treated lumber or similar  
29 material, which structure is used to biologically treat  
30 poultry carcasses by composting.

31 (d) "Mortality incinerator" means a structure certified  
32 by the air pollution control commission which is used for  
33 the purpose of burning animal carcasses.

34 (e) "Nutrient management system" means an  
35 established procedure for managing the amount, form,  
36 placement, and timing of applications of plant nutrients.

37 (f) "Qualified agricultural equipment" means  
38 advanced technology pesticide and fertilizer application  
39 equipment, conservation tillage equipment, dead poultry  
40 composting facilities, nutrient management systems,  
41 streambank and shoreline protection systems, stream  
42 channel stabilization systems, stream crossing or access  
43 plans, waste management systems, waste storage facilities,  
44 and waste treatment lagoons located on or at agricultural  
45 operations in this state and certified by the tax  
46 commissioner in accordance with section five of this  
47 article.

48 (g) "Streambank and shoreline protection system"  
49 means the consistent use of vegetation or structures to  
50 stabilize and protect banks of streams, lakes, estuaries, or  
51 excavated channels in order to stabilize or protect banks  
52 of streams, lakes, estuaries, or excavated channels for one  
53 or more of the following purposes: (1) To prevent the  
54 loss of land or damage to utilities, roads, buildings, or  
55 other facilities adjacent to the banks; (2) To maintain the  
56 capacity of the channel; (3) To control channel meander  
57 that would adversely affect downstream facilities; (4) To  
58 reduce sediment loads causing downstream damages and  
59 pollution; (5) To improve the stream for recreation or as  
60 a habitat for fish and wildlife.



61 (h) "Stream channel stabilization system" means an  
62 established structure for the stabilization of the channel of  
63 a stream.

64 (i) "Stream crossing or access plan" means the  
65 maintenance of a stabilized area to provide for crossing of  
66 a stream by livestock and farm machinery, or to provide  
67 access to the stream for livestock water.

68 (j) "Waste management system" means a planned  
69 system in which all necessary components are installed for  
70 managing liquid and solid waste, including runoff from  
71 concentrated waste areas at an agricultural operation, in a  
72 manner that does not degrade air, soil, or water resources.

73 (k) "Waste storage facility" means a waste  
74 impoundment made by constructing an embankment  
75 and/or excavating a pit or dugout, or by fabricating a  
76 facility for the storage of waste from livestock or poultry.

77 (l) "Waste treatment lagoon" means an impoundment  
78 made by excavation or earthfill for biological treatment of  
79 animal or other agricultural waste.

### §11-13K-3. Amount of credit.

1 (a) There shall be allowed to eligible taxpayers who  
2 have made investments in qualified agricultural equipment  
3 in this state, a credit against taxes imposed by articles  
4 twenty-one and twenty-four of this chapter in the amount  
5 set forth in subsection (b) of this section.

6 (b) The amount of credit shall be equal to  
7 twenty-five percent of the purchase price of qualified  
8 agricultural equipment, but not to exceed two thousand  
9 five hundred dollars for purchases during a taxable year  
10 or the total amount of tax imposed by articles twenty-one  
11 or twenty-four of this chapter, whichever is less, in the year  
12 of purchase of qualified agricultural equipment. If the  
13 amount of the credit exceeds the taxpayer's tax liability  
14 for the taxable year, the amount which exceeds the tax  
15 liability may be carried over and applied as a credit  
16 against the tax liability of the taxpayer pursuant to article  
17 twenty-one or twenty-four of this chapter to each of the  
18 next five taxable years unless sooner used.

**§11-13K-4. Proration of credit.**

1 For purposes of this section, the amount of any credit  
2 attributable to the purchase of agricultural equipment by a  
3 partnership or electing small business corporation (S  
4 corporation) shall be allocated to the individual partners  
5 or shareholders in proportion to their ownership or  
6 interest in the partnership or S corporation.

**§11-13K-5. Legislative rules.**

1 On or before the thirty-first day of May, one  
2 thousand nine hundred ninety-six, the tax commissioner  
3 and the agricultural commissioner shall propose legislative  
4 rules for promulgation in accordance with article three,  
5 chapter twenty-nine-a of this code to determine the  
6 equipment which shall be certified as qualified agricultural  
7 equipment for purposes of application of the credit  
8 provided for in this article not inconsistent with the  
9 provisions of section two of this article. The tax  
10 commissioner shall also propose legislative rules for  
11 promulgation in accordance with article three, chapter  
12 twenty-nine-a of this code regarding the administration of  
13 the credit established pursuant to this article.

**§11-13K-6. Effective date.**

1 The credit shall be allowed for taxable years  
2 beginning on or after the first day of July, one thousand  
3 nine hundred ninety-seven.

**ARTICLE 23. BUSINESS FRANCHISE TAX.****§11-23-24a. Tax credit for value-added products from raw agricultural products; regulations.**

1 (a) Effective for taxable years beginning the first day  
2 of July, one thousand nine hundred ninety-seven,  
3 notwithstanding any provisions of this code to the  
4 contrary, any person, newly and solely engaged in the  
5 production of value-added products from raw agricultural  
6 products shall be allowed a credit, in the amount of one  
7 thousand dollars for each taxable year against the tax  
8 imposed by this article, for a period of five years from the  
9 date the person becomes subject to this article. The credit  
10 shall be allowed only against the tax imposed on that

11 capital which is attributable to the value-added production  
12 activity in this state.

13 (b) For purposes of this section, "value-added  
14 product" means the following products derived from  
15 processing a raw agricultural product, whether for human  
16 consumption or for other use. The following enterprises  
17 qualify as processing raw agricultural products into  
18 value-added products: (1) The conversion of lumber into  
19 furniture, toys, collectibles and home furnishings; (2) the  
20 conversion of fruit into wine; (3) the conversion of honey  
21 into wine; (4) the conversion of wool into fabric; (5) the  
22 conversion of raw hides into semifinished or finished  
23 leather products; (6) the conversion of milk into cheese;  
24 (7) the conversion of fruits or vegetables into a dried,  
25 canned or frozen product; (8) the conversion of feeder  
26 cattle into commonly acceptable marketable retail  
27 portions; (9) the conversion of aquatic animals into a  
28 dried, canned, cooked or frozen product; and (10) the  
29 conversion of poultry into a dried, canned, cooked or  
30 frozen product.

31 (c) The tax commissioner may propose rules for  
32 promulgation in accordance with article three, chapter  
33 twenty-nine-a as may be necessary to effectuate the  
34 purposes of this section.

#### ARTICLE 24. CORPORATION NET INCOME TAX.

##### §11-24-22a. Tax credit for value-added products from raw agricultural products; regulations.

1 (a) Effective for taxable years beginning the first day  
2 of July, one thousand nine hundred ninety-seven,  
3 notwithstanding any provisions of this code to the  
4 contrary, any new corporation engaged solely in the  
5 production of value-added products from raw agricultural  
6 products shall be allowed a credit, in the amount of one  
7 thousand dollars for each taxable year against the tax  
8 imposed by this article, for a period of five years from the  
9 date the person becomes subject to this article. The credit  
10 shall be allowed only against the tax on taxable income  
11 which is attributable to the production of value-added  
12 products.

13 (b) Effective for taxable years beginning the first day  
14 of July, one thousand nine hundred ninety-seven, any new  
15 corporation engaged solely in the production of  
16 value-added products in West Virginia shall be allowed a  
17 tax credit, according to the schedule herein, for every one  
18 hour spent by a new permanent, full-time employee  
19 training to learn a skill specific to the production of  
20 value-added products as defined in article twenty-one,  
21 chapter thirty-one of this code. The tax credit shall be  
22 allowed for a maximum of sixty hours, per company, per  
23 year.

24 (c) For purposes of this section, tax credits for hours  
25 spent by a new permanent, full-time employee in training  
26 shall be allowed as follows:

27 (1) Corporations which employ up to five new  
28 employees shall be allowed a tax credit of two dollars for  
29 every one hour spent by a new employee in training as  
30 specified herein;

31 (2) Corporations which employ between six and  
32 twenty-five new employees shall be allowed a tax credit of  
33 one dollar and fifty cents for every one hour spent by a  
34 new employee in training as specified herein;

35 (3) Corporations which employ between twenty-six  
36 and seventy-five new employees shall be allowed a tax  
37 credit of one dollar and twenty-five cents for every one  
38 hour spent by a new employee in training as specified  
39 herein;

40 (4) Corporations which employ between seventy-six  
41 and one hundred and twenty-five new employees shall be  
42 allowed a tax credit of one dollar for every one hour spent  
43 by a new employee in training as specified herein; and

44 (5) Corporations which employ more than one  
45 hundred twenty-five new employees shall be allowed a tax  
46 credit of seventy-five cents for every one hour spent by a  
47 new employee in training as specified herein.

48 (d) For purposes of this section, "value-added  
49 product" means the following products derived from  
50 processing a raw agricultural product, whether for human

51 consumption or for other use. The following enterprises  
52 qualify as processing raw agricultural products into  
53 value-added products: (1) The conversion of lumber into  
54 furniture, toys, collectibles and home furnishings; (2) the  
55 conversion of fruit into wine; (3) the conversion of honey  
56 into wine; (4) the conversion of wool into fabric; (5) the  
57 conversion of raw hides into semifinished or finished  
58 leather products; (6) the conversion of milk into cheese;  
59 (7) the conversion of fruits or vegetables into a dried,  
60 canned or frozen product; (8) the conversion of feeder  
61 cattle into commonly acceptable marketable retail por-  
62 tions; (9) the conversion of aquatic animals into a dried,  
63 canned, cooked or frozen product; and (10) the conver-  
64 sion of poultry into a dried, canned, cooked or frozen  
65 product.

66 (e) The tax commissioner may propose rules for pro-  
67 mulgation in accordance with the provisions of article  
68 three, chapter twenty-nine-a of this code as may be neces-  
69 sary to effectuate the purposes of this article.

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## CHAPTER 239

(S. B. 37—By Senators Craigo, Scott and Plymale)

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[Passed March 15, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to repeal sections nine-b and nine-c, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to repeal sections three-b and three-c, article fifteen-a of said chapter; to amend and reenact sections two and five, article fourteen of said chapter; to further amend said article by adding thereto three new sections, designated sections seventeen, seventeen-a and eighteen; and to amend and reenact section nine, article fifteen of said chapter, all relating generally to exemptions from excise taxes and compliance with those taxes; removing the gasoline and special fuels excise tax on special dyed diesel fuels used in off-highway equipment; prohibiting the operation of motor vehicles upon the highways of this state

with special dyed diesel fuel as a fuel and carried in the fuel tanks; providing for spot check inspections and where such inspections may occur; setting forth who may make these inspections; setting forth civil and criminal penalties; sales tax; exemptions from sales tax; specifying effective dates; creating exemptions from the consumers sales and service tax for services performed by a corporation, partnership or limited liability company for a related corporation, partnership or limited liability company; exempting sales by public and academic libraries; exempting sales of primary opinion research services performed for out-of-state clients; exempting certain purchases by persons making value added agricultural products; exempting sales of musical instructional services by music teachers; exempting charges to members for membership, newsletters, seminars and instructional materials related thereto for members of certain membership organizations which are tax exempt under specified sections of the Internal Revenue Code; repealing separate sections relating to how exemptions from tax are asserted and incorporating these requirements in the section providing the exemptions from tax; exempting commissions received by manufacturers' representatives and numbering the exemptions from sales tax; and specifying effective dates for such exemptions.

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

That sections nine-c and nine-d, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that sections three-b and three-c, article fifteen-a of said chapter be repealed; that sections two and five, article fourteen of said chapter be amended and reenacted; that said article be further amended by adding thereto three new sections, designated sections seventeen, seventeen-a and eighteen; and that section nine, article fifteen of said chapter be amended and reenacted, all to read as follows:

**Article**

**14. Gasoline and Special Fuel Excise Tax.**

**15. Consumers Sales Tax.**

**ARTICLE 14. GASOLINE AND SPECIAL FUEL EXCISE TAX.**

§11-14-2. Definitions.

§11-14-5. Exemptions from tax.

§11-14-17. No dyed fuel on highways.

§11-14-17a. Spot check inspections.

§11-14-18. Penalty for refusal to permit inspection.

### §11-14-2. Definitions.

1 For purposes of this article:

2 (1) "Actual metered gallons" means, in addition to  
3 amounts computed by mechanical devices which measure  
4 and record directly in digital terms, all amounts computed  
5 by other methods of computing quantities commonly  
6 employed by persons engaged in the sale of petroleum  
7 products, including, but not limited to, tank or barge  
8 strappings and other graduated lineal devices.

9 (2) "Aircraft fuel" means gasoline and special fuel  
10 suitable for use in any aircraft engine.

11 (3) "Commissioner" or "tax commissioner" means the  
12 tax commissioner of the state of West Virginia or his or  
13 her duly authorized agent.

14 (4) "Distributor" or "producer" means and includes  
15 every person:

16 (a) Who produces, manufactures, processes or other-  
17 wise alters gasoline or special fuel in this state for use or  
18 for sale;

19 (b) Who engages in this state in the sale of gasoline or  
20 special fuel for the purpose of resale or for distribution; or

21 (c) Who receives gasoline or special fuel into the cargo  
22 tank of a tank wagon in this state for use or sale by such  
23 person.

24 (5) "Gallon" means two hundred thirty-one cubic  
25 inches of liquid measurement, by volume: *Provided*, That  
26 the commissioner may by rule prescribe other measure-  
27 ment or definition of gallon.

28 (6) "Gasoline" means any product commonly or com-  
29 mercially known as gasoline, regardless of classification,  
30 suitable for use as fuel in an internal combustion engine,  
31 except special fuel as defined in this section.

32 (7) "Highway" means every way or place of whatever  
33 nature open to the use of the public as a matter of right  
34 for the purpose of vehicular travel, which is maintained by  
35 this state or some taxing subdivision or unit of this state or  
36 the federal government or any of its agencies.

37 (8) "Importer" means every person, resident or nonres-  
38 ident, other than a distributor, who receives gasoline or  
39 special fuel outside this state for use, sale or consumption  
40 within this state, but shall not include the fuel in the supply  
41 tank of a motor vehicle, or a person paying the motor  
42 carrier road tax as provided for in article fourteen-a of this  
43 chapter.

44 (9) "Motor carrier" means any passenger vehicle which  
45 has seats for more than nine passengers in addition to the  
46 driver, or any road tractor, or any tractor truck or any  
47 truck having more than two axles which is operated or  
48 caused to be operated by any person on any highway in  
49 this state.

50 (10) "Motor vehicle" means automobiles, motor carri-  
51 ers, motor trucks, motorcycles and all other vehicles or  
52 equipment, engines or machines which are operated or  
53 propelled by combustion of gasoline or special fuel.

54 (11) "Person" means and includes any individual, firm,  
55 partnership, limited partnership, joint venture, association,  
56 company, corporation, organization, syndicate, receiver,  
57 trust or any other group or combination acting as a unit,  
58 in the plural as well as the singular number, and means  
59 and includes the officers, directors, trustees or members of  
60 any firm, partnership, limited partnership, joint venture,  
61 association, company, corporation, organization, syndicate,  
62 receiver, trust or any other group or combination acting as  
63 a unit, in the plural as well as the singular number, unless  
64 the intention to give a more limited meaning is disclosed  
65 by the context.

66 (12) "Petroleum carrier" means any person who hauls  
67 or transports gasoline or special fuel within this state or on  
68 any navigable rivers which are within the jurisdiction of  
69 this state.



70 (13) "Purchase" means and includes any acquisition of  
71 ownership of property or of a security interest for a con-  
72 sideration.

73 (14) "Receive" means any acquisition of ownership or  
74 possession of gasoline or special fuel.

75 (15) "Retail dealer" means any person not a distributor  
76 or producer who sells gasoline or special fuel from a fixed  
77 location in this state to users.

78 (16) "Sale" means any transfer, exchange, gift, barter  
79 or other disposition of any property or security interest  
80 for a consideration.

81 (17) "Special fuel" means any gas or liquid, other than  
82 gasoline, used or suitable for use as fuel in an internal  
83 combustion engine. The term "special fuel" includes  
84 products commonly known as natural or casinghead gaso-  
85 line, but shall not include any petroleum product or chem-  
86 ical compound such as alcohol, industrial solvent, heavy  
87 furnace oil, lubricant, etc., not commonly used nor practi-  
88 cally suited for use as fuel in an internal combustion  
89 engine.

90 (18) "Special dyed diesel fuel" means diesel fuel that is  
91 required to be dyed under United States environmental  
92 protection agency rules for high sulphur diesel fuel or is  
93 dyed under internal revenue service rules for low sulphur  
94 fuel or pursuant to any other requirements subsequently  
95 set by the United States environmental protection agency  
96 or internal revenue service including any invisible marker  
97 requirements that is sold for the exclusive use or con-  
98 sumption in off-highway equipment and is exempt from  
99 excise taxation under federal law.

100 (19) "Supply tank" means any receptacle on a motor  
101 vehicle from which gasoline or special fuel is supplied for  
102 the propulsion of the vehicle or equipment located there-  
103 on, exclusive of a cargo tank. A supply tank includes a  
104 separate compartment of a cargo tank used as a supply  
105 tank, and any auxiliary tank or receptacle of any kind  
106 from which gasoline or special fuel is supplied for the  
107 propulsion of the vehicle, whether or not the tank or re-

108 ceptacle is directly connected to the fuel supply line of the  
109 vehicle.

110 (20) "Tank wagon" means and includes any motor  
111 vehicle or vessel with a cargo tank or cargo tanks ordinari-  
112 ly used for making deliveries of gasoline or special fuel or  
113 both for sale or use.

114 (21) "Tax" includes, within its meaning, interest, addi-  
115 tions to tax and penalties, unless the intention to give it a  
116 more limited meaning is disclosed by the context.

117 (22) "Taxpayer" means any person liable for any tax,  
118 interest, additions to tax or penalty under the provisions of  
119 this article.

120 (23) "User" means any person who purchases gasoline  
121 or special fuel for use as fuel and uses the fuel in an inter-  
122 nal combustion engine owned or operated by that person.

**§11-14-5. Exemptions from tax.**

1 There shall be exempted from the excise tax on gaso-  
2 line or special fuel imposed by this article the following:

3 (1) All gallons of gasoline or special fuel exported  
4 from this state to any other state or nation;

5 (2) All gallons of gasoline or special fuel sold to and  
6 purchased by the United States or any agency of the Unit-  
7 ed States when delivered in bulk quantities of five hundred  
8 gallons or more;

9 (3) All gallons of gasoline or special fuel sold to and  
10 purchased by a county board of education when delivered  
11 in bulk quantities of five hundred gallons or more;

12 (4) All gallons of gasoline or special fuel sold pursu-  
13 ant to a government contract, in bulk quantities of five  
14 hundred gallons or more, for use in conjunction with any  
15 municipal, county, state or federal civil defense or emer-  
16 gency service program, or to any person on whom is im-  
17 posed a requirement to maintain an inventory of gasoline  
18 or special fuel for the purpose of the program: *Provided,*  
19 That fueling facilities used for these purposes are not  
20 capable of fueling motor vehicles and the person in

21 charge of the program has in his or her possession a letter  
22 of authority from the tax commissioner certifying his or  
23 her right to the exemption;

24 (5) All gallons of gasoline or special fuel imported  
25 into this state in the fuel supply tank or tanks of a motor  
26 vehicle, other than in the fuel supply tank of a vehicle  
27 being hauled. This exemption does not relieve a person  
28 owning or operating as a motor carrier of any taxes im-  
29 posed by article fourteen-a of this chapter;

30 (6) All gallons of gasoline and special fuel used and  
31 consumed in stationary off-highway turbine engines;

32 (7) All gallons of special fuel for heating any public  
33 or private dwelling, building or other premises;

34 (8) All gallons of special fuel for boilers;

35 (9) All gallons of gasoline or special fuel used as a dry  
36 cleaning solvent or commercial or industrial solvent;

37 (10) All gallons of gasoline or special fuel used as  
38 lubricants, ingredients or components of any manufac-  
39 tured product or compound;

40 (11) All gallons of gasoline or special fuel sold to any  
41 municipality or agency of a municipality for use in vehi-  
42 cles or equipment owned and operated by the municipali-  
43 ty or agency of a municipality and when purchased for  
44 delivery in bulk quantities of five hundred gallons or  
45 more;

46 (12) All gallons of gasoline or special fuel sold to any  
47 urban mass transportation authority, created pursuant to  
48 the provisions of article twenty-seven, chapter eight of this  
49 code, for use in an urban mass transportation system;

50 (13) All gallons of gasoline or special fuel sold for use  
51 as aircraft fuel;

52 (14) All gallons of gasoline or special fuel sold for use  
53 or used as a fuel for commercial watercraft;

54 (15) All gallons of special fuel sold for use or con-  
55 sumed in railroad diesel locomotives;

56 (16) All gallons of gasoline or special fuel sold to and  
57 purchased by a unit of county government when delivered  
58 in bulk quantities of five hundred gallons or more; and

59 (17) All gallons of special dyed diesel fuel.

**§11-14-17. No dyed fuel on highways.**

1 No person may operate or maintain a motor vehicle  
2 on any public highway in this state with special dyed die-  
3 sel fuel as the motor fuel contained in the fuel supply  
4 tank. This provision does not apply to: (a) Persons oper-  
5 ating motor vehicles that have received fuel into their fuel  
6 tanks outside of this state in a jurisdiction that permits  
7 introduction of dyed taxable motor fuel of that color and  
8 type into the motor fuel tank of highway vehicles, and can  
9 show proof of such; or (b) uses of dyed fuel on the high-  
10 way which are lawful under the Internal Revenue Code  
11 and regulations under that code, including state and local  
12 government vehicles and buses unless otherwise prohibited  
13 by this chapter.

14 Any person who violates this section is guilty of a  
15 misdemeanor and, upon conviction thereof, shall be fined  
16 ten dollars per gallon of fuel capacity of the fuel tanks or  
17 one thousand dollars, whichever is greater, for the first two  
18 violations of this section in a calendar year, and a fine of  
19 fifteen dollars per gallon of fuel capacity of the fuel tanks  
20 or two thousand dollars, whichever is greater, for each  
21 subsequent offense in the same calendar year.

**§11-14-17a. Spot check inspections.**

1 (a) The tax commissioner or his or her appointees,  
2 may stop, inspect and issue citations to operators of motor  
3 vehicles for violations of this chapter at sites where fuel is,  
4 or may be, produced, stored, or loaded into or consumed  
5 by motor vehicles. These sites include, but are not limited  
6 to:

7 (1) A terminal;

8 (2) A fuel storage facility that is not a terminal, such as  
9 a bulk storage facility;

10 (3) A retail fuel facility;

11 (4) Highway rest stops; or

12 (5) A designated inspection area, including any state  
13 highway inspection station, weigh station, agricultural  
14 inspection station, mobile station or other location desig-  
15 nated by the tax commissioner.

16 (b) Nothing contained in this section may be con-  
17 strued to prohibit the issuance of a citation for the viola-  
18 tion of the provisions of this article on the open highway  
19 or other than the spot check areas where the violation of  
20 this article is discovered where the motor vehicle is lawful-  
21 ly stopped for any other criminal violation of the laws of  
22 this state.

#### §11-14-18. Penalty for refusal to permit inspection.

1 Any person who refuses to permit the inspection au-  
2 thorized by section seventeen-a of this article is guilty of a  
3 violation of the rules of the state tax division and shall pay  
4 a civil penalty of five thousand dollars, in addition to any  
5 other penalty imposed in this code.

### ARTICLE 15. CONSUMERS SALES TAX.

#### §11-15-9. Exemptions.

1 (a) *Exemptions for which exemption certificate may be*  
2 *issued.* — A person having a right or claim to any exemp-  
3 tion set forth in this subsection may, in lieu of paying the  
4 tax imposed by this article and filing a claim for refund,  
5 execute a certificate of exemption, in such form as the tax  
6 commissioner may require, and deliver it to the vendor of  
7 the property or service, in such manner as the tax commis-  
8 sioner may require. However, the tax commissioner may,  
9 by rule, specify those exemptions authorized in this sub-  
10 section for which exemptions certificates are not required.  
11 The following sales of tangible personal property and/or  
12 services are exempt as provided in this subsection:

13 (1) Sales of gas, steam and water delivered to consum-  
14 ers through mains or pipes and sales of electricity;

15 (2) Sales of textbooks required to be used in any of  
16 the schools of this state or in any institution in this state

17 which qualifies as a nonprofit or educational institution  
18 subject to the West Virginia department of education and  
19 the arts, the board of trustees of the university system of  
20 West Virginia or the board of directors for colleges locat-  
21 ed in this state;

22 (3) Sales of property or services to this state, its institu-  
23 tions or subdivisions, governmental units, institutions or  
24 subdivisions of other states: *Provided*, That the law of the  
25 other state provides the same exemption to governmental  
26 units or subdivisions of this state and to the United States,  
27 including agencies of federal, state or local governments  
28 for distribution in public welfare or relief work;

29 (4) Sales of vehicles which are titled by the division of  
30 motor vehicles and which are subject to the tax imposed  
31 by section four, article three, chapter seventeen-a of this  
32 code, or like tax;

33 (5) Sales of property or services to churches who  
34 make no charge whatsoever for the services they render:  
35 *Provided*, That the exemption granted in this subdivision  
36 applies only to services, equipment, supplies, food for  
37 meals and materials directly used or consumed by these  
38 organizations, and shall not apply to purchases of gasoline  
39 or special fuel;

40 (6) Sales of tangible personal property or services to a  
41 corporation or organization which has a current registra-  
42 tion certificate issued under article twelve of this chapter, is  
43 exempt from federal income taxes under Section 501(c)  
44 (3) or (c)(4) of the Internal Revenue Code of 1986, as  
45 amended, and is:

46 (A) A church or a convention or association of  
47 churches as defined in Section 170 of the Internal Reve-  
48 nue Code of 1986, as amended;

49 (B) An elementary or secondary school which main-  
50 tains a regular faculty and curriculum and has a regularly  
51 enrolled body of pupils or students in attendance at the  
52 place in this state where its educational activities are regu-  
53 larly carried on;

54 (C) A corporation or organization which annually  
55 receives more than one half of its support from any com-  
56 bination of gifts, grants, direct or indirect charitable con-  
57 tributions or membership fees;

58 (D) An organization which has no paid employees and  
59 its gross income from fund raisers, less reasonable and  
60 necessary expenses incurred to raise the gross income (or  
61 the tangible personal property or services purchased with  
62 the net income), is donated to an organization which is  
63 exempt from income taxes under Section 501(c)(3) or  
64 (c)(4) of the Internal Revenue Code of 1986, as amended;

65 (E) A youth organization, such as the girl scouts of the  
66 United States of America, the boy scouts of America or  
67 the YMCA Indian guide/princess program and the local  
68 affiliates thereof, which is organized and operated exclu-  
69 sively for charitable purposes and has as its primary pur-  
70 pose the nonsectarian character development and citizen-  
71 ship training of its members;

72 (F) For purposes of this subsection:

73 (i) The term "support" includes, but is not limited to:

74 (I) Gifts, grants, contributions or membership fees;

75 (II) Gross receipts from fund raisers which include  
76 receipts from admissions, sales of merchandise, perfor-  
77 mance of services or furnishing of facilities in any activity  
78 which is not an unrelated trade or business within the  
79 meaning of Section 513 of the Internal Revenue Code of  
80 1986, as amended;

81 (III) Net income from unrelated business activities,  
82 whether or not such activities are carried on regularly as a  
83 trade or business;

84 (IV) Gross investment income as defined in Section  
85 509(e) of the Internal Revenue Code of 1986, as amend-  
86 ed;

87 (V) Tax revenues levied for the benefit of a corpora-  
88 tion or organization either paid to or expended on behalf  
89 of the organization; and

90 (VI) The value of services or facilities (exclusive of  
91 services or facilities generally furnished to the public with-  
92 out charge) furnished by a governmental unit referred to  
93 in Section 170(c)(1) of the Internal Revenue Code of  
94 1986, as amended, to an organization without charge.  
95 This term does not include any gain from the sale or other  
96 disposition of property which would be considered as gain  
97 from the sale or exchange of a capital asset, or the value of  
98 an exemption from any federal, state or local tax or any  
99 similar benefit;

100 (ii) The term "charitable contribution" means a contri-  
101 bution or gift to or for the use of a corporation or organi-  
102 zation, described in Section 170(c)(2) of the Internal Rev-  
103 enue Code of 1986, as amended;

104 (iii) The term "membership fee" does not include any  
105 amounts paid for tangible personal property or specific  
106 services rendered to members by the corporation or orga-  
107 nization; or

108 (G) The exemption allowed by this subdivision (6)  
109 does not apply to sales of gasoline or special fuel or to  
110 sales of tangible personal property or services to be used  
111 or consumed in the generation of unrelated business in-  
112 come as defined in Section 513 of the Internal Revenue  
113 Code of 1986, as amended. The provisions of this subdivi-  
114 sion apply to sales made after the thirtieth day of June,  
115 one thousand nine hundred eighty-nine: *Provided*, That  
116 the exemption granted in this subdivision applies only to  
117 services, equipment, supplies and materials used or con-  
118 sumed in the activities for which the organizations qualify  
119 as tax exempt organizations under the Internal Revenue  
120 Code and shall not apply to purchases of gasoline or spe-  
121 cial fuel;

122 (7) An isolated transaction in which any taxable ser-  
123 vice or any tangible personal property is sold, transferred,  
124 offered for sale or delivered by the owner of the property  
125 or by his or her representative for the owner's account, the  
126 sale, transfer, offer for sale or delivery not being made in  
127 the ordinary course of repeated and successive transac-  
128 tions of like character by the owner or on his or her ac-



129 count by the representative: *Provided*, That nothing con-  
130 tained in this subdivision may be construed to prevent an  
131 owner who sells, transfers or offers for sale tangible per-  
132 sonal property in an isolated transaction through an auc-  
133 tioneer from availing himself or herself of the exemption  
134 provided in this subdivision, regardless where the isolated  
135 sale takes place. The tax commissioner may adopt such  
136 legislative rule pursuant to article three, chapter  
137 twenty-nine-a of this code as he or she considers necessary  
138 for the efficient administration of this exemption;

139 (8) Sales of tangible personal property or of any tax-  
140 able services rendered for use or consumption in connec-  
141 tion with the commercial production of an agricultural  
142 product the ultimate sale of which will be subject to the tax  
143 imposed by this article or which would have been subject  
144 to tax under this article: *Provided*, That sales of tangible  
145 personal property and services to be used or consumed in  
146 the construction of or permanent improvement to real  
147 property and sales of gasoline and special fuel are not  
148 exempt: *Provided, however*, That nails and fencing shall  
149 not be considered as improvements to real property;

150 (9) Sales of tangible personal property to a person for  
151 the purpose of resale in the form of tangible personal  
152 property: *Provided*, That sales of gasoline and special fuel  
153 by distributors and importers is taxable except when the  
154 sale is to another distributor for resale: *Provided, howev-*  
155 *er*, That sales of building materials or building supplies or  
156 other property to any person engaging in the activity of  
157 contracting, as defined in this article, which is to be in-  
158 stalled in, affixed to or incorporated by that person or his  
159 or her agent into any real property, building or structure is  
160 not exempt under this subdivision, except that sales of  
161 tangible personal property to a person engaging in the  
162 activity of contracting pursuant to a written contract with  
163 the United States, this state, or with a political subdivision  
164 of this state, or with a public corporation created by the  
165 Legislature or by another governmental entity pursuant to  
166 an act of the Legislature, for a building or structure, or  
167 improvement thereto, or other improvement to real prop-  
168 erty that is or will be owned and used by the governmental

169 entity for a governmental or proprietary purpose, who  
170 incorporates the property in the building, structure or  
171 improvement shall, with respect to the tangible personal  
172 property, nevertheless be considered to be the vendor of  
173 the property to the governmental entity and any person  
174 seeking to qualify for and assert this exception must do so  
175 pursuant to the legislative rules as the tax commissioner  
176 may promulgate and upon such forms as the tax commis-  
177 sioner may prescribe. A subcontractor who, pursuant to a  
178 written subcontract with a prime contractor who qualifies  
179 for this exception, provides equipment, or materials, and  
180 labor to a prime contractor shall be treated in the same  
181 manner as the prime contractor is treated with respect to  
182 the prime contract under this exception and the legislative  
183 rules promulgated by the tax commissioner: *Provided*  
184 *further*, That the exemption for government contractors in  
185 the preceding proviso expires on the first day of October,  
186 one thousand nine hundred ninety, subject to the transi-  
187 tion rules set forth in section eight-c of this article;

188 (10) Sales of newspapers when delivered to consumers  
189 by route carriers;

190 (11) Sales of drugs dispensed upon prescription and  
191 sales of insulin to consumers for medical purposes;

192 (12) Sales of radio and television broadcasting time,  
193 preprinted advertising circulars and newspaper and out-  
194 door advertising space for the advertisement of goods or  
195 services;

196 (13) Sales and services performed by day-care centers;

197 (14) Casual and occasional sales of property or servic-  
198 es not conducted in a repeated manner or in the ordinary  
199 course of repetitive and successive transactions of like  
200 character by a corporation or organization which is ex-  
201 empt from tax under subdivision (6) of this subsection on  
202 its purchases of tangible personal property or services:

203 (A) For purposes of this subdivision, the term "casual  
204 and occasional sales not conducted in a repeated manner  
205 or in the ordinary course of repetitive and successive

206 transactions of like character" means sales of tangible  
207 personal property or services at fund raisers sponsored by  
208 a corporation or organization which is exempt, under  
209 subdivision (6) of this subsection, from payment of the tax  
210 imposed by this article on its purchases, when the fund  
211 raisers are of limited duration and are held no more than  
212 six times during any twelve-month period and "limited  
213 duration" means no more than eighty-four consecutive  
214 hours;

215 (B) The provisions of this subdivision apply to sales  
216 made after the thirtieth day of June, one thousand nine  
217 hundred eighty-nine;

218 (15) Sales of property or services to a school which  
219 has approval from the board of trustees of the university  
220 system of West Virginia or the board of directors of the  
221 state college system to award degrees, which has its princi-  
222 pal campus in this state, and which is exempt from federal  
223 and state income taxes under Section 501(c)(3) of the  
224 Internal Revenue Code of 1986, as amended: *Provided*,  
225 That sales of gasoline and special fuel are taxable;

226 (16) Sales of mobile homes to be utilized by purchas-  
227 ers as their principal year-round residence and dwelling:  
228 *Provided*, That these mobile homes are subject to tax at  
229 the three-percent rate;

230 (17) Sales of lottery tickets and materials by licensed  
231 lottery sales agents and lottery retailers authorized by the  
232 state lottery commission, under the provisions of article  
233 twenty-two, chapter twenty-nine of this code;

234 (18) Leases of motor vehicles titled pursuant to the  
235 provisions of article three, chapter seventeen-a of this code  
236 to lessees for a period of thirty or more consecutive days.  
237 This exemption applies to leases executed on or after the  
238 first day of July, one thousand nine hundred eighty-seven,  
239 and to payments under long-term leases executed before  
240 that date, for months thereof beginning on or after that  
241 date;

242 (19) Sales of propane to consumers for poultry house  
243 heating purposes, with any seller to the consumer who  
244 may have prior paid the tax in his or her price, to not pass  
245 on the same to the consumer, but to make application and  
246 receive refund of the tax from the tax commissioner, pur-  
247 suant to rules which shall be promulgated by the tax com-  
248 missioner; notwithstanding the provisions of section eigh-  
249 teen of this article or any other provision of this article to  
250 the contrary;

251 (20) Any sales of tangible personal property or servic-  
252 es purchased after the thirtieth day of September, one  
253 thousand nine hundred eighty-seven, and lawfully paid for  
254 with food stamps pursuant to the federal food stamp pro-  
255 gram codified in 7 U. S. C. §2011 et seq., as amended, or  
256 with drafts issued through the West Virginia special sup-  
257 plement food program for women, infants and children  
258 codified in 42 U. S. C. §1786;

259 (21) Sales of tickets for activities sponsored by ele-  
260 mentary and secondary schools located within this state;

261 (22) Sales of electronic data processing services and  
262 related software: *Provided*, That for the purposes of this  
263 subdivision "electronic data processing services" means:  
264 (A) The processing of another's data, including all pro-  
265 cesses incident to processing of data such as keypunching,  
266 keystroke verification, rearranging or sorting of previous-  
267 ly documented data for the purpose of data entry or auto-  
268 matic processing and changing the medium on which data  
269 is sorted, whether these processes are done by the same  
270 person or several persons; and (B) providing access to  
271 computer equipment for the purpose of processing data or  
272 examining or acquiring data stored in or accessible to the  
273 computer equipment;

274 (23) Tuition charged for attending educational sum-  
275 mer camps;

276 (24) Dispensing of services performed by one corpo-  
277 ration, partnership or limited liability company for anoth-  
278 er corporation, partnership or limited liability company  
279 when the entities are members of the same controlled

280 group or are related taxpayers as defined in Section 267  
281 of the Internal Revenue Code. "Control" means owner-  
282 ship, directly or indirectly, of stock, equity interests or  
283 membership interests possessing fifty percent or more of  
284 the total combined voting power of all classes of the stock  
285 of a corporation, equity interests of a partnership or mem-  
286 bership interests of a limited liability company entitled to  
287 vote or ownership, directly or indirectly, of stock, equity  
288 interests or membership interests possessing fifty percent  
289 or more of the value of the corporation, partnership or  
290 limited liability company;

291 (25) Food for the following are exempt:

292 (A) Food purchased or sold by public or private  
293 schools, school sponsored student organizations or school  
294 sponsored parent-teacher associations to students enrolled  
295 in such school or to employees of such school during  
296 normal school hours; but not those sales of food made to  
297 the general public;

298 (B) Food purchased or sold by a public or private  
299 college or university or by a student organization official-  
300 ly recognized by the college or university to students  
301 enrolled at the college or university when the sales are  
302 made on a contract basis so that a fixed price is paid for  
303 consumption of food products for a specific period of  
304 time without respect to the amount of food product actual-  
305 ly consumed by the particular individual contracting for  
306 the sale and no money is paid at the time the food product  
307 is served or consumed;

308 (C) Food purchased or sold by a charitable or private  
309 nonprofit organization, a nonprofit organization or a  
310 governmental agency under a program to provide food to  
311 low-income persons at or below cost;

312 (D) Food sold in an occasional sale by a charitable or  
313 nonprofit organization including volunteer fire depart-  
314 ments and rescue squads, if the purpose of the sale is to  
315 obtain revenue for the functions and activities of the orga-  
316 nization and the revenue obtained is actually expended for  
317 that purpose;

318 (E) Food sold by any religious organization at a social  
319 or other gathering conducted by it or under its auspices, if  
320 the purpose in selling the food is to obtain revenue for the  
321 functions and activities of the organization and the reve-  
322 nue obtained from selling the food is actually used in  
323 carrying on those functions and activities: *Provided*, That  
324 purchases made by the organizations are not exempt as a  
325 purchase for resale;

326 (26) Sales of food by little leagues, midget football  
327 leagues, youth football or soccer leagues and similar types  
328 of organizations, including scouting groups and church  
329 youth groups, if the purpose in selling the food is to ob-  
330 tain revenue for the functions and activities of the organi-  
331 zation and the revenues obtained from selling the food is  
332 actually used in supporting or carrying on functions and  
333 activities of the groups: *Provided*, That the purchases  
334 made by the organizations are not exempt as a purchase  
335 for resale;

336 (27) Charges for room and meals by fraternities and  
337 sororities to their members: *Provided*, That the purchases  
338 made by a fraternity or sorority are not exempt as a pur-  
339 chase for resale;

340 (28) Sales of or charges for the transportation of pas-  
341 sengers in interstate commerce;

342 (29) Sales of tangible personal property or services to  
343 any person which this state is prohibited from taxing un-  
344 der the laws of the United States or under the constitution  
345 of this state;

346 (30) Sales of tangible personal property or services to  
347 any person who claims exemption from the tax imposed  
348 by this article or article fifteen-a of this chapter pursuant  
349 to the provision of any other chapter of this code;

350 (31) Charges for the services of opening and closing a  
351 burial lot;

352 (32) Sales of livestock, poultry or other farm products  
353 in their original state by the producer thereof or a member  
354 of the producer's immediate family who is not otherwise

355 engaged in making retail sales of tangible personal prop-  
356 erty; and sales of livestock sold at public sales sponsored  
357 by breeders or registry associations or livestock auction  
358 markets: *Provided*, That the exemptions allowed by this  
359 subdivision apply to sales made on or after the first day of  
360 July, one thousand nine hundred ninety, and may be  
361 claimed without presenting or obtaining exemption certifi-  
362 cates: *Provided, however*, That the farmer shall maintain  
363 adequate records;

364 (33) Sales of motion picture films to motion picture  
365 exhibitors for exhibition if the sale of tickets or the charge  
366 for admission to the exhibition of the film is subject to the  
367 tax imposed by this article and sales of coin-operated  
368 video arcade machines or video arcade games to a person  
369 engaged in the business of providing the machines to the  
370 public for a charge upon which the tax imposed by this  
371 article is remitted to the tax commissioner: *Provided*, That  
372 the exemption provided in this subdivision applies to sales  
373 made on or after the first day of July, one thousand nine  
374 hundred ninety, and may be claimed by presenting to the  
375 seller a properly executed exemption certificate;

376 (34) Sales of aircraft repair, remodeling and mainte-  
377 nance services when such services are to an aircraft operat-  
378 ed by a certified or licensed carrier of persons or property,  
379 or by a governmental entity, or to an engine or other com-  
380 ponent part of an aircraft operated by a certificated or  
381 licensed carrier of persons or property, or by a govern-  
382 mental entity and sales of tangible personal property that  
383 is permanently affixed or permanently attached as a com-  
384 ponent part of an aircraft owned or operated by a certifi-  
385 cated or licensed carrier of persons or property, or by a  
386 governmental entity, as part of the repair, remodeling or  
387 maintenance service and sales of machinery, tools or  
388 equipment, directly used or consumed exclusively in the  
389 repair, remodeling or maintenance of aircraft, aircraft  
390 engines, or aircraft component parts, for a certificated or  
391 licensed carrier of persons or property, or for a govern-  
392 mental entity;

393 (35) Charges for memberships or services provided by  
394 health and fitness organizations relating to personalized  
395 fitness programs;

396 (36) Sales of services by individuals who baby-sit for a  
397 profit: *Provided*, That the gross receipts of the individual  
398 from the performance of baby-sitting services do not  
399 exceed five thousand dollars in a taxable year;

400 (37) Sales of services after the thirtieth day of June,  
401 one thousand nine hundred ninety-seven, by public librar-  
402 ies or by libraries at academic institutions or by libraries at  
403 institutions of higher learning;

404 (38) Commissions received after the thirtieth day of  
405 June, one thousand nine hundred ninety-seven, by a man-  
406 ufacturer's representative;

407 (39) Sales of primary opinion research services after  
408 the thirtieth day of June, one thousand nine hundred  
409 ninety-seven, when:

410 (A) The services are provided to an out-of-state client;

411 (B) The results of the service activities, including, but  
412 not limited to, reports, lists of focus group recruits and  
413 compilation of data are transferred to the client across  
414 state lines by mail, wire or other means of interstate com-  
415 merce, for use by the client outside the state of West Vir-  
416 ginia; and

417 (C) The transfer of the results of the service activities is  
418 an indispensable part of the overall service.

419 For the purpose of this subdivision the term "primary  
420 opinion research" means original research in the form of  
421 telephone surveys, mall intercept surveys, focus group  
422 research, direct mail surveys, personal interviews and other  
423 data collection methods commonly utilized for quantita-  
424 tive and qualitative opinion research studies;

425 (40) Sales of property or services after the thirtieth  
426 day of June, one thousand nine hundred ninety-seven, to  
427 persons within the state when those sales are for the pur-  
428 poses of the production of value-added products: *Provid-*



429 *ed.* That the exemption granted in this subdivision applies  
430 only to services, equipment, supplies and materials directly  
431 used or consumed by such persons engaged solely in the  
432 production of value-added products: *Provided, however,*  
433 That this exemption may not be claimed by any one pur-  
434 chaser for more than five consecutive years, except as  
435 otherwise permitted in this section.

436 For the purpose of this subdivision, the term  
437 "value-added product" means the following products de-  
438 rived from processing a raw agricultural product, whether  
439 for human consumption or for other use: For purposes of  
440 this subdivision, the following enterprises qualify as pro-  
441 cessing raw agricultural products into value-added prod-  
442 ucts: Those engaged in the conversion of:

443 (A) Lumber into furniture, toys, collectibles and home  
444 furnishings;

445 (B) Fruits into wine;

446 (C) Honey into wine;

447 (D) Wool into fabric;

448 (E) Raw hides into semi-finished or finished leather  
449 products;

450 (F) Milk into cheese;

451 (G) Fruits or vegetables into a dried, canned or frozen  
452 product;

453 (H) Feeder cattle into commonly accepted slaughter  
454 weights;

455 (I) Aquatic animals into a dried, canned, cooked or  
456 frozen product; and

457 (J) Poultry into a dried, canned, cooked or frozen  
458 product;

459 (41) Sales of music instructional services after the  
460 thirtieth day of June, one thousand nine hundred  
461 ninety-seven, by a music teacher; and

462 (42) After the thirtieth day of June, one thousand nine  
463 hundred ninety-seven, charges to a member by a member-

464 ship association or organization which is exempt from  
465 paying federal income taxes under Section 501(c)(3) or  
466 (c)(6) of the Internal Revenue Code of 1986, as amended,  
467 for membership in the association or organization, includ-  
468 ing charges to members for newsletters prepared by the  
469 association or organization for distribution primarily to its  
470 members, charges to members for continuing education  
471 seminars, workshops, conventions, lectures or courses put  
472 on or sponsored by the association or organization, in-  
473 cluding charges for related course materials prepared by  
474 the association or organization or by the speaker or speak-  
475 ers for use during the continuing education seminar,  
476 workshop, convention, lecture or course, but not including  
477 any separate charge or separately stated charge for meals,  
478 lodging, entertainment or transportation taxable under this  
479 article: *Provided*, That the association or organization  
480 pays the tax imposed by this article on its purchases of  
481 meals, lodging, entertainment or transportation taxable  
482 under this article for which a separate or separately stated  
483 charge is not made. A membership association or organi-  
484 zation which is exempt from paying federal income taxes  
485 under Section 501(c)(3) or (c)(6) of the Internal Revenue  
486 Code of 1986, as amended, may elect to pay the tax im-  
487 posed under this article on the purchases for which a sepa-  
488 rate charge or separately stated charge could apply and  
489 not charge its members the tax imposed by this article or,  
490 the association or organization may avail itself of the ex-  
491 emption set forth in subdivision (9) of this subsection  
492 relating to purchases of tangible personal property for  
493 resale and then collect the tax imposed by this article on  
494 those items from its member.

495 (b) *Refundable exemptions.* — Any person having a  
496 right or claim to any exemption set forth in this subsection  
497 shall first pay to the vendor the tax imposed by this article  
498 and then apply to the tax commissioner for a refund or  
499 credit, or as provided in section nine-d of this article, give  
500 to the vendor such person's West Virginia direct pay per-  
501 mit number. The following sales of tangible personal  
502 property and/or services are exempt from tax as provided  
503 in this subsection:

503 (1) Sales of property or services to bona fide charita-  
504 ble organizations who make no charge whatsoever for the  
505 services they render: *Provided*, That the exemption grant-  
506 ed in this subdivision applies only to services, equipment,  
507 supplies, food, meals and materials directly used or con-  
508 sumed by these organizations, and shall not apply to pur-  
509 chases of gasoline or special fuel;

510 (2) Sales of services, machinery, supplies and materials  
511 directly used or consumed in the activities of manufactur-  
512 ing, transportation, transmission, communication, produc-  
513 tion of natural resources, gas storage, generation or pro-  
514 duction or selling electric power, provision of a public  
515 utility service or the operation of a utility service or the  
516 operation of a utility business, in the businesses or organi-  
517 zations named above and shall not apply to purchases of  
518 gasoline or special fuel;

519 (3) Sales of property or services to nationally char-  
520 tered fraternal or social organizations for the sole purpose  
521 of free distribution in public welfare or relief work: *Pro-*  
522 *vided*, That sales of gasoline and special fuel are taxable;

523 (4) Sales and services, fire fighting or station house  
524 equipment, including construction and automotive, made  
525 to any volunteer fire department organized and incorpo-  
526 rated under the laws of the state of West Virginia: *Provid-*  
527 *ed*, That sales of gasoline and special fuel are taxable; and

528 (5) Sales of building materials or building supplies or  
529 other property to an organization qualified under Section  
530 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986,  
531 as amended, which are to be installed in, affixed to or  
532 incorporated by the organization or its agent into real  
533 property, or into a building or structure which is or will be  
534 used as permanent low-income housing, transitional hous-  
535 ing, emergency homeless shelter, domestic violence shelter  
536 or emergency children and youth shelter if the shelter is  
537 owned, managed, developed or operated by an organiza-  
538 tion qualified under Section 501(c)(3) or (c)(4) of the  
539 Internal Revenue Code of 1986, as amended.

# CHAPTER 240

(Com. Sub. for H. B. 4580—By Delegates Smirl and Jenkins)

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section eight-f, article twenty-one, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section twenty-three-f, article twenty-four of said chapter, all relating to the historic buildings preservation tax credit against the personal income tax and corporate net income tax; extending the credit indefinitely; requiring disclosure of certain taxpayer information in accordance with the tax procedures and administration act; and allowing the credit for specific taxable years.

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

That section eight-f, article twenty-one, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that section twenty-three-f, article twenty-four of said chapter be amended and reenacted, all to read as follows:

## **ARTICLE 21. PERSONAL INCOME TAX.**

### **§11-21-8f. Disclosure of credit applications and grants.**

- 1 The tax commissioner shall require disclosure of in-
- 2 formation regarding credits granted pursuant to section
- 3 eight-a of this article in accordance with the provisions of
- 4 section five-s, article ten of this chapter.

#### **Article**

21. **Personal Income Tax.**
24. **Corporation Net Income Tax.**

## **ARTICLE 24. CORPORATION NET INCOME TAX.**

### **§11-24-23f. Credit allowed for specific taxable years.**

- 1 Subject to the provisions of section twenty-three-e of
- 2 this article, any qualified rehabilitation expenditures made
- 3 by a taxpayer in the taxable year beginning on the first

4 day of January, one thousand nine hundred ninety-five,  
5 shall be allowed against the tax imposed by this article in  
6 the taxable year beginning on the first day of January, one  
7 thousand nine hundred ninety-six. The tax commissioner  
8 shall require disclosure of information regarding the cred-  
9 its allowed in section twenty-three-a of this article in ac-  
10 cordance with the provisions of section five-s, article ten of  
11 this chapter.

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## CHAPTER 241

(S. B. 93—By Senators Craigo, Blatnik, Chafin, Dugan, Helmick, Kimble, Love,  
Macnaughtan, Manchin, Minear, Plymale, Sharpe, Walker and Whitlow)

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[Passed February 13, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections nine and twelve, article twenty-one, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to updating meaning of certain terms used in the personal income tax act; making such updating retroactive; preserving law in effect for each prior tax year for such year; defining certain additional terms; making technical corrections in the definition of West Virginia adjusted gross income; deleting obsolete language; and specifying effective date.

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

That sections nine and twelve, article twenty-one, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

### ARTICLE 21. PERSONAL INCOME TAX.

§11-21-9. Meaning of terms.

§11-21-12. West Virginia adjusted gross income of resident individual.

#### §11-21-9. Meaning of terms.

- 1 (a) Any term used in this article shall have the same
- 2 meaning as when used in a comparable context in the laws

3 of the United States relating to income taxes, unless a  
4 different meaning is clearly required. Any reference in  
5 this article to the laws of the United States shall mean the  
6 provisions of the Internal Revenue Code of 1986, as  
7 amended, and such other provisions of the laws of the  
8 United States as relate to the determination of income for  
9 federal income tax purposes. All amendments made to  
10 the laws of the United States prior to the first day of Janu-  
11 ary, one thousand nine hundred ninety-six, shall be given  
12 effect in determining the taxes imposed by this article for  
13 any taxable year beginning the first day of January, one  
14 thousand nine hundred ninety-five, or thereafter, but no  
15 amendment to the laws of the United States made on or  
16 after the first day of January, one thousand nine hundred  
17 ninety-six, shall be given any effect. The exception to the  
18 preceding rule is the change in federal income tax law  
19 restoring subsection (l), Section 162 of the Internal Reve-  
20 nue Code for taxable years beginning on or after the first  
21 day of January, one thousand nine hundred ninety-four,  
22 which shall be allowed under this article for taxable years  
23 beginning on or after the first day of January, one thou-  
24 sand nine hundred ninety-four.

25 (b) *Medical savings accounts.* — The term "taxable  
26 trust" does not include a medical savings account estab-  
27 lished pursuant to section twenty, article fifteen or section  
28 fifteen, article sixteen, both of chapter thirty-three of this  
29 code. Employer contributions to a medical savings ac-  
30 count established pursuant to said sections, are not "wages"  
31 for purposes of withholding under section seventy-one of  
32 this article.

33 (c) *Surtax.* — The term "surtax" means the twenty  
34 percent additional tax imposed on taxable withdrawals  
35 from a medical savings account under section twenty,  
36 article fifteen, chapter thirty-three of this code, and the  
37 twenty percent additional tax imposed on taxable with-  
38 draws from a medical savings account under section  
39 fifteen, article sixteen of said chapter, which are collected  
40 by the tax commissioner as tax collected under this article.

41 (d) *Effective date.* — The amendments to this section  
42 enacted in the year one thousand nine hundred ninety-six

43 shall be retroactive and shall apply to taxable years begin-  
44 ning on or after the first day of January, one thousand  
45 nine hundred ninety-five, except as otherwise provided in  
46 subsection (a) of this section, to the extent allowable under  
47 federal income tax law. With respect to taxable years that  
48 begin prior to the first day of January, one thousand nine  
49 hundred ninety-four, the law in effect for each of those  
50 years shall be fully preserved as to such year.

**§11-21-12. West Virginia adjusted gross income of resident individual.**

1 (a) *General.* — The West Virginia adjusted gross in-  
2 come of a resident individual means his federal adjusted  
3 gross income as defined in the laws of the United States  
4 for the taxable year with the modifications specified in this  
5 section.

6 (b) *Modifications increasing federal adjusted gross*  
7 *income.* — There shall be added to federal adjusted gross  
8 income unless already included therein the following  
9 items:

10 (1) Interest income on obligations of any state other  
11 than this state or of a political subdivision of any other  
12 state unless created by compact or agreement to which this  
13 state is a party;

14 (2) Interest or dividend income on obligations or  
15 securities of any authority, commission or instrumentality  
16 of the United States, which the laws of the United States  
17 exempt from federal income tax but not from state in-  
18 come taxes;

19 (3) Any deduction allowed when determining federal  
20 adjusted gross income for federal income tax purposes for  
21 the taxable year that is not allowed as a deduction under  
22 this article for the taxable year;

23 (4) Interest on indebtedness incurred or continued to  
24 purchase or carry obligations or securities the income  
25 from which is exempt from tax under this article, to the  
26 extent deductible in determining federal adjusted gross  
27 income;

28 (5) Interest on a depository institution tax-exempt  
29 savings certificate which is allowed as an exclusion from  
30 federal gross income under Section 128 of the Internal  
31 Revenue Code, for the federal taxable year;

32 (6) The amount of a lump sum distribution for which  
33 the taxpayer has elected under Section 402(e) of the Inter-  
34 nal Revenue Code of 1986, as amended, to be separately  
35 taxed for federal income tax purposes; and

36 (7) Amounts withdrawn from a medical savings ac-  
37 count established by or for an individual under section  
38 twenty, article fifteen or section fifteen, article sixteen,  
39 both of chapter thirty-three of this code, that are used for  
40 a purpose other than payment of medical expenses, as  
41 defined in those sections.

42 (c) *Modifications reducing federal adjusted gross*  
43 *income.* — There shall be subtracted from federal adjusted  
44 gross income to the extent included therein:

45 (1) Interest income on obligations of the United States  
46 and its possessions to the extent includable in gross in-  
47 come for federal income tax purposes;

48 (2) Interest or dividend income on obligations or  
49 securities of any authority, commission or instrumentality  
50 of the United States or of the state of West Virginia to the  
51 extent includable in gross income for federal income tax  
52 purposes but exempt from state income taxes under the  
53 laws of the United States or of the state of West Virginia,  
54 including federal interest or dividends paid to sharehold-  
55 ers of a regulated investment company, under Section 852  
56 of the Internal Revenue Code for taxable years ending  
57 after the thirtieth day of June, one thousand nine hundred  
58 eighty-seven;

59 (3) Any amount included in federal adjusted gross  
60 income for federal income tax purposes for the taxable  
61 year that is not included in federal adjusted gross income  
62 under this article for the taxable year;

63 (4) The amount of any refund or credit for overpay-  
64 ment of income taxes imposed by this state, or any other



65 taxing jurisdiction, to the extent properly included in  
66 gross income for federal income tax purposes;

67 (5) Annuities, retirement allowances, returns of contri-  
68 butions and any other benefit received under the West  
69 Virginia public employees retirement system, the West  
70 Virginia state teachers retirement system and all forms of  
71 military retirement, including regular armed forces, re-  
72 serves and national guard, including any survivorship  
73 annuities derived therefrom, to the extent includable in  
74 gross income for federal income tax purposes: *Provided*,  
75 That notwithstanding any provisions in this code to the  
76 contrary this modification shall be limited to the first two  
77 thousand dollars of benefits received under the West Vir-  
78 ginia public employees retirement system, the West Vir-  
79 ginia state teachers retirement system and all forms of  
80 military retirement including regular armed forces, re-  
81 serves and national guard, including any survivorship  
82 annuities derived therefrom, to the extent includable in  
83 gross income for federal income tax purposes for taxable  
84 years beginning after the thirty-first day of December, one  
85 thousand nine hundred eighty-six; and the first two thou-  
86 sand dollars of benefits received under any federal retire-  
87 ment system to which Title 4 U.S.C. §111 applies: *Pro-*  
88 *vided, however*, That the total modification under this  
89 paragraph shall not exceed two thousand dollars per per-  
90 son receiving retirement benefits and this limitation shall  
91 apply to all returns or amended returns filed after the last  
92 day of December, one thousand nine hundred  
93 eighty-eight;

94 (6) Retirement income received in the form of pen-  
95 sions and annuities after the thirty-first day of December,  
96 one thousand nine hundred seventy-nine, under any West  
97 Virginia police, West Virginia firemen's retirement system  
98 or the West Virginia department of public safety death,  
99 disability and retirement fund, including any survivorship  
100 annuities derived therefrom, to the extent includable in  
101 gross income for federal income tax purposes;

102 (7) Federal adjusted gross income in the amount of  
103 eight thousand dollars received from any source after the  
104 thirty-first day of December, one thousand nine hundred

105 eighty-six, by any person who has attained the age of  
106 sixty-five on or before the last day of the taxable year, or  
107 by any person certified by proper authority as permanent-  
108 ly and totally disabled, regardless of age, on or before the  
109 last day of the taxable year, to the extent includable in  
110 federal adjusted gross income for federal tax purposes:  
111 *Provided*, That if a person has a medical certification from  
112 a prior year and he is still permanently and totally dis-  
113 abled, a copy of the original certificate is acceptable as  
114 proof of disability. A copy of the form filed for the fed-  
115 eral disability income tax exclusion is acceptable: *Provid-*  
116 *ed, however*, That:

117 (i) Where the total modification under subdivisions  
118 (1), (2), (5) and (6) of this subsection is eight thousand  
119 dollars per person or more, no deduction shall be allowed  
120 under this subdivision; and

121 (ii) Where the total modification under subdivisions  
122 (1), (2), (5) and (6) of this subsection is less than eight  
123 thousand dollars per person, the total modification allowed  
124 under this subdivision for all gross income received by  
125 that person shall be limited to the difference between eight  
126 thousand dollars and the sum of modifications under  
127 subdivisions (1), (2), (5) and (6) of this subsection;

128 (8) Federal adjusted gross income in the amount of  
129 eight thousand dollars received from any source after the  
130 thirty-first day of December, one thousand nine hundred  
131 eighty-six, by the surviving spouse of any person who had  
132 attained the age of sixty-five or who had been certified as  
133 permanently and totally disabled, to the extent includable  
134 in federal adjusted gross income for federal tax purposes:  
135 *Provided*, That:

136 (i) Where the total modification under subdivisions  
137 (1), (2), (5), (6) and (7) of this subsection is eight thou-  
138 sand dollars or more, no deduction shall be allowed under  
139 this subdivision; and

140 (ii) Where the total modification under subdivisions  
141 (1), (2), (5), (6) and (7) of this subsection is less than eight  
142 thousand dollars per person, the total modification allowed  
143 under this subdivision for all gross income received by

144 that person shall be limited to the difference between eight  
145 thousand dollars and the sum of subdivisions (1), (2), (5),  
146 (6) and (7) of this subsection;

147 (9) Contributions from any source to a medical sav-  
148 ings account established by or for the individual pursuant  
149 to section twenty, article fifteen or section fifteen, article  
150 sixteen, chapter thirty-three of this code, plus interest  
151 earned on the account, to the extent includable in federal  
152 adjusted gross income for federal tax purposes: *Provided*,  
153 That the amount subtracted pursuant to this subdivision  
154 for any one taxable year may not exceed two thousand  
155 dollars plus interest earned on the account. For married  
156 individuals filing a joint return, the maximum deduction is  
157 computed separately for each individual; and

158 (10) Any other income which this state is prohibited  
159 from taxing under the laws of the United States.

160 (d) *Modification for West Virginia fiduciary adjust-*  
161 *ment.* — There shall be added to or subtracted from feder-  
162 al adjusted gross income, as the case may be, the taxpay-  
163 er's share, as beneficiary of an estate or trust, of the West  
164 Virginia fiduciary adjustment determined under section  
165 nineteen of this article.

166 (e) *Partners and S corporation shareholders.* — The  
167 amounts of modifications required to be made under this  
168 section by a partner or an S corporation shareholder,  
169 which relate to items of income, gain, loss or deduction of  
170 a partnership or an S corporation, shall be determined  
171 under section seventeen of this article.

172 (f) *Husband and wife.* — If husband and wife deter-  
173 mine their federal income tax on a joint return but deter-  
174 mine their West Virginia income taxes separately, they  
175 shall determine their West Virginia adjusted gross incomes  
176 separately as if their federal adjusted gross incomes had  
177 been determined separately.

178 (g) *Effective date.* — Changes in the language of this  
179 section enacted in the year one thousand nine hundred  
180 ninety-six shall apply to taxable years beginning after the  
181 thirty-first day of December, one thousand nine hundred  
182 ninety-five.

## CHAPTER 242

(Com. Sub. for S. B. 17—By Senators Craigo, Tomblin, Mr. President, Chafin, Jackson, Wooton, Bailey, Walker, Wagner, Manchin, Anderson, Plymale, White, Whitlow, Dittmar, Bowman, Macnaughtan, Miller, Helmick, Sharpe, Ross, Schoonover, Love, Blatnik, Grubb, Oliverio, Wiedebusch, Buckalew, Deem, Kimble, Yoder, Boley, Minear, Scott and Dugan)

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[Passed January 23, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend article twenty-one, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section ten; to amend and reenact sections fifty-one and seventy-one of said article; and to amend and reenact section six, article twenty-three of said chapter, all relating generally to reductions in personal income and business franchise taxes; providing a low income exclusion from federal adjusted gross income; increasing threshold for filing certain income tax returns; making technical corrections; reducing the rate of business franchise tax; and specifying effective dates.

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

That article twenty-one, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section ten; that sections fifty-one and seventy-one of said article be amended and reenacted; and that section six, article twenty-three of said chapter be amended and reenacted, all to read as follows:

### Article

- 21. Personal Income Tax.
- 23. Business Franchise Tax.

### ARTICLE 21. PERSONAL INCOME TAX.

- §11-21-10. Low income exclusion.
- §11-21-51. Returns and liabilities.
- §11-21-71. Requirement of withholding tax from wages.

#### §11-21-10. Low income exclusion.

- 1 (a) *Earned income exclusion.* — In the case of an
- 2 eligible taxpayer, there shall be allowed as a deduction

3 from federal adjusted gross income the amount of his or  
4 her earned income included therein, not to exceed ten  
5 thousand dollars, except that when a husband and wife file  
6 separate returns under this article this exclusion shall not  
7 exceed five thousand dollars per separate return: *Provid-*  
8 *ed*, That for the taxable year beginning the first day of  
9 January, one thousand nine hundred ninety-six, the exclu-  
10 sion provided for in this section shall apply only to earned  
11 income received after the thirtieth day of June, one thou-  
12 sand nine hundred ninety-six, and the amount excluded  
13 shall not exceed fifty percent of the annual low income  
14 exclusion amounts set forth in this subsection.

15 (b) "*Eligible taxpayer*" defined. — The term "eligible  
16 taxpayer" means:

17 (1) Any unmarried individual and any husband and  
18 wife filing a joint return under this article who has or have  
19 federal adjusted gross income of ten thousand dollars or  
20 less for the taxable year; or

21 (2) Any husband or wife filing a separate return under  
22 this article who has federal adjusted gross income of five  
23 thousand dollars or less.

24 (c) "*Earned income*" defined. —

25 (1) The term "earned income" means:

26 (A) Wages, salaries, tips and other employee compen-  
27 sation; plus

28 (B) The amount of the taxpayer's net earnings from  
29 self-employment for the taxable year (within the meaning  
30 of Section 1402(a) of the Internal Revenue Code), but  
31 such net earnings shall be determined with regard to the  
32 deduction allowed to the taxpayer under Section 164 of  
33 the Internal Revenue Code.

34 (2) For purposes of this section:

35 (A) The earned income of an individual shall be com-  
36 puted without regard to any community property laws;

37 (B) No amount received as pension or annuity shall be  
38 taken into account; and

39 (C) No amount received for services provided by an  
40 individual while the individual is an inmate at a penal  
41 institution shall be taken into account.

42 (d) *Taxable year must be full taxable year.* — Except  
43 in the case of a taxable year closed by reason of the death  
44 of the taxpayer, no credit shall be allowed under this sec-  
45 tion in the case of a taxable year covering a period of less  
46 than twelve months.

### §11-21-51. Returns and liabilities.

1 (a) *General.* — On or before the fifteenth day of the  
2 fourth month following the close of a taxable year, an  
3 income tax return under this article shall be made and  
4 filed by or for:

5 (1) Every resident individual required to file a federal  
6 income tax return for the taxable year, or having West  
7 Virginia adjusted gross income for the taxable year, deter-  
8 mined under section twelve of this article in excess of the  
9 sum of his or her West Virginia personal exemptions:  
10 *Provided,* That the tax commissioner shall by legislative  
11 rule specify circumstances when an individual is not re-  
12 quired to file a return as a result of the application of  
13 section ten of this article;

14 (2) Every resident estate or trust required to file a  
15 federal income tax return for the taxable year, or having  
16 any West Virginia taxable income for the taxable year,  
17 determined under section eighteen of this article;

18 (3) Every nonresident individual having any West  
19 Virginia adjusted gross income for the taxable year, deter-  
20 mined under section thirty-two of this article, in excess of  
21 the sum of his or her West Virginia personal exemptions,  
22 except when all of such nonresident individual's West  
23 Virginia source income is taxed on a composite return  
24 filed under this article for the taxable year; and

25 (4) Every nonresident estate or trust having items of  
26 income or gain derived from West Virginia sources, deter-  
27 mined in accordance with the applicable rules of section  
28 thirty-two of this article as in the case of a nonresident  
29 individual, in excess of its West Virginia exemption.

30 (b) *Husband and wife.* —

31 (1) If the federal income tax liability of husband or  
32 wife is determined on a separate federal income tax return,  
33 their West Virginia income tax liabilities and returns shall  
34 be separate.

35 (2) If the federal income tax liabilities of husband and  
36 wife other than a husband and wife described in subdivi-  
37 sion (3) of this subsection are determined on a joint feder-  
38 al return, or if neither files a federal return:

39 (A) They shall file a joint West Virginia income tax  
40 return, and their tax liabilities shall be joint and several; or

41 (B) They may elect to file separate West Virginia in-  
42 come tax returns on a single or separate form, as may be  
43 required by the tax commissioner, if they comply with the  
44 requirements of the tax commissioner in setting forth  
45 information, and in such event their tax liabilities shall be  
46 separate.

47 (3) If either husband or wife is a resident and the other  
48 is a nonresident, they shall file separate West Virginia  
49 income tax returns on such single or separate forms as  
50 may be required by the tax commissioner, and in such  
51 event their tax liabilities shall be separate.

52 (c) *Decedents.* — The return of any deceased individ-  
53 ual shall be made and filed by his or her executor, admin-  
54 istrator or other person charged with his or her property.

55 (d) *Individuals under a disability.* — The return for  
56 an individual who is unable to make a return by reason of  
57 minority or other disability shall be made and filed by his  
58 or her guardian, committee, fiduciary or other person  
59 charged with the care of his or her person or property  
60 (other than a receiver in possession of only a part of his or  
61 her property), by his or her duly authorized agent.

62 (e) *Estates and trusts.* — The return for an estate or  
63 trust shall be made and filed by the fiduciary.

64 (f) *Joint fiduciaries.* — If two or more fiduciaries are  
65 acting jointly, the return may be made by any one of  
66 them.

67 (g) *Tax a debt.* — Any tax under this article, and any  
68 increase, interest or penalty thereon, shall, from the time it  
69 is due and payable, be a personal debt of the person liable  
70 to pay the same, to the state of West Virginia.

71 (h) *Cross reference.* — For provisions as to informa-  
72 tion returns by partnerships, employers and other persons,  
73 see section fifty-eight of this article. For provisions as to  
74 composite returns of nonresidents, see section fifty-one-a  
75 of this article. For provisions as to information returns by  
76 electing small business corporations, see section thirteen-b,  
77 article twenty-four of this chapter.

78 (i) *Effective date.* — This section, as amended by this  
79 act in the year one thousand nine hundred ninety-six, shall  
80 apply to all taxable years beginning after the thirty-first  
81 day of December, one thousand nine hundred ninety-five.

#### §11-21-71. Requirement of withholding tax from wages.

1 (a) *General.* — Every employer maintaining an office  
2 or transacting business within this state and making pay-  
3 ment of any wage taxable under this article to a resident or  
4 nonresident individual shall deduct and withhold from  
5 such wages for each payroll period a tax computed in  
6 such manner as to result, so far as practicable, in withhold-  
7 ing from the employee's wages during each calendar year  
8 an amount substantially equivalent to the tax reasonably  
9 estimated to be due under this article resulting from the  
10 inclusion in the employee's West Virginia adjusted gross  
11 income of wages received during such calendar year. The  
12 method of determining the amount to be withheld shall be  
13 prescribed by the tax commissioner, with due regard to the  
14 West Virginia withholding exemption of the employee and  
15 any low income exclusion allowed to such employee un-  
16 der section ten of this article and asserted in good faith by  
17 the employee. This section shall not apply to payments  
18 by the United States for service in the armed forces of the  
19 United States: *Provided,* That the tax commissioner may  
20 execute an agreement with the secretary of the treasury, as  
21 provided in 5 U. S. C. §5517, for the mandatory withhold-  
22 ing of tax under this section on pay to members of the  
23 national guard while participating in exercises or perform-  
24 ing duty under 32 U. S. C. §502, and on pay to members  
25 of the ready reserve while participating in scheduled drills



26 or training periods or serving on active duty for training  
27 under 10 U. S. C. §270(a).

28 (b) *Withholding exemptions.* — For purposes of this  
29 section:

30 (1) An employee shall be entitled to the same number  
31 of West Virginia withholding exemptions as the number of  
32 withholding exemptions to which he or she is entitled for  
33 federal income tax withholding purposes. An employer  
34 may rely upon the number of federal withholding exemp-  
35 tions claimed by the employee, except where the employ-  
36 ee claims a higher number of West Virginia withholding  
37 exemptions.

38 (2) With respect to any taxable year beginning after  
39 the thirty-first day of December, one thousand nine hun-  
40 dred eighty-six, the amount of each West Virginia exemp-  
41 tion shall be two thousand dollars whether the individual is  
42 a resident or nonresident.

43 (c) *Exception for certain nonresidents.* — If the in-  
44 come tax law of another state of the United States or of the  
45 District of Columbia results in its residents being allowed a  
46 credit under section forty sufficient to offset all taxes  
47 required by this article to be withheld from wages of an  
48 employee, the tax commissioner may by regulation relieve  
49 the employers of such employees from withholding re-  
50 quirements of this article with respect to such employees.

51 (d) *Effective date.* — The provisions of this section, as  
52 amended in the year one thousand nine hundred  
53 ninety-six, shall apply to all taxable years or portions  
54 thereof beginning after the thirtieth day of June, one thou-  
55 sand nine hundred ninety-six.

#### ARTICLE 23. BUSINESS FRANCHISE TAX.

##### §11-23-6. Imposition of tax; change in rate of tax.

1 (a) *General.* — An annual business franchise tax is  
2 hereby imposed on the privilege of doing business in this  
3 state and in respect of the benefits and protection con-  
4 ferred. Such tax shall be collected from every domestic  
5 corporation, every corporation having its commercial  
6 domicile in this state, every foreign or domestic corpora-  
7 tion owning or leasing real or tangible personal property

8 located in this state or doing business in this state and  
9 from every partnership owning or leasing real or tangible  
10 personal property located in this state or doing business in  
11 this state, effective on and after the first day of July, one  
12 thousand nine hundred eighty-seven.

13 (b) *Amount of tax and rate; effective date.* —

14 (1) On and after the first day of July, one thousand  
15 nine hundred eighty-seven, the amount of tax shall be the  
16 greater of fifty dollars or fifty-five one hundredths of one  
17 percent of the value of the tax base, as determined under  
18 this article: *Provided*, That when the taxpayer's first tax-  
19 able year under this article is a short taxable year, the  
20 taxpayer's liability shall be prorated based upon the ratio  
21 which the number of months in which such short taxable  
22 year bears to twelve: *Provided, however*, That this subdi-  
23 vision shall not apply to taxable years beginning on or  
24 after the first day of January, one thousand nine hundred  
25 eighty-nine.

26 (2) *Taxable years after December 31, 1988.* — For  
27 taxable years beginning on or after the first day of Janu-  
28 ary, one thousand nine hundred eighty-nine, the amount  
29 of tax due under this article shall be the greater of fifty  
30 dollars or seventy-five one hundredths of one percent of  
31 the value of the tax base as determined under this article.

32 (3) *Taxable years after June 30, 1997.* — For taxable  
33 years beginning on or after the first day of July, one thou-  
34 sand nine hundred ninety-seven, the amount of tax due  
35 under this article shall be the greater of fifty dollars or  
36 seventy hundredths of one percent of the value of the tax  
37 base as determined under this article.

38 (c) *Short taxable years.* — When the taxpayer's tax-  
39 able year for federal income tax purposes is a short tax-  
40 able year, the tax determined by application of the tax rate  
41 to the taxpayer's tax base shall be prorated based upon the  
42 ratio which the number of months in such short taxable  
43 year bears to twelve: *Provided*, That when the taxpayer's  
44 first taxable year under this article is less than twelve  
45 months, the taxpayer's liability shall be prorated based  
46 upon the ratio which the number of months the taxpayer  
47 was doing business in this state bears to twelve but in no  
48 event shall the tax due be less than fifty dollars.

# CHAPTER 243

(S. B. 505—By Senator Miller)

[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact sections five and six, article twenty-two, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to the recordation of instruments transferring real property with the county clerk; permitting documentary stamps reflecting the payment of taxes upon the privilege of transferring real property to be affixed by meter or similar device; providing that such stamps need not be canceled; and providing that those instruments to which documentary stamps are not required to be affixed may not be recorded unless there is tendered with the document a verified sales listing form.

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

That sections five and six, article twenty-two, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 22. EXCISE TAX ON PRIVILEGE OF TRANSFERRING REAL PROPERTY.**

§11-22-5. Commissioner to provide for sale of stamps; rules and regulations.

§11-22-6. Duties of clerk; declaration of consideration or value; filing of sales listing form for tax commissioner; disposition and use of proceeds.

**§11-22-5. Commissioner to provide for sale of stamps; rules and regulations.**

- 1 (a) The commissioner shall prescribe, prepare and
- 2 furnish adhesive stamps of such denominations and quan-
- 3 tities as may be necessary for the payment of the tax im-
- 4 posed and assessed by this article, to the clerks of the vari-
- 5 ous county commissions whose duty it shall be to offer
- 6 said stamps for sale.

7 (b) The commissioner is hereby authorized and em-  
8 powered to prescribe, adopt, promulgate and enforce rules  
9 and regulations relating to:

10 (1) The method and means to be used in affixing or  
11 cancelling of stamps in substitution for or in addition to  
12 the method and means provided in this article.

13 (2) The denominations and sale of stamps.

14 (3) Any other matter or thing pertaining to the admin-  
15 istration and enforcement of the provisions of this article.

16 (c) In addition to the form of the stamps described in  
17 subsection (a) of this section, and the method and means  
18 to be used in affixing the stamps heretofore authorized by  
19 the commissioner, the commissioner may authorize the  
20 clerks of the county commissions to affix stamps by meter  
21 or other similar device. Stamps that are affixed by the use  
22 of such devices shall be uniform as to size and design and  
23 shall be in such form as determined by the commissioner.  
24 Notwithstanding the provisions of section four of this  
25 article, cancellation of the stamps affixed by the use of  
26 such devices is not required.

**§11-22-6. Duties of clerk; declaration of consideration or  
value; filing of sales listing form for tax com-  
missioner; disposition and use of proceeds.**

1 When any instrument on which the tax as herein pro-  
2 vided is imposed is offered for recordation, the clerk of  
3 the county commission shall ascertain and compute the  
4 amount of the tax due thereon and shall ascertain if  
5 stamps in the proper amount are attached thereto as a  
6 prerequisite to acceptance of the instrument for recorda-  
7 tion.

8 When offered for recording, each instrument subject  
9 to the tax as herein provided shall have appended on the  
10 face or at the end thereof a statement or declaration signed  
11 by the grantor, grantee or other responsible party familiar  
12 with the transaction therein involved declaring the consid-  
13 eration paid for or the value of the property thereby con-  
14 veyed. The declaration may be in the following language:

## 16 "DECLARATION OF CONSIDERATION OR VALUE

17 I hereby declare:

18 (a) The total consideration paid for the property con-  
19 veyed by the document to which this declaration is ap-  
20 pended is \$\_\_\_\_\_; or21 (b) The true and actual value of the property trans-  
22 ferred by the document to which this declaration is ap-  
23 pended is, to the best of my knowledge and belief  
24 \$\_\_\_\_\_; or25 (c) The proportion of all the property included in the  
26 document to which this declaration is appended which is  
27 real property located in West Virginia is \_\_\_\_\_%; the  
28 value of all the property \$\_\_\_\_\_; the value of real  
29 estate in West Virginia is \$\_\_\_\_\_; or30 (d) This deed conveys real estate located in more than  
31 one county in West Virginia; the total consideration paid  
32 for, or actual cash value of, all the real estate located in  
33 West Virginia conveyed by this document is \$\_\_\_\_\_;  
34 and documentary stamps showing payment of all of the  
35 excise tax on all of said real estate are attached to an exe-  
36 cuted counterpart of this deed recorded in  
37 \_\_\_\_\_ County.38 Given under my hand this \_\_\_\_\_ day of  
39 \_\_\_\_\_, 19\_\_.40 Signed \_\_\_\_\_ (Indi-  
41 cate whether grantor, grantee, or other interest in convey-  
42 ance). \_\_\_\_\_  
43 Address"44 The declaration shall be considered by the clerk in  
45 ascertaining the correct number of stamps required, and if  
46 declaration (d) above is used, no stamps shall be required  
47 on the duplicate deed to which it is attached and such  
48 duplicate deed shall be admitted to record, and when re-  
49 corded shall have the same effect for all purposes as if  
50 stamps were attached thereto.51 On or after the first day of July, one thousand nine  
52 hundred ninety-six, the clerk shall not record any docu-

53 ment with or without stamps affixed unless there is ten-  
54 dered with the document a completed and verified sales  
55 listing form for the benefit and use of the state tax com-  
56 missioner. Preprinted forms for this purpose shall be  
57 provided to each clerk by the tax commissioner.

58 The forms shall require the following information:  
59 (1) If the last deed in the chain of title represents the last  
60 transfer of the property, the names of the grantor and  
61 grantee and the deedbook and page number; or (2) if the  
62 last transfer was not made by deed, the source of the  
63 grantor's title, if known; or (3) if the source of the grant-  
64 or's title is unknown, a description of the property and the  
65 name of the person to whom real property taxes are as-  
66 sessed as set forth in the landbook prepared by the asses-  
67 sor. In all cases the forms shall require the tax map and  
68 parcel number of the property, the district or municipality  
69 in which the real property or the greater portion thereof  
70 lies, the address of the property, the consideration or value  
71 in money, including any other valuable goods or services,  
72 upon which the buyer and seller agree to consummate the  
73 sale, and any other financing arrangements affecting val-  
74 ue. The sales listing form required by this paragraph is to  
75 be completed in addition to, and not in lieu of, the decla-  
76 ration required by this section: *Provided*, That the tax  
77 commissioner may design and provide a form which com-  
78 bines into one form the contents of the declaration and the  
79 sales listing form required herein and recordation and  
80 filing of that form may be used as an alternative to filing  
81 the sales listing form required herein: *Provided, however*,  
82 That the filing with the clerk of a duplicate deed contain-  
83 ing the sales listing form information required by this  
84 section shall also satisfy the requirements of this section  
85 regarding the sales listing form. The clerk shall, at the end  
86 of the month, pay all of the proceeds collected from the  
87 sale of stamps for the county excise tax into the county  
88 general fund for use of the county.

89 On or before the tenth day of each month the clerk  
90 shall deliver to the tax commissioner, or a person designat-  
91 ed by the tax commissioner, the sales listing forms or

91 other alternative forms as may be authorized by this sec-  
92 tion for documents recorded during the preceding month.

93 The sales listing form required by this section shall  
94 also include a portion thereof for the information required  
95 of a person claiming a lien against the real property de-  
96 scribed in the document who desires to file a statement  
97 pursuant to the provisions of subsection (a), section three,  
98 article three, chapter eleven-a of this code. Upon receipt  
99 of the form, the clerk shall, no later than the end of the  
100 business day upon which it was received, provide a copy  
101 of the statement to the assessor and a copy thereof to the  
102 sheriff. The assessor shall note the lien and any new own-  
103 er of the real property indicated on the sales listing form  
104 upon his landbooks. The sheriff shall promptly compare  
105 the information contained in the sales listing form with his  
106 records and shall:

107 (1) Provide the lienholder such notice as the lienhold-  
108 er would thereafter otherwise be entitled to receive pursu-  
109 ant to the provisions of chapter eleven-a of this code had  
110 the lienholder provided the information in the form of a  
111 statement as permitted by the provisions of section three,  
112 article three of said chapter;

113 (2) Provide any other person listed on the sales listing  
114 form such notice as the person would thereafter otherwise  
115 be entitled to receive pursuant to the provisions of chapter  
116 eleven-a of this code as a result of the person's interest in  
117 the real property;

118 (3) Deliver to any person listed on the sales listing  
119 form as the new owner of the real property described in  
120 the document a copy of any subsequently issued tax ticket  
121 required to be sent by the provisions of section eight,  
122 article one, chapter eleven-a of this code; and

123 (4) Promptly notify any person listed on the sales  
124 listing form as the lienholder or the new owner of the real  
125 property of any due and unpaid taxes assessed against the  
126 property.

# CHAPTER 244

(S. B. 129—By Senators Craig, Plymale and Oliverio)

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[Passed February 19, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections five-a, nine and twenty-seven, article twenty-three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section nine-a; to amend and reenact sections seven-b, thirteen-a and twenty-four, article twenty-four of said chapter; and to further amend said article by adding thereto a new section, designated section thirty-eight, all relating generally to how financial organizations and other corporations determine tax liability, file returns and pay business franchise and corporation net income taxes; and specifying effective dates.

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

That sections five-a, nine and twenty-seven, article twenty-three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section nine-a; that sections seven-b, thirteen-a and twenty-four, article twenty-four of said chapter be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section thirty-eight, all to read as follows:

**Article**

**23. Business Franchise Tax.**

**24. Corporation Net Income Tax.**

**ARTICLE 23. BUSINESS FRANCHISE TAX.**

§11-23-5a. Special apportionment rules — Financial organizations.

§11-23-9. Annual returns.

§11-23-9a. Method of filing for business taxes.

§11-23-27. Credit for franchise tax paid to another state.

**§11-23-5a. Special apportionment rules — Financial organizations.**



1       (a) *General.* — The Legislature hereby finds that the  
2 general formula set forth in section five of this article for  
3 apportioning the tax base of corporations and partnerships  
4 taxable in this state as well as in another state is inappro-  
5 priate for use by financial organizations due to the partic-  
6 ular characteristics of those organizations and the manner  
7 in which their business is conducted. Accordingly, the  
8 general formula set forth in section five of this article may  
9 not be used to apportion the tax base of such financial  
10 organizations which shall use only the apportionment  
11 formula and methods set forth in this section.

12       (b) *West Virginia financial organizations taxable in*  
13 *another state.* — A financial organization that has its com-  
14 mercial domicile in this state and which is taxable in an-  
15 other state may not apportion its tax base as provided in  
16 section five of this article, but shall allocate all of its tax  
17 base to West Virginia without apportionment: *Provided,*  
18 That such financial organization shall be allowed as a  
19 credit against its tax liability under this article the credit  
20 described in section twenty-seven of this article.

21       (c) *Out-of-state financial organizations with business*  
22 *activities in this state.* — A financial organization that  
23 does not have its commercial domicile in this state and  
24 which regularly engages in business in this state shall ap-  
25 portion its tax base to this state by multiplying it by the  
26 special gross receipts factor calculated as provided in sub-  
27 section (f) of this section. The product of this multiplica-  
28 tion is the portion of its tax base that is attributable to  
29 business activity in this state.

30       (d) *Engaging in business — nexus presumptions and*  
31 *exclusions.* — A financial organization that has its com-  
32 mercial domicile in another state is presumed to be regu-  
33 larly engaging in business in this state if during any year it  
34 obtains or solicits business with twenty or more persons  
35 within this state, or if the sum of the value of its gross  
36 receipts attributable to sources in this state equals or ex-  
37 ceeds one hundred thousand dollars. However, gross  
38 receipts from the following types of property (as well as  
39 those contacts with this state reasonably and exclusively  
40 required to evaluate and complete the acquisition or dis-

41 position of the property, the servicing of the property or  
42 the income from it, the collection of income from the  
43 property, or the acquisition or liquidation of collateral  
44 relating to the property) shall not be a factor in determin-  
45 ing whether the owner is engaging in business in this state:

46 (1) An interest in a real estate mortgage investment  
47 conduit, a real estate investment trust or a regulated invest-  
48 ment company;

49 (2) An interest in a loan backed security representing  
50 ownership or participation in a pool of promissory notes  
51 or certificates of interest that provide for payments in  
52 relation to payments or reasonable projections of pay-  
53 ments on the notes or certificates;

54 (3) An interest in a loan or other asset from which the  
55 interest is attributed to a consumer loan, a commercial  
56 loan or a secured commercial loan, and in which the pay-  
57 ment obligations were solicited and entered into by a per-  
58 son that is independent, and not acting on behalf, of the  
59 owner;

60 (4) An interest in the right to service or collect in-  
61 come from a loan or other asset from which interest on the  
62 loan is attributed as a loan described in the previous para-  
63 graph, and in which the payment obligations were solicited  
64 and entered into by a person that is independent, and not  
65 acting on behalf, of the owner; and

66 (5) Any amounts held in an escrow or trust account  
67 with respect to property described above.

68 (e) *Definitions.* — For purposes of this section:

69 (1) "Commercial domicile". See section three of this  
70 article.

71 (2) "Deposit" means: (A) The unpaid balance of  
72 money or its equivalent received or held by a financial  
73 organization in the usual course of business and for which  
74 it has given or it is obligated to give credit, either condi-  
75 tionally or unconditionally, to a commercial, checking,  
76 savings, time or thrift account whether or not advance  
77 notice is required to withdraw the credit funds, or which is

78 evidenced by a certificate of deposit, thrift certificate,  
79 investment certificate or certificate of indebtedness, or  
80 other similar name, or a check or draft drawn against a  
81 deposit account and certified by the financial organiza-  
82 tion, or a letter of credit or a traveler's check on which the  
83 financial organization is primarily liable: *Provided*, That  
84 without limiting the generality of the term "money or its  
85 equivalent", any such account or instrument must be re-  
86 garded as evidencing the receipt of the equivalent of mon-  
87 ey when credited or issued in exchange for checks or  
88 drafts or for a promissory note upon which the person  
89 obtaining any such credit or instrument is primarily or  
90 secondarily liable or for a charge against a deposit ac-  
91 count or in settlement of checks, drafts or other instru-  
92 ments forwarded to such bank for collection;

93 (B) Trust funds received or held by such financial  
94 organization, whether held in the trust department or held  
95 or deposited in any other department of such financial  
96 organization;

97 (C) Money received or held by a financial organiza-  
98 tion or the credit given for money or its equivalent re-  
99 ceived or held by a financial organization in the usual  
100 course of business for a special or specific purpose, re-  
101 gardless of the legal relationship thereby established, in-  
102 cluding, without being limited to, escrow funds, funds held  
103 as security for an obligation due the financial organization  
104 or other (including funds held as dealers' reserves) or for  
105 securities loaned by the financial organization, funds de-  
106 posited by a debtor to meet maturing obligations, funds  
107 deposited as advance payment on subscriptions to United  
108 States government securities, funds held for distribution or  
109 purchase of securities, funds held to meet its acceptances  
110 or letters of credit and withheld taxes: *Provided*, That  
111 there shall not be included funds which are received by  
112 the financial organization for immediate application to the  
113 reduction of an indebtedness to the receiving financial  
114 organization, or under condition that the receipt thereof  
115 immediately reduces or extinguishes such an indebted-  
116 ness;

117 (D) Outstanding drafts (including advice or authori-  
118 zation to charge a financial organization's balance in an-  
119 other such organization), cashier's checks, money orders  
120 or other officer's checks issued in the usual course of  
121 business for any purpose, but not including those issued in  
122 payment for services, dividends or purchases or other costs  
123 or expenses of the financial organization itself; and

124 (E) Money or its equivalent held as a credit balance  
125 by a financial organization on behalf of its customer if  
126 such entity is engaged in soliciting and holding such bal-  
127 ances in the regular course of its business.

128 (3) "Financial organization" means a financial organi-  
129 zation as defined in subdivision (13), subsection (b), sec-  
130 tion three of this article, as well as a partnership which  
131 derives more than fifty percent of its gross business in-  
132 come from one or more of the activities enumerated in  
133 subparagraphs (1) through (6), paragraph (C) of said  
134 subdivision.

135 (4) "Sales" means: For purposes of apportionment  
136 under this section, the gross receipts of a financial organi-  
137 zation included in the gross receipts factor described in  
138 subsection (f) of this section, regardless of their source.

139 (f) *Special gross receipts factor.* — The gross receipts  
140 factor is a fraction, the numerator of which is the total  
141 gross receipts of the taxpayer from sources within this  
142 state during the taxable year and the denominator of  
143 which is the total gross receipts of the taxpayer wherever  
144 earned during the taxable year: *Provided*, That neither the  
145 numerator nor the denominator of the gross receipts fac-  
146 tor shall include receipts from obligations described in  
147 paragraphs (A), (B), (C) and (D), subdivision (1), subsec-  
148 tion (f), section six, article twenty-four of this chapter.

149 (1) *Numerator.* — The numerator of the gross receipts  
150 factor shall include, in addition to items otherwise  
151 includable in the sales factor under section five of this  
152 article, the following:

153 (A) Gross receipts from the lease or rental of real or  
154 tangible personal property (whether as the economic

155 equivalent of an extension of credit or otherwise) if the  
156 property is located in this state;

157 (B) Interest income and other receipts from assets in  
158 the nature of loans which are secured primarily by real  
159 estate or tangible personal property if such security prop-  
160 erty is located in the state. In the event that such security  
161 property is also located in one or more other states, such  
162 receipts shall be presumed to be from sources within this  
163 state, subject to rebuttal based upon factors described in  
164 rules to be promulgated by the tax commissioner, includ-  
165 ing the factor that the proceeds of any such loans were  
166 applied and used by the borrower entirely outside of this  
167 state;

168 (C) Interest income and other receipts from consumer  
169 loans which are unsecured or are secured by intangible  
170 property that are made to residents of this state, whether at  
171 a place of business, by traveling loan officer, by mail, by  
172 telephone or other electronic means or otherwise;

173 (D) Interest income and other receipts from commer-  
174 cial loans and installment obligations which are unsecured  
175 or are secured by intangible property if and to the extent  
176 that the borrower or debtor is a resident of or is domiciled  
177 in this state: *Provided*, That such receipts are presumed to  
178 be from sources in this state and such presumption may be  
179 overcome by reference to factors described in rules to be  
180 promulgated by the tax commissioner, including the fac-  
181 tor that the proceeds of any such loans were applied and  
182 used by the borrower entirely outside of this state;

183 (E) Interest income and other receipts from a finan-  
184 cial organization's syndication and participation in loans,  
185 under the rules set forth in (A) through (D), above;

186 (F) Interest income and other receipts, including ser-  
187 vice charges, from financial institution credit card and  
188 travel and entertainment credit card receivables and credit  
189 card holders' fees if the borrower or debtor is a resident of  
190 this state or if the billings for any such receipts are regu-  
191 larly sent to an address in this state;

192 (G) Merchant discount income derived from financial  
193 institution credit card holder transactions with a merchant  
194 located in this state. In the case of merchants located  
195 within and without this state, only receipts from merchant  
196 discounts attributable to sales made from locations within  
197 this state shall be attributed to this state. It shall be pre-  
198 sumed, subject to rebuttal, that the location of a merchant  
199 is the address shown on the invoice submitted by the mer-  
200 chant to the taxpayer;

201 (H) Gross receipts from the performance of services  
202 are attributed to this state if:

203 (i) The service receipts are loan-related fees, including  
204 loan servicing fees, and the borrower resides in this state,  
205 except that, at the taxpayer's election, receipts from  
206 loan-related fees which are either: (I) "Pooled" or aggre-  
207 gated for collective financial accounting treatment; or (II)  
208 manually written as nonrecurring extraordinary charges to  
209 be processed directly to the general ledger may either be  
210 attributed to a state based upon the borrowers' residences  
211 or upon the ratio that total interest sourced to that state  
212 bears to total interest from all sources;

213 (ii) The service receipts are deposit-related fees and  
214 the depositor resides in this state, except that, at the tax-  
215 payer's election, receipts from deposit-related fees which  
216 are either: (I) "Pooled" or aggregated for collective finan-  
217 cial accounting treatment; or (II) manually written as non-  
218 recurring extraordinary charges to be processed directly  
219 to the general ledger may either be attributed to a state  
220 based upon the depositors' residences or upon the ratio  
221 that total deposits sourced to that state bears to total depos-  
222 its from all sources;

223 (iii) The service receipt is a brokerage fee and the  
224 account holder is a resident of this state;

225 (iv) The service receipts are fees related to estate or  
226 trust services and the estate's decedent was a resident of  
227 this state immediately before death, or the grantor who  
228 either funded or established the trust is a resident of this  
229 state; or

230 (v) The service receipt is associated with the perfor-  
231 mance of any other service not identified above and the  
232 service is performed for an individual resident of, or for a  
233 corporation or other business domiciled in, this state and  
234 the economic benefit of such service is received in this  
235 state;

236 (I) Gross receipts from the issuance of travelers'  
237 checks and money orders if such checks and money or-  
238 ders are purchased in this state; and

239 (J) All other receipts not attributed by this rule to a  
240 state in which the taxpayer is taxable shall be attributed  
241 pursuant to the laws of the state of the taxpayer's commer-  
242 cial domicile.

243 (2) *Denominator.* — The denominator of the gross  
244 receipts factor shall include all of the taxpayer's gross  
245 receipts from transactions of the kind included in the  
246 numerator, but without regard to their source or situs.

247 (g) *Effective date.* — The provisions of this section  
248 enacted in chapter one hundred sixty-seven, acts of the  
249 Legislature, one thousand nine hundred ninety-one, shall  
250 apply to all taxable years beginning on or after the first  
251 day of January, one thousand nine hundred ninety-one.  
252 The amendments to this section, enacted in the year one  
253 thousand nine hundred ninety-six, shall apply to taxable  
254 years beginning after the thirty-first day of December, one  
255 thousand nine hundred ninety-five.

#### §11-23-9. Annual returns.

1 (a) *In general.* — Every person subject to the tax  
2 imposed by this article shall make and file an annual re-  
3 turn for its taxable year with the tax commissioner on or  
4 before:

5 (1) The fifteenth day of the third month of the next  
6 succeeding taxable year if the person is a corporation; or

7 (2) The fifteenth day of the fourth month of the next  
8 succeeding taxable year if the corporation is a partnership.

9       The annual return shall include such information as  
10 the tax commissioner may require for determining the  
11 amount of taxes due under this article for the taxable year.

12       (b) *Special rule for tax exempt organizations with*  
13 *unrelated business taxable income.* — Notwithstanding the  
14 provisions of subsection (a) of this section, when a busi-  
15 ness franchise tax return is required from an organization  
16 generally exempt from tax under subsection (b), section  
17 seven of this article, which has unrelated business taxable  
18 income, the annual return shall be filed on or before the  
19 fifteenth day of the fifth month following the close of the  
20 taxable year.

21       (c) *Effective date.* — The amendments to this section,  
22 made in the year one thousand nine hundred ninety-six,  
23 shall apply to tax returns that become due for taxable  
24 years beginning on or after the first day of that year.

**§11-23-9a. Method of filing for business taxes.**

1       (a) *Privilege to file consolidated return.* — An affiliat-  
2 ed group of corporations (as defined for purposes of  
3 filing a consolidated federal income tax return) shall,  
4 subject to the provisions of this section and in accordance  
5 with any regulations prescribed by the tax commissioner,  
6 have the privilege of filing a consolidated return with  
7 respect to the tax imposed by this article for the taxable  
8 year in lieu of filing separate returns. The making of a  
9 consolidated return shall be upon the condition that all  
10 corporations which at any time during the taxable year  
11 have been members of the affiliated group are included in  
12 such return and consent to the filing of such return. The  
13 filing of a consolidated return shall be considered as such  
14 consent. When a corporation is a member of an affiliated  
15 group for a fractional part of the year, the consolidated  
16 return shall include the tax base of such corporation for  
17 that part of the year during which it is a member of the  
18 affiliated group.

19       (b) *Election binding.* — If an affiliated group of cor-  
20 porations elects to file a consolidated return under this  
21 article, such election once made shall not be revoked for



22 any subsequent taxable year without the written approval  
23 of the tax commissioner consenting to the revocation.

24 (c) *Consolidated return — financial organizations.* —  
25 An affiliated group that includes one or more financial  
26 organizations may elect under this section to file a consol-  
27 idated return when that affiliated group complies with all  
28 of the following rules:

29 (1) The affiliated group of which the financial organi-  
30 zation is a member must file a federal consolidated in-  
31 come tax return for the taxable year;

32 (2) All members of the affiliated group included in  
33 the federal consolidated return must consent to being  
34 included in the consolidated return filed under this article.  
35 The filing of a consolidated return under this article is  
36 conclusive proof of such consent;

37 (3) The taxable capital of the affiliated group shall be  
38 the sum of:

39 (A) The pro forma West Virginia taxable capital of all  
40 financial organizations having their commercial domicile  
41 in this state that are included in the federal consolidated  
42 return, as shown on a combined pro forma West Virginia  
43 return prepared for such financial organizations; plus

44 (B) The pro forma West Virginia taxable capital of all  
45 financial organizations not having their commercial domi-  
46 cile in this state that are included in the federal consolidat-  
47 ed return, as shown on a combined pro forma West Vir-  
48 ginia return prepared for such financial organizations;  
49 plus

50 (C) The pro forma West Virginia taxable capital of all  
51 other members included in the federal consolidated in-  
52 come tax return, as shown on a combined pro forma West  
53 Virginia return prepared for all such nonfinancial organi-  
54 zation members, except that the capital, apportionments  
55 factors and other items considered when determining tax  
56 liability shall not be included in the pro forma return  
57 prepared under this paragraph for a member that is totally  
58 exempt from tax under section seven of this article, or for  
59 a member that is subject to a different special industry

60 apportionment rule provided for in this article. When a  
61 different special industry apportionment rule applies, the  
62 taxable capital of a member(s) subject to that special in-  
63 dustry apportionment rule shall be determined on a sepa-  
64 rate pro forma West Virginia return for the member(s)  
65 subject to that special industry rule and the taxable capital  
66 so determined shall be included in the consolidated return;

67 (4) The West Virginia consolidated return is prepared  
68 in accordance with regulations of the tax commissioner  
69 promulgated as provided in article three, chapter  
70 twenty-nine-a of this code; and

71 (5) The filing of a consolidated return does not distort  
72 the taxable capital of the affiliated group. In any pro-  
73 ceeding, the burden of proof that the taxpayer's method of  
74 filing does not distort taxable capital under this article  
75 shall be upon the taxpayer.

76 (d) *Combined return.* — A combined return may be  
77 filed under this article by a unitary group, including a  
78 unitary group that includes one or more financial organi-  
79 zations, only pursuant to the prior written approval of the  
80 tax commissioner. A request for permission to file a com-  
81 bined return must be filed on or before the statutory due  
82 date of the return, determined without inclusion of any  
83 extension of time to file the return. Permission to file a  
84 combined return may be granted by the tax commissioner  
85 only when taxpayer submits evidence that conclusively  
86 establishes that failure to allow the filing of a combined  
87 return will result in an unconstitutional distortion of the  
88 measure of tax under this article. When permission to file  
89 a combined return is granted, combined filing will be  
90 allowed for the year(s) stated in the tax commissioner's  
91 letter. The combined return must be filed in accordance  
92 with regulations of the tax commissioner promulgated in  
93 accordance with article three, chapter twenty-nine-a of this  
94 code.

95 (e) *Method of filing under this article deemed control-*  
96 *ling for purposes of other business taxes articles.* — The  
97 taxpayer shall file on the same basis under article  
98 twenty-four of this chapter as such taxpayer files under  
99 this article for the taxable year.

100       (f) *Regulations.* — The tax commissioner shall pre-  
101 scribe such regulations as he may deem necessary in order  
102 that the tax liability of any affiliated group of corpora-  
103 tions filing a consolidated return, or of any unitary group  
104 of corporations filing a combined return, and of each  
105 corporation in an affiliated or unitary group, both during  
106 and after the period of affiliation, may be returned, deter-  
107 mined, computed, assessed, collected and adjusted, in such  
108 manner as the tax commissioner deems necessary to clear-  
109 ly reflect tax liability under this article and the factors  
110 necessary for the determination of such liability, and in  
111 order to prevent avoidance of such tax liability.

112       (g) *Computation and payment of tax.* — In any case  
113 in which a consolidated or combined return is filed, or  
114 required to be filed, the tax due under this article from the  
115 affiliated or unitary group shall be determined, computed,  
116 assessed, collected and adjusted in accordance with regula-  
117 tions prescribed by the tax commissioner, in effect on the  
118 last day prescribed by section nine of this article for the  
119 filing of such return, and such affiliated or unitary group,  
120 as the case may be, shall be treated as the taxpayer. How-  
121 ever, when any member of an affiliated or unitary group  
122 that files a consolidated or combined return under this  
123 article is allowed to claim credit against its tax liability  
124 under this article for payment of any other tax, the  
125 amount of credit allowed may not exceed that member's  
126 proportionate share of the affiliated or unitary group's  
127 precredit tax liability under this article, as shown on its pro-  
128 forma return.

129       (h) *Consolidated or combined return may be required.*  
130 — If any affiliated group of corporations has not elected  
131 to file a consolidated return, or if any unitary group of  
132 corporations has not applied for permission to file a com-  
133 bined return, the tax commissioner may require such cor-  
134 porations to make a consolidated or combined return, as  
135 the case may be, in order to clearly reflect taxable capital  
136 of such corporations.

137       (i) *Effective date.* — This section shall apply to taxable  
138 years beginning on or after the first day of January, one  
139 thousand nine hundred ninety-six, except that financial

140 organizations that are part of an affiliated group may  
141 elect, after the effective date of this act, to file a consolidat-  
142 ed return prepared in accordance with the provisions of  
143 this section and subject to applicable statutes of limitation,  
144 for taxable years beginning on or after the first day of  
145 January, one thousand nine hundred ninety-one, but be-  
146 fore the first day of January, one thousand nine hundred  
147 ninety-six, notwithstanding provisions then in effect pro-  
148 hibiting out-of-state financial organizations from filing  
149 consolidated returns for those years: *Provided*, That when  
150 the statute of limitations on filing an amended return for  
151 any of those years expires before the first day of July, one  
152 thousand nine hundred ninety-six, the consolidated return  
153 for such year, if filed, must be filed by said first day of  
154 July.

**§11-23-27. Credit for franchise tax paid to another state.**

1 (a) Effective for taxable years beginning on or after  
2 the first day of January, one thousand nine hundred  
3 ninety-one, and notwithstanding any provisions of this  
4 code to the contrary, any financial organization having its  
5 commercial domicile in this state shall be allowed a credit  
6 against the tax imposed by this article for any taxable year  
7 for taxes paid to another state. That credit shall be equal  
8 in amount to the lesser of:

9 (1) The taxes such financial organization shall actual-  
10 ly have paid, which payments were made on or before the  
11 filing date of the annual return required by this article, to  
12 any other state, and which tax was based upon or mea-  
13 sured by the financial organization's capital and was paid  
14 with respect to the same taxable year; or

15 (2) The portion of the tax actually paid that the finan-  
16 cial organization would have paid if the rate of tax im-  
17 posed by this article is applied to the tax base determined  
18 under the law of such other state.

19 (b) Any additional payments of such tax to other  
20 states, or to political subdivisions thereof, by a financial  
21 organization described in this section, and any refunds of  
22 such taxes, made or received by such financial organiza-  
23 tion with respect to the taxable year, but after the due date

24 of the annual return required by this article for the taxable  
25 year, including any extensions, shall likewise be accounted  
26 for in the taxable year in which such additional payment is  
27 made or such refund is received by the financial organiza-  
28 tion.

#### ARTICLE 24. CORPORATION NET INCOME TAX.

§11-24-7b. Special apportionment rules — Financial organizations.

§11-24-13a. Method of filing for business taxes.

§11-24-24. Credit for income tax paid to another state.

§11-24-38. Deposit of revenue.

#### §11-24-7b. Special apportionment rules — Financial organizations.

1 (a) *General.* — The Legislature hereby finds that the  
2 general formula set forth in section seven of this article for  
3 apportioning the business income of corporations taxable  
4 in this state as well as in another state is inappropriate for  
5 use by financial organizations due to the particular char-  
6 acteristics of those organizations and the manner in which  
7 their business is conducted. Accordingly, the general  
8 formula set forth in section seven of this article may not  
9 be used to apportion the business income of such financial  
10 organizations, which shall use only the apportionment  
11 formula and methods set forth in this section.

12 (b) *West Virginia financial organizations taxable in*  
13 *another state.* — The West Virginia taxable income of a  
14 financial organization that has its commercial domicile in  
15 this state and which is taxable in another state shall be the  
16 sum of: (1) The nonbusiness income component of its  
17 adjusted federal taxable income for the taxable year which  
18 is allocated to this state as provided in subsection (d), sec-  
19 tion seven of this article; plus (2) the total amount of the  
20 business income component of its adjusted federal taxable  
21 income for the taxable year, without apportionment, re-  
22 gardless of where such business income was derived:  
23 *Provided,* That such financial organization shall be al-  
24 lowed as a credit against its tax liability under this article  
25 the credit described in section twenty-four of this article.

26           (c) *Out-of-state financial organizations with business*  
27 *activities in this state.* — The West Virginia taxable in-  
28 come of a financial organization that does not have its  
29 commercial domicile in this state but which regularly  
30 engages in business in this state shall be the sum of: (1)  
31 The nonbusiness income component of its adjusted feder-  
32 al taxable income for the taxable year which is allocated to  
33 this state as provided in subsection (d), section seven of  
34 this article; plus (2) the business income component of its  
35 adjusted federal taxable income for the taxable year which  
36 is apportioned to this state as provided in this section.

37           (d) *Engaging in business — nexus presumptions and*  
38 *exclusions.* — A financial organization that has its com-  
39 mercial domicile in another state is presumed to be regu-  
40 larly engaging in business in this state if during any year it  
41 obtains or solicits business with twenty or more persons  
42 within this state, or if the sum of the value of its gross  
43 receipts attributable to sources in this state equals or ex-  
44 ceeds one hundred thousand dollars. However, gross  
45 receipts from the following types of property (as well as  
46 those contacts with this state reasonably and exclusively  
47 required to evaluate and complete the acquisition or dis-  
48 position of the property, the servicing of the property or  
49 the income from it, the collection of income from the  
50 property, or the acquisition or liquidation of collateral  
51 relating to the property) shall not be a factor in determin-  
52 ing whether the owner is engaging in business in this state:

53           (1) An interest in a real estate mortgage investment  
54 conduit, a real estate investment trust or a regulated invest-  
55 ment company;

56           (2) An interest in a loan backed security representing  
57 ownership or participation in a pool of promissory notes  
58 or certificates of interest that provide for payments in  
59 relation to payments or reasonable projections of pay-  
60 ments on the notes or certificates;

61           (3) An interest in a loan or other asset from which  
62 the interest is attributed to a consumer loan, a commercial  
63 loan or a secured commercial loan, and in which the pay-  
64 ment obligations were solicited and entered into by a per-

65 son that is independent, and not acting on behalf, of the  
66 owner;

67 (4) An interest in the right to service or collect in-  
68 come from a loan or other asset from which interest on the  
69 loan is attributed as a loan described in the previous para-  
70 graph, and in which the payment obligations were solicited  
71 and entered into by a person that is independent, and not  
72 acting on behalf, of the owner; and

73 (5) Any amounts held in an escrow or trust account  
74 with respect to property described above.

75 (e) *Definitions.* — For purposes of this section:

76 (1) "Commercial domicile". See section three-a of  
77 this article;

78 (2) "Deposit" means: (A) The unpaid balance of  
79 money or its equivalent received or held by a financial  
80 organization in the usual course of business and for which  
81 it has given or it is obligated to give credit, either condi-  
82 tionally or unconditionally, to a commercial, checking,  
83 savings, time or thrift account whether or not advance  
84 notice is required to withdraw the credit funds, or which is  
85 evidenced by a certificate of deposit, thrift certificate,  
86 investment certificate or certificate of indebtedness, or  
87 other similar name, or a check or draft drawn against a  
88 deposit account and certified by the financial organiza-  
89 tion, or a letter of credit or a traveler's check on which the  
90 financial organization is primarily liable: *Provided*, That  
91 without limiting the generality of the term "money or its  
92 equivalent", any such account or instrument must be re-  
93 garded as evidencing the receipt of the equivalent of mon-  
94 ey when credited or issued in exchange for checks or  
95 drafts or for a promissory note upon which the person  
96 obtaining any such credit or instrument is primarily or  
97 secondarily liable or for a charge against a deposit ac-  
98 count or in settlement of checks, drafts or other instru-  
99 ments forwarded to such bank for collection;

100 (B) Trust funds received or held by such financial  
101 organization, whether held in the trust department or held

102 or deposited in any other department of such financial  
103 organization;

104 (C) Money received or held by a financial organiza-  
105 tion or the credit given for money or its equivalent re-  
106 ceived or held by a financial organization in the usual  
107 course of business for a special or specific purpose, re-  
108 gardless of the legal relationship thereby established, in-  
109 cluding, without being limited to, escrow funds, funds held  
110 as security for an obligation due the financial organization  
111 or other (including funds held as dealers' reserves) or for  
112 securities loaned by the financial organization, funds de-  
113 posited by a debtor to meet maturing obligations, funds  
114 deposited as advance payment on subscriptions to United  
115 States government securities, funds held for distribution or  
116 purchase of securities, funds held to meet its acceptances  
117 or letters of credit, and withheld taxes: *Provided*, That  
118 there shall not be included funds which are received by  
119 the financial organization for immediate application to the  
120 reduction of an indebtedness to the receiving financial  
121 organization, or under condition that the receipt thereof  
122 immediately reduces or extinguishes such an indebted-  
123 ness;

124 (D) Outstanding drafts (including advice or authoriza-  
125 tion to charge a financial organization's balance in another  
126 such organization), cashier's checks, money orders or  
127 other officer's checks issued in the usual course of busi-  
128 ness for any purpose, but not including those issued in  
129 payment for services, dividends or purchases or other costs  
130 or expenses of the financial organization itself; and

131 (E) Money or its equivalent held as a credit balance  
132 by a financial organization on behalf of its customer if  
133 such entity is engaged in soliciting and holding such bal-  
134 ances in the regular course of its business;

135 (3) "Financial organization". See section three-a of  
136 this article; and

137 (4) "Sales" means, for purposes of apportionment  
138 under this section, the gross receipts of a financial organi-  
139 zation included in the gross receipts factor described in  
140 subsection (g) of this section, regardless of their source.



141           (f) *Apportionment rules.* — A financial organization  
142 not having its commercial domicile in this state which  
143 regularly engages in business both within and without this  
144 state shall apportion the business income component of its  
145 federal taxable income, after adjustment as provided in  
146 section six of this article, by multiplying the amount there-  
147 of by the special gross receipts factor determined as pro-  
148 vided in subsection (g) of this section.

149           (g) *Special gross receipts factor.* — The gross re-  
150 cepts factor is a fraction, the numerator of which is the  
151 total gross receipts of the taxpayer from sources within  
152 this state during the taxable year and the denominator of  
153 which is the total gross receipts of the taxpayer wherever  
154 earned during the taxable year: *Provided,* That neither the  
155 numerator nor the denominator of the gross receipts fac-  
156 tor shall include receipts from obligations described in  
157 paragraphs (A), (B), (C) and (D), subdivision (1), subsec-  
158 tion (f), section six of this article.

159           (1) *Numerator.* — The numerator of the gross re-  
160 cepts factor shall include, in addition to items otherwise  
161 includable in the sales factor under section seven of this  
162 article, the following:

163           (A) Receipts from the lease or rental of real or tangi-  
164 ble personal property (whether as the economic equivalent  
165 of an extension of credit or otherwise) if the property is  
166 located in this state;

167           (B) Interest income and other receipts from assets in  
168 the nature of loans which are secured primarily by real  
169 estate or tangible personal property if such security prop-  
170 erty is located in the state. In the event that such security  
171 property is also located in one or more other states, such  
172 receipts shall be presumed to be from sources within this  
173 state, subject to rebuttal based upon factors described in  
174 rules to be promulgated by the tax commissioner, includ-  
175 ing the factor that the proceeds of any such loans were  
176 applied and used by the borrower entirely outside of this  
177 state;

178           (C) Interest income and other receipts from consum-  
179 er loans which are unsecured or are secured by intangible

180 property that are made to residents of this state, whether at  
181 a place of business, by traveling loan officer, by mail, by  
182 telephone or other electronic means or otherwise;

183 (D) Interest income and other receipts from commer-  
184 cial loans and installment obligations which are unsecured  
185 or are secured by intangible property if and to the extent  
186 that the borrower or debtor is a resident of or is domiciled  
187 in this state: *Provided*, That such receipts are presumed to  
188 be from sources in this state and such presumption may be  
189 overcome by reference to factors described in rules to be  
190 promulgated by the tax commissioner, including the fac-  
191 tor that the proceeds of any such loans were applied and  
192 used by the borrower entirely outside of this state;

193 (E) Interest income and other receipts from a finan-  
194 cial organization's syndication and participation in loans,  
195 under the rules set forth in items (A) through (D), above;

196 (F) Interest income and other receipts, including  
197 service charges, from financial institution credit card and  
198 travel and entertainment credit card receivables and credit  
199 card holders' fees if the borrower or debtor is a resident of  
200 this state or if the billings for any such receipts are regu-  
201 larly sent to an address in this state;

202 (G) Merchant discount income derived from finan-  
203 cial institution credit card holder transactions with a mer-  
204 chant located in this state. In the case of merchants locat-  
205 ed within and without this state, only receipts from mer-  
206 chant discounts attributable to sales made from locations  
207 within this state shall be attributed to this state. It shall be  
208 presumed, subject to rebuttal, that the location of a mer-  
209 chant is the address shown on the invoice submitted by the  
210 merchant to the taxpayer;

211 (H) Gross receipts from the performance of services  
212 are attributed to this state if:

213 (i) The service receipts are loan-related fees, includ-  
214 ing loan servicing fees, and the borrower resides in this  
215 state, except that, at the taxpayer's election, receipts from  
216 loan-related fees which are either: (I) "Pooled" or aggre-  
217 gated for collective financial accounting treatment; or (II)

218 manually written as nonrecurring extraordinary charges to  
219 be processed directly to the general ledger may either be  
220 attributed to a state based upon the borrowers' residences  
221 or upon the ratio that total interest sourced to that state  
222 bears to total interest from all sources;

223 (ii) The service receipts are deposit-related fees and  
224 the depositor resides in this state, except that, at the tax-  
225 payer's election, receipts from deposit-related fees which  
226 are either: (I) "Pooled" or aggregated for collective finan-  
227 cial accounting treatment; or (II) manually written as non-  
228 recurring extraordinary charges to be processed directly  
229 to the general ledger may either be attributed to a state  
230 based upon the depositors' residences or upon the ratio  
231 that total deposits sourced to that state bears to total depos-  
232 its from all sources;

233 (iii) The service receipt is a brokerage fee and the  
234 account holder is a resident of this state;

235 (iv) The service receipts are fees related to estate or  
236 trust services and the estate's decedent was a resident of  
237 this state immediately before death, or the grantor who  
238 either funded or established the trust is a resident of this  
239 state; or

240 (v) The service receipt is associated with the perfor-  
241 mance of any other service not identified above and the  
242 service is performed for an individual resident of, or for a  
243 corporation or other business domiciled in, this state and  
244 the economic benefit of such service is received in this  
245 state;

246 (I) Gross receipts from the issuance of travelers'  
247 checks and money orders if such checks and money or-  
248 ders are purchased in this state; and

249 (J) All other receipts not attributed by this rule to a  
250 state in which the taxpayer is taxable shall be attributed  
251 pursuant to the laws of the state of the taxpayer's commer-  
252 cial domicile.

253 (2) *Denominator.* — The denominator of the gross  
254 receipts factor shall include all of the taxpayer's gross

255 receipts from transactions of the kind included in the  
256 numerator, but without regard to their source or situs.

257 (h) *Effective date.* — The provisions of this section  
258 enacted as chapter one hundred sixty-seven, acts of the  
259 Legislature, one thousand nine hundred ninety-one, shall  
260 apply to all taxable years beginning on or after the first  
261 day of January, one thousand nine hundred ninety-one.  
262 Amendments to this section enacted in the year one thou-  
263 sand nine hundred ninety-six shall apply to taxable years  
264 beginning after the thirty-first day of December, one  
265 thousand nine hundred ninety-five.

**§11-24-13a. Method of filing for business taxes.**

1 (a) *Privilege to file consolidated return.* — An affiliat-  
2 ed group of corporations (as defined for purposes of  
3 filing a consolidated federal income tax return) shall,  
4 subject to the provisions of this section and in accordance  
5 with any regulations prescribed by the tax commissioner,  
6 have the privilege of filing a consolidated return with  
7 respect to the tax imposed by this article for the taxable  
8 year in lieu of filing separate returns. The making of a  
9 consolidated return shall be upon the condition that all  
10 corporations which at any time during the taxable year  
11 have been members of the affiliated group are included in  
12 such return and consent to the filing of such return. The  
13 filing of a consolidated return shall be considered as such  
14 consent. When a corporation is a member of an affiliated  
15 group for a fractional part of the year, the consolidated  
16 return shall include the income of such corporation for  
17 that part of the year during which it is a member of the  
18 affiliated group.

19 (b) *Election binding.* — If an affiliated group of cor-  
20 porations elects to file a consolidated return under this  
21 article for any taxable year ending after the thirtieth day  
22 of June, one thousand nine hundred eighty-seven, such  
23 election once made shall not be revoked for any subse-  
24 quent taxable year without the written approval of the tax  
25 commissioner consenting to the revocation.

26 (c) *Consolidated return — financial organizations.* —  
27 An affiliated group that includes one or more financial

28 organizations may elect under this section to file a consol-  
29 idated return when that affiliated group complies with all  
30 of the following rules:

31 (1) The affiliated group of which the financial organi-  
32 zation is a member must file a federal consolidated in-  
33 come tax return for the taxable year.

34 (2) All members of the affiliated group included in  
35 the federal consolidated return must consent to being  
36 included in the consolidated return filed under this article.  
37 The filing of a consolidated return under this article is  
38 conclusive proof of such consent.

39 (3) The West Virginia taxable income of the affiliated  
40 group shall be the sum of:

41 (A) The pro forma West Virginia taxable income of  
42 all financial organizations having their commercial domi-  
43 cile in this state that are included in the federal consolida-  
44 ted return, as shown on a combined pro forma West Vir-  
45 ginia return prepared for such financial organizations;  
46 plus

47 (B) The pro forma West Virginia taxable income of  
48 all financial organizations not having their commercial  
49 domicile in this state that are included in the federal con-  
50 solidated return, as shown on a combined pro forma West  
51 Virginia return prepared for such financial organizations;  
52 plus

53 (C) The pro forma West Virginia taxable income of  
54 all other members included in the federal consolidated  
55 income tax return, as shown on a combined pro forma  
56 West Virginia return prepared for all such nonfinancial  
57 organization members, except that income, income adjust-  
58 ments and exclusions, apportionment factors and other  
59 items considered when determining tax liability shall not  
60 be included in the pro forma return prepared under this  
61 paragraph for a member that is totally exempt from tax  
62 under section five of this article, or for a member that is  
63 subject to a different special industry apportionment rule  
64 provided for in this article. When a different special in-  
65 dustry apportionment rule applies, the West Virginia tax-

66 able income of a member(s) subject to that special indus-  
67 try apportionment rule shall be determined on a separate  
68 pro forma West Virginia return for the member(s) subject  
69 to that special industry rule and the West Virginia taxable  
70 income so determined shall be included in the consolidat-  
71 ed return.

72 (4) The West Virginia consolidated return is prepared  
73 in accordance with regulations of the tax commissioner  
74 promulgated as provided in article three, chapter  
75 twenty-nine-a of this code.

76 (5) The filing of a consolidated return does not dis-  
77 tort taxable income. In any proceeding, the burden of  
78 proof that taxpayer's method of filing does not distort  
79 taxable income shall be upon the taxpayer.

80 (d) *Combined return.* — A combined return may be  
81 filed under this article by a unitary group, including a  
82 unitary group that includes one or more financial organi-  
83 zations, only pursuant to the prior written approval of the  
84 tax commissioner. A request for permission to file a com-  
85 bined return must be filed on or before the statutory due  
86 date of the return, determined without inclusion of any  
87 extension of time to file the return. Permission to file a  
88 combined return may be granted by the tax commissioner  
89 only when taxpayer submits evidence that conclusively  
90 establishes that failure to allow the filing of a combined  
91 return will result in an unconstitutional distortion of tax-  
92 able income. When permission to file a combined return  
93 is granted, combined filing will be allowed for the year(s)  
94 stated in the tax commissioner's letter. The combined  
95 return must be filed in accordance with regulations of the  
96 tax commissioner promulgated in accordance with article  
97 three, chapter twenty-nine-a of this code.

98 (e) *Method of filing under this article deemed con-*  
99 *trolling for purposes of other business taxes articles.* —  
100 The taxpayer shall file on the same basis under article  
101 twenty-three of this chapter as such taxpayer files under  
102 this article for the taxable year.

103 (f) *Regulations.* — The tax commissioner shall pre-  
104 scribe such regulations as he may deem necessary in order

105 that the tax liability of any affiliated group of corpora-  
106 tions filing a consolidated return, or of any unitary group  
107 of corporations filing a combined return, and of each  
108 corporation in the affiliated or unitary group, both during  
109 and after the period of affiliation, may be returned, deter-  
110 mined, computed, assessed, collected and adjusted, in such  
111 manner as the tax commissioner deems necessary to clear-  
112 ly reflect the income tax liability and the income factors  
113 necessary for the determination of such liability, and in  
114 order to prevent avoidance of such tax liability.

115 (g) *Computation and payment of tax.* — In any case  
116 in which a consolidated or combined return is filed, or  
117 required to be filed, the tax due under this article from the  
118 affiliated or unitary group shall be determined, computed,  
119 assessed, collected and adjusted in accordance with regula-  
120 tions prescribed by the tax commissioner, in effect on the  
121 last day prescribed by section thirteen of this article for  
122 the filing of such return, and such affiliated or unitary  
123 group, as the case may be, shall be treated as the taxpayer.  
124 However, when any member of an affiliated or unitary  
125 group that files a consolidated or combined return under  
126 this article is allowed to claim credit against its tax liability  
127 under this article for payment of any other tax, the  
128 amount of credit allowed may not exceed that member's  
129 proportionate share of the affiliated or unitary group's  
130 precredit tax liability under this article, as shown on its pro  
131 forma return.

132 (h) *Consolidated or combined return may be re-*  
133 *quired.* — If any affiliated group of corporations has not  
134 elected to file a consolidated return, or if any unitary  
135 group of corporations has not applied for permission to  
136 file a combined return, the tax commissioner may require  
137 such corporations to make a consolidated or combined  
138 return, as the case may be, in order to clearly reflect the  
139 taxable income of such corporations.

140 (i) *Effective date.* — The amendments to this section  
141 made by chapter one hundred seventy-nine, acts of the  
142 Legislature in the year one thousand nine hundred ninety,  
143 shall apply to all taxable years ending after the eighth day

144 of March, one thousand nine hundred ninety. Amend-  
145 ments to this article enacted by this act in the year one  
146 thousand nine hundred ninety-six, shall apply to taxable  
147 years beginning on or after the first day of January, one  
148 thousand nine hundred ninety-six, except that financial  
149 organizations that are part of an affiliated group may  
150 elect, after the effective date of this act, to file a consolidat-  
151 ed return prepared in accordance with the provisions of  
152 this section, as amended, and subject to applicable statutes  
153 of limitation, for taxable years beginning on or after the  
154 first day of January, one thousand nine hundred  
155 ninety-one, but before the first day of January, one thou-  
156 sand nine hundred ninety-six, notwithstanding provisions  
157 then in effect prohibiting out-of-state financial organiza-  
158 tions from filing consolidated returns for those years:  
159 *Provided*, That when the statute of limitation on filing an  
160 amended return for any of those years expires before the  
161 first day of July, one thousand nine hundred ninety-six,  
162 the consolidated return for such year, if filed, must be  
163 filed by said first day of July.

**§11-24-24. Credit for income tax paid to another state.**

1 (a) Effective for taxable years beginning on or after  
2 the first day of January, one thousand nine hundred  
3 ninety-one, and notwithstanding any provisions of this  
4 code to the contrary, any financial organization, the busi-  
5 ness activities of which take place, or are deemed to take  
6 place, entirely within this state, shall be allowed a credit  
7 against the tax imposed by this article for any taxable year  
8 for taxes paid to another state. That credit shall be equal  
9 in amount to the lesser of:

10 (1) The taxes such financial organization shall actual-  
11 ly have paid, which payments were made on or before the  
12 filing date of the annual return required by this article, to  
13 any other state, and which tax was based upon or mea-  
14 sured by the financial organization's net income and was  
15 paid with respect to the same taxable year; or

16 (2) The amount of such tax the financial organiza-  
17 tion would have paid if the rate of tax imposed by this



18 article is applied to the tax base determined under the laws  
19 of such other state.

20 (b) Any additional payments of such tax to other  
21 states, or to political subdivisions thereof, by a financial  
22 organization described in this section, and any refunds of  
23 such taxes, made or received by such financial organiza-  
24 tion with respect to the taxable year, but after the due date  
25 of the annual return required by this article for the taxable  
26 year, including any extensions, shall likewise be accounted  
27 for in the taxable year in which such additional payment is  
28 made or such refund is received by the financial organiza-  
29 tion.

#### §11-24-38. Deposit of revenue.

1 (a) Section thirteen of this article authorizes the tax  
2 commissioner to combine into one form the annual re-  
3 turns due under this article and article twenty-three of this  
4 chapter. To facilitate combining returns, reports and dec-  
5 larations for these two taxes, and to allow a taxpayer to  
6 pay both taxes with one remittance, the amount of taxes  
7 collected under this article and article twenty-three of this  
8 chapter, including any additions to tax, penalties or inter-  
9 est collected with respect to such taxes, pursuant to a com-  
10 bined return, report or declaration shall be deposited in  
11 one account: *Provided*, That the tax commissioner shall  
12 keep such records as may be necessary to separately ac-  
13 count for the amount of each tax collected, including  
14 additions to tax, penalties or interest collected with respect  
15 to each tax, during each fiscal year of the state.

16 (b) Overpayments of the tax imposed by article  
17 twenty-three of this chapter may be applied against tax  
18 due under this article for same taxable year, and  
19 overpayments of the tax imposed by this article may be  
20 applied against underpayment of the tax imposed by arti-  
21 cle twenty-three of this chapter for the same taxable year.

22 (c) The provisions of this section shall take effect  
23 upon passage.

## CHAPTER 245

(S. B. 92—By Senators Craigo, Blatnik, Chafin, Dugan, Helmick, Kimble, Love, Macnaughtan, Manchin, Minear, Plymale, Sharpe, Walker and Whitlow)

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[Passed February 13, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section three, article twenty-four, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to updating the meaning of certain terms used in the West Virginia corporation net income tax act by bringing them into conformity with their meanings for federal income tax purposes for taxable years beginning after the thirty-first day of December, one thousand nine hundred ninety-four; preserving prior law; and specifying effective date.

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

That section three, article twenty-four, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 24. CORPORATION NET INCOME TAX.

#### §11-24-3. Meaning of terms; general rule.

1           (a) Any term used in this article shall have the same  
2 meaning as when used in a comparable context in the laws  
3 of the United States relating to federal income taxes, un-  
4 less a different meaning is clearly required by the context  
5 or by definition in this article. Any reference in this arti-  
6 cle to the laws of the United States shall mean the provi-  
7 sions of the Internal Revenue Code of 1986, as amended,  
8 and such other provisions of the laws of the United States  
9 as relate to the determination of income for federal in-  
10 come tax purposes. All amendments made to the laws of  
11 the United States prior to the first day of January, one  
12 thousand nine hundred ninety-six, shall be given effect in  
13 determining the taxes imposed by this article for any tax-  
14 able year beginning the first day of January, one thousand  
15 nine hundred ninety-five, or thereafter, but no amendment  
16 to the laws of the United States made on or after the first  
17 day of January, one thousand nine hundred ninety-six,  
18 shall be given any effect.

1 (b) The term "Internal Revenue Code of 1986" means  
2 the Internal Revenue Code of the United States enacted by  
3 the "Federal Tax Reform Act of 1986" and includes the  
4 provisions of law formerly known as the Internal Revenue  
5 Code of 1954, as amended, and in effect when the  
6 "Federal Tax Reform Act of 1986" was enacted, that were  
7 not amended or repealed by the "Federal Tax Reform Act  
8 of 1986". Except when inappropriate, any references in  
9 any law, executive order or other document:

10 (1) To the Internal Revenue Code of 1954 shall  
11 include reference to the Internal Revenue Code of 1986;  
12 and

13 (2) To the Internal Revenue Code of 1986 shall  
14 include a reference to the provisions of law formerly  
15 known as the Internal Revenue Code of 1954.

16 (c) *Effective date.* — The amendments to this section  
17 enacted in the year one thousand nine hundred ninety-six  
18 shall be retroactive and shall apply to taxable years  
19 beginning on or after the first day of January, one  
20 thousand nine hundred ninety-five, to the extent allowable  
21 under federal income tax law. With respect to taxable  
22 years that begin prior to the first day of January, one  
23 thousand nine hundred ninety-five, the law in effect for  
24 each of those years shall be fully preserved as to such  
25 year.

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## CHAPTER 246

(Com. Sub. for S. B. 388—By Senators Dittmar and Anderson)

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[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section thirteen, article one, chapter eleven-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to accounts to be kept by sheriffs on taxes; allowing sheriffs to maintain a

permanent record on an electronic data processing system; manner of keeping the accounts and inspection of accounts; and promulgation of rules.

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

That section thirteen, article one, chapter eleven-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 1. ACCRUAL AND COLLECTION OF TAXES.**

**§11A-1-13. Accounts to be kept by sheriff.**

1       The sheriff shall keep separate accounts in a perma-  
2       nent book or in a permanent record on an electronic data  
3       processing system, in form prescribed by the tax commis-  
4       sioner, of all the taxes received and disbursed by him or  
5       her, for the different purposes for which the taxes were  
6       levied. Each of the accounts shall be kept so as to show  
7       the total receipts and disbursements up to the close of  
8       business on each day; and in a separate column opposite  
9       the totals the sheriff shall ascertain and note in figures, at  
10      the close of each day's transactions, the balance due from  
11      or to him or her, as the case may be, on account of the  
12      funds. The account book or a printout of the permanent  
13      record on the electronic data processing system is subject  
14      to inspection at any time by the tax commissioner, mem-  
15      bers of the county commission, the clerk of the county  
16      commission, the prosecuting attorney, the mayor or trea-  
17      surer of any municipality or the treasurer of the county  
18      board of education. The tax commissioner shall promul-  
19      gate rules in accordance with article three, chapter  
20      twenty-nine-a of this code requiring that printouts of the  
21      permanent record on the electronic data processing system  
22      be made on a periodic basis and that those printouts be  
23      stored in a safe and secure manner, so that they are pro-  
24      tected from fire damage.

## CHAPTER 247

(Com. Sub. for S. B. 40—By Senators Oliverio, Craig, Manchin  
and Tomblin, Mr. President)

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[Passed March 9, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article twenty-four, relating to establishing the technology-related assistance revolving loan fund for individuals with disabilities and the technology-related assistance revolving loan fund for individuals with disabilities board; providing short title, defining certain terms; providing for the membership of the technology-related assistance revolving loan fund for individuals with disabilities board and its powers, duties and compensation; allowing a nonprofit, consumer-driven organization as contracted by the board and other related associations to develop criteria for funds; providing for disbursement of the revolving loan fund money; setting forth the minimum amount of interest the board may charge; including a provision regarding funding; setting a cap on the maximum amount which may be expended from the fund for administrative expenses; and specifying maximum time such loans may be outstanding.

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

That chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article twenty-four, to read as follows:

**ARTICLE 24. TECHNOLOGY-RELATED ASSISTANCE REVOLVING LOAN FUND FOR INDIVIDUALS WITH DISABILITIES ACT.**

- §29-24-1. Legislative findings and declarations.
- §29-24-2. Terms defined.
- §29-24-3. Board created, membership, terms, officers and staff.
- §29-24-4. Compensation and expenses of board.

- §29-24-5. Power, duties and responsibilities of the board; loans.  
§29-24-6. Disbursements.  
§29-24-7. Fund created.  
§29-24-8. Deposits created by the board.  
§29-24-9. Priority of fund use.

**§29-24-1. Legislative findings and declarations.**

1 Individuals with disabilities comprise a significant and  
2 increasing percentage of West Virginia's population. The  
3 Legislature finds and declares that action is necessary to  
4 assist these individuals in their homes, schools, employ-  
5 ment and communities to become more independent citi-  
6 zens of the state. Many of these individuals require  
7 technology-related devices and technology-related servic-  
8 es in order to perform functions, such as caring for them-  
9 selves, performing manual tasks, mobility, seeing, hearing,  
10 speaking, breathing and learning in order to have the  
11 ability to more independently participate in society and  
12 the work force. In order to meet present and increasing  
13 needs of West Virginians for technology-related devices  
14 and technology-related services, it is necessary for the state  
15 to provide funds that neither supplant nor replace existing  
16 state or federal funds for the technology-related revolving  
17 loan fund for individuals with disabilities.

**§29-24-2. Terms defined.**

- 1 As used in this article, the term:
- 2 (a) "Board" means the technology-related assistance  
3 revolving loan fund for individuals with disabilities board.
- 4 (b) "Individual with disability" means any individual,  
5 of any age who, for the purposes of state or federal law, is  
6 considered to have a disability or handicap, injuries and  
7 chronic health conditions, whether congenital or acquired;  
8 and who is or would be enabled by technology-related  
9 devices or technology-related services to maintain or im-  
10 prove his or her ability to function in society and the  
11 workplace.
- 12 (c) "Qualifying borrower" means any individual with  
13 disabilities and their family members, guardians, autho-

14 rized representatives or nonprofit entity who demonstrates  
15 that such a loan will improve their independence or be-  
16 come more productive members of the community. The  
17 individual must demonstrate credit worthiness and repay-  
18 ment abilities to the satisfaction of the board. No more  
19 than twenty-percent of all loan funds are to be provided to  
20 nonprofit entities in a single year.

21 (d) "Technology-related assistance" means either the  
22 provision of technology-related devices or technology-  
23 related services to improve the independence, quality of  
24 life or productive involvement in the community of indi-  
25 viduals with disabilities.

26 (e) "Technology-related device" means any item, piece  
27 of equipment or product system, whether acquired com-  
28 mercially off-the-shelf, modified or customized, that is  
29 used to increase, maintain or improve functional capabili-  
30 ties of individuals with disabilities.

31 (f) "Technology-related service" means any service  
32 that directly assists an individual with a disability in the  
33 selection, acquisition or use of a technology-related de-  
34 vice, including:

35 (1) The evaluation of the needs of an individual with a  
36 disability, including a functional evaluation in the individ-  
37 ual's customary environment;

38 (2) Purchasing, leasing or otherwise providing for the  
39 acquisition of technology-related devices by individuals  
40 with disabilities;

41 (3) Selecting, designing, fitting, customizing, adapting,  
42 applying, maintaining, repairing or replacing technology-  
43 related devices;

44 (4) Coordinating and using other therapies, interven-  
45 tions or services with technology-related devices, such as  
46 those associated with existing education and rehabilitation  
47 plans and programs; and

48 (5) Training or technical assistance for individuals or  
49 the family of an individual with disabilities.

50 (g) "Revolving loan fund" means the technology-  
51 related assistance loan fund for individuals with disabilities  
52 established in this article.

53 (h) "Consumer" means individuals with disabilities and,  
54 when appropriate, their family members, guardians, advo-  
55 cates or authorized representatives.

**§29-24-3. Board created, membership, terms, officers and  
staff.**

1 (a) There is established the technology-related assis-  
2 tance revolving loan fund for individuals with disabilities  
3 board that shall contract to a nonprofit, consumer-driven  
4 organization for administrative purposes only.

5 (b) The board shall consist of seven members of which  
6 at least three must be individuals with disabilities and ap-  
7 pointed by the secretary of education and the arts as fol-  
8 lows:

9 (1) Director of division of rehabilitation services or his  
10 or her designee;

11 (2) A representative of the banking industry;

12 (3) A representative of the medical profession;

13 (4) A certified public accountant; and

14 (5) Three additional members from the public-at-large  
15 shall be consumers. Members shall be appointed by the  
16 governor, by and with the advice and consent of the Sen-  
17 ate, for terms of three years, their initial appointments,  
18 however, being three for three-year terms, two for  
19 two-year terms and two for one-year terms: *Provided,*  
20 That the governor may not appoint any members to this  
21 board until the Legislature has made an appropriation in a  
22 sufficient amount to cover the expenses of this board.  
23 State officers or employees may be appointed to the board  
24 unless otherwise prohibited by law. To be eligible for  
25 appointment to the board, the citizen members shall dem-  
26 onstrate knowledge in the area of technology-related assis-  
27 tance as users or providers of the rehabilitative services to  
28 the extent practicable. The board shall approve all pro-



29 posed rules and the established nonprofit consumer-driven  
30 organization shall then promulgate and implement same.

31 (c) In the event a board member fails to attend  
32 twenty-five percent of the scheduled meetings in a  
33 twelve-month period, the board may elect to remove that  
34 member after written notification to that member and the  
35 secretary of education and the arts.

36 (d) In the event of death, resignation, disqualification  
37 or removal for any reason of any member of the board,  
38 the vacancy shall be filled in the same manner as the origi-  
39 nal appointment and the successor shall serve for the un-  
40 expired term.

41 (e) The initial terms for all members shall be on the  
42 first day of July, one thousand nine hundred ninety-seven.

43 (f) Membership on the board does not constitute pub-  
44 lic office and no member shall be disqualified from hold-  
45 ing public office by reason of his or her membership.

46 (g) The board shall elect from its membership a chair-  
47 person, treasurer and secretary as well as any other officer  
48 as appropriate. The term of the "chairperson" is for two  
49 years in duration and he or she cannot serve more than  
50 two consecutive terms.

51 (h) The board has the power and authority to establish  
52 an appeals process with regard to the administration of the  
53 fund. The selected nonprofit, consumer-driven organiza-  
54 tion contracted by the board shall submit to the board  
55 proposed rules governing the operation of the fund in-  
56 cluding, but not limited to, eligibility of receipt of funds  
57 and all other matters consistent with and necessary to ac-  
58 complishing the purpose of this fund.

59 (i) The board may contract to a nonprofit entity to be  
60 the authority to carry out the purposes of this article. The  
61 compensation of personnel shall be paid from moneys in  
62 the loan fund. Board personnel may be members of the  
63 state civil service system. The board shall utilize existing  
64 state resources and staff of participating departments  
65 whenever practicable. Personnel expenses and other costs

66 authorized in this subsection shall be paid from moneys in  
67 the revolving loan fund. Administrative costs are not to  
68 exceed ten percent of the revolving loan funds yearly  
69 budget.

**§29-24-4. Compensation and expenses of board.**

1 Members of the board shall receive a compensation in  
2 an amount not to exceed the state per diem for each day  
3 the member of the board is in attendance at a meeting of  
4 the board, plus either reimbursement for actual transporta-  
5 tion cost while traveling by public carrier or the same  
6 mileage allowance for use of a personal car in connection  
7 with such attendance as members of the Legislature re-  
8 ceive. Members with disabilities shall be compensated for  
9 costs associated with personal assistance, interpreters and  
10 disability related accommodations for the purpose of  
11 conducting the business of the board. Expense allowances  
12 and other costs authorized in this section shall be paid  
13 from moneys in the loan fund.

**§29-24-5. Power, duties and responsibilities of the board;  
loans.**

1 (a) The board shall do all of the following:

2 (1) Meet at such times (minimum of four times each  
3 fiscal year) and at places as it determines necessary or  
4 convenient to perform its duties. The board shall also  
5 meet on the call of the chairperson or secretary of educa-  
6 tion and the arts;

7 (2) Maintain written minutes of its meetings;

8 (3) Adopt rules for the transaction of its business;

9 (4) Promulgate rules to carry out the purposes of this  
10 chapter, which ensure that individuals, profit and nonprofit  
11 corporations and partnerships are eligible for loans;

12 (5) Receive, administer and disburse funds to support  
13 purposes established by this chapter and contract with  
14 nonprofit, consumer-based groups dealing with individu-  
15 als with disabilities to assist in administering programs  
16 established by this chapter;

17           (6) Maintain detailed records of all expenditures of  
18 the board, funds received as gifts and donations and dis-  
19 bursements made from the revolving loan fund;

20           (7) During the first three years of operation of the  
21 fund, the contracted nonprofit consumer-driven organiza-  
22 tion shall submit to the secretary of education and the arts  
23 and the board annually a summary report concerning  
24 programmatic and financial status of the technology re-  
25 volving loan fund. Future year annual reports will be  
26 provided to the board;

27           (8) Develop and implement a comprehensive set of  
28 financial standards to ensure the integrity and accountabil-  
29 ity of all funds received as well as loan funds disbursed;  
30 and

31           (9) Conform to the standards and requirements pre-  
32 scribed by the state auditor.

33           (b) The board shall enter into loan agreements with  
34 any qualifying borrower, who demonstrates that:

35           (1) The loan will assist one or more individuals with  
36 disabilities in improving their independence, productivity  
37 and full participation in the community; and

38           (2) The applicant has the ability to repay the loan.  
39 Any necessary loan limitation shall be determined by the  
40 board. All loans must be repaid within such terms and at  
41 such interest rates as the board may determine to be ap-  
42 propriate. However, no loan may extend beyond sixty  
43 months from date of award and may be paid off anytime  
44 without prepayment penalty. The board shall determine  
45 the interest rate to be charged on loans made pursuant to  
46 this article, but in no event may the interest rate on any  
47 such loans be less than four per centum per annum.

48           (c) The board may authorize loans up to ninety per-  
49 cent of the cost of an item or items.

50           (d) The board may award loans to qualifying borrow-  
51 ers for purposes, including, but not limited to, the follow-  
52 ing:

53 (1) To assist one or more individuals with disabilities  
54 to improve their independence through the purchase of  
55 technology-related devices; and

56 (2) To assist one or more individuals with disabilities  
57 to become more independent members of the community  
58 and improve such individuals quality of life within the  
59 community through the purchase of technology-related  
60 devices.

61 (e) In the event of the failure of the borrower to repay  
62 the loan balance due and owing, the board shall seek to  
63 recover the loan balance by such legal or administrative  
64 action available to it. Persons or representatives of persons  
65 who default on a loan are not eligible for a new loan. The  
66 board shall retain ownership of all property, equipment or  
67 devices until the borrower's loan is paid-in-full.

68 (f) A new loan may not be issued to, or on behalf of,  
69 a disabled person if a previous loan made to, or on behalf  
70 of, such person remains unpaid.

71 (g) The board may charge a fee for loan applications  
72 and processing. All funds generated by fee charges shall  
73 be directly placed into the revolving loan fund to off-set  
74 the costs of application processing.

75 The board may accept federal funds granted by Con-  
76 gress or executive order for the purposes of this chapter as  
77 well as gifts and donations from individuals, private orga-  
78 nizations or foundations. The acceptance and use of fed-  
79 eral funds does not commit state funds and does not place  
80 an obligation upon the Legislature to continue the purpos-  
81 es for which the federal funds are made available. All  
82 funds received in the manner described in this article shall  
83 be deposited in the revolving loan fund to be disbursed as  
84 other moneys in the revolving loan fund.

#### §29-24-6. Disbursements.

1 Loans may be made for amounts ranging from a  
2 minimum of five hundred dollars to a maximum of five  
3 thousand dollars. The loan must be used to purchase  
4 essential equipment or directly related services that will

5 assist the person with a disability to overcome barriers in  
6 daily living.

**§29-24-7. Fund created.**

1 The technology-related assistance revolving loan fund  
2 for individuals with disabilities is created as a separate  
3 fund and placed with a selected bank or credit union. The  
4 revolving loan fund may be expended only as provided in  
5 this chapter. All amounts in this fund shall be expended  
6 only upon appropriation by the Legislature, and nothing  
7 contained herein may be construed to require any level of  
8 funding by the Legislature.

**§29-24-8. Deposits created by the board.**

1 The board shall credit to the revolving loan fund all  
2 amounts paid, appropriated or donated to the revolving  
3 loan fund. All funds shall be deposited with, maintained  
4 and administered by a commercial bank or credit union  
5 and shall contain appropriations provided for that pur-  
6 pose, interest accrued on loan balances, fees charged and  
7 funds received in repayment of loans.

**§29-24-9. Priority of fund use.**

1 The moneys collected in the revolving loan fund shall  
2 be used only for the following purposes:

3 (a) Implementing revolving loan program for tech-  
4 nology-related devices;

5 (b) Providing technology-related devices to individu-  
6 als with severe disabilities who meet economic criteria  
7 established by the board;

8 (c) Providing support for technology-related assis-  
9 tance;

10 (d) Providing technology-related and disability pre-  
11 vention education and research;

12 (e) Disseminating public information;

13 (f) Conducting program evaluation and needs assess-  
14 ment;

- 15 (g) Operating the board;
- 16 (h) Conducting research and demonstration projects,  
17 including new and future uses of technology-related  
18 services; and
- 19 (i) Developing a strategic plan.
- 20 All unexpended moneys contained in this fund at the  
21 end of the fiscal year shall be carried forward from year to  
22 year.

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## CHAPTER 248

(H. B. 4659—By Delegates J. Martin, Varner, Love,  
Given, Nichols, Fantasia and Everson)

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[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section nine, article two, chapter five-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section two, article five, chapter twenty of said code, all relating to transferring responsibilities for the state's telemarketing initiative to the tourism commission.

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

That section nine, article two, chapter five-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that section two, article five, chapter twenty of said code be amended and reenacted, all to read as follows:

### Chapter

**5B. Economic Development Act of 1985.**

**20. Natural Resources.**

### **CHAPTER 5B. ECONOMIC DEVELOPMENT ACT OF 1985.**

**ARTICLE 2. WEST VIRGINIA DEVELOPMENT OFFICE.**

**§5B-2-9. Powers and duties of tourism commission.**

1           (a) The commission shall develop a comprehensive  
2 tourism promotion and development strategy for West  
3 Virginia. "Comprehensive tourism promotion and  
4 development strategy" means a plan that outlines strategies  
5 and activities designed to continue, diversify or expand the  
6 tourism base of the state as a whole; create tourism jobs;  
7 develop a highly skilled tourism work force; facilitate  
8 business access to capital for tourism; advertise and market  
9 the resources offered by the state with respect to tourism  
10 promotion and development; facilitate cooperation among  
11 local, regional and private tourism enterprises; improve  
12 infrastructure on a state, regional and community level in  
13 order to facilitate tourism development; improve the  
14 tourism business climate generally; and leverage funding  
15 from sources other than the state, including local, federal  
16 and private sources.

17           (b) In developing its strategies, the commission shall  
18 consider the following:

19           (1) Improvement and expansion of existing tourism  
20 marketing and promotion activities;

21           (2) Promotion of cooperation among municipalities,  
22 counties, and the West Virginia infrastructure and jobs  
23 development council in funding physical infrastructure to  
24 enhance the potential for tourism development.

25           (c) The tourism commission shall have the power and  
26 duty:

27           (1) To acquire for the state in the name of the  
28 commission by purchase, lease or agreement, or accept or  
29 reject for the state, in the name of the commission, gifts,  
30 donations, contributions, bequests or devises of money,  
31 security or property, both real and personal, and any  
32 interest in such property, to effectuate or support the  
33 purposes of this article;

34           (2) To make recommendations to the governor and  
35 the Legislature of any legislation deemed necessary to  
36 facilitate the carrying out of any of the foregoing powers  
37 and duties and to exercise any other power that may be

38 necessary or proper for the orderly conduct of the  
39 business of the commission and the effective discharge of  
40 the duties of the commission;

41 (3) To cooperate and assist in the production of  
42 motion pictures and television and other communications;

43 (4) To purchase advertising time or space in or upon  
44 any medium generally engaged or employed for said  
45 purpose to advertise and market the resources of the state  
46 or to inform the public at large or any specifically  
47 targeted group or industry about the benefits of living in,  
48 investing in, producing in, buying from, contracting with,  
49 or in any other way related to, the state of West Virginia or  
50 any business, industry, agency, institution or other entity  
51 therein: *Provided*, That of any funds appropriated and  
52 allocated for purposes of advertising and marketing  
53 expenses for the promotion and development of tourism,  
54 not less than twenty percent of the funds shall be  
55 expended with the approval of the director of the division  
56 of natural resources to advertise, promote and market state  
57 parks, state forests, state recreation areas and wildlife  
58 recreational resources;

59 (5) To promote and disseminate information related  
60 to the attractions of the state through the operation of the  
61 state's telemarketing initiative, which telemarketing  
62 initiative shall include a centralized reservation and  
63 information system for state parks and recreational  
64 facilities; and

65 (6) To take such additional actions as may be  
66 necessary to carry out the duties and programs described  
67 in this article.

68 (d) The commission shall submit a report annually to  
69 the council for community and economic development  
70 about the development of the tourism industry in the state  
71 and the necessary funding required by the state to  
72 continue the development of the tourism industry.

73 (e) The executive director of the West Virginia  
74 development office shall assist the commission in the  
75 performance of its powers and duties and the executive  
76 director is hereby authorized in providing this assistance



77 to employ necessary personnel, contract with professional  
78 or technical experts or consultants and to purchase or  
79 contract for the necessary equipment or supplies.

80 (f) The commission shall promulgate legislative rules  
81 pursuant to the provisions of chapter twenty-nine-a of this  
82 code to carry out its purposes and programs, to include  
83 generally the programs available, the procedure and  
84 eligibility of applications relating to assistance under such  
85 programs and the staff structure necessary to support such  
86 programs, which structure shall include the qualifications  
87 for a professional staff person qualified by reason of  
88 exceptional training and experience in the field of  
89 advertising to supervise the advertising and promotion  
90 functions of the commission, and shall further include  
91 provision for the management of West Virginia welcome  
92 centers. The commission is further authorized to  
93 promulgate procedural rules pursuant to said chapter to  
94 include instructions and forms for applications relating to  
95 assistance.

## CHAPTER 20. NATURAL RESOURCES.

### ARTICLE 5. PARKS AND RECREATION.

#### §20-5-2. Powers of the director with respect to the section of parks and recreation.

1 The director of the division of natural resources shall  
2 be responsible for the execution and administration of the  
3 provisions herein as an integral part of the parks and  
4 recreation program of the state and shall organize and  
5 staff the section of parks and recreation for the orderly,  
6 efficient and economical accomplishment of these ends.  
7 The authority granted in the year one thousand nine  
8 hundred ninety-four to the director of the division of  
9 natural resources to employ up to six additional  
10 unclassified personnel to carry out the parks functions of  
11 the division of natural resources is continued.

12 The director of the division of natural resources shall  
13 further have the authority, power and duty to:

14 (a) Establish, manage and maintain the state's parks  
15 and recreation system for the benefit of the people of this

16 state and do all things necessary and incidental to the  
17 development and administration thereof;

18 (b) Acquire property for the state in the name of the  
19 division of natural resources by purchase, lease or  
20 agreement; retain, employ and contract with legal advisors  
21 and consultants; or accept or reject for the state, in the  
22 name of the division, gifts, donations, contributions,  
23 bequests or devises of money, security or property, both  
24 real and personal, and any interest in such property,  
25 including lands and waters, for state park or recreational  
26 areas for the purpose of providing public recreation:  
27 *Provided*, That the provisions of section twenty, article one  
28 of this chapter are specifically made applicable to any  
29 acquisitions of land: *Provided, however*, That any sale,  
30 exchange or transfer of property for the purposes of  
31 completing land acquisitions or providing improved  
32 recreational opportunities to the citizens of the state shall  
33 be subject to the procedures of article one-a of this  
34 chapter: *Provided further*, That no sale of any park or  
35 recreational area property, including lands and waters,  
36 used for purposes of providing public recreation on the  
37 effective date of this article and no privatization of any  
38 park may occur without statutory authority;

39 (c) Approve and direct the use of all revenue derived  
40 from the operation of the state parks and public recreation  
41 system for the operation, maintenance and improvement  
42 of the system, individual projects of the system or for the  
43 retirement of park development revenue bonds;

44 (d) Approve the use of no less than twenty percent of  
45 the: (i) Funds appropriated for purposes of advertising  
46 and marketing expenses related to the promotion and  
47 development of tourism, pursuant to subsection (j), section  
48 eighteen, article twenty-two, chapter twenty-nine of this  
49 code; and (ii) funds authorized for expenditure from the  
50 tourism promotion fund for purposes of direct advertising,  
51 pursuant to section twelve, article two, chapter five-b of  
52 this code and section ten, article twenty-two-a, chapter  
53 twenty-nine of this code, to effectively promote and  
54 market the state's parks, state forests, state recreation areas  
55 and wildlife recreational resources;

56 (e) Issue park development revenue bonds as  
57 provided in this article;

58 (f) Provide for the construction and operation of  
59 cabins, lodges, resorts, restaurants and other developed  
60 recreational service facilities, subject to the provisions of  
61 section fifteen of this article and section twenty, article one  
62 of this chapter;

63 (g) Promulgate rules to control uses of the parks,  
64 subject to the provisions of chapter twenty-nine-a of this  
65 code: *Provided*, That the director shall not permit public  
66 hunting, the exploitation of minerals or the harvesting of  
67 timber for commercial purposes in any state park;

68 (h) Notwithstanding any provision of this code to the  
69 contrary, the director may, for amounts less than two  
70 hundred fifty dollars, exempt designated state parks from  
71 the requirement that all payments must be deposited in a  
72 bank within twenty-four hours;

73 (i) The director of the division of natural resources  
74 shall waive the use fee normally charged to an individual  
75 or group for one day's use of a picnic shelter or one  
76 week's use of a cabin in a state recreation area when the  
77 individual or group donates the materials and labor for the  
78 construction of the picnic shelter or cabin: *Provided*, That  
79 the individual or group was authorized by the director to  
80 construct the picnic shelter or cabin and that it was  
81 constructed in accordance with the authorization granted  
82 and the standards and requirements of the division  
83 pertaining to such construction. The individual or group  
84 to whom the waiver is granted may use the picnic shelter  
85 for one reserved day or the cabin for one reserved week  
86 during each calendar year until the amount of the  
87 donation equals the amount of the loss of revenue from  
88 the waiver or until the individual dies or the group ceases  
89 to exist, whichever first occurs. The waiver is not  
90 transferable. The director shall permit free use of picnic  
91 shelters or cabins to individuals or groups who have  
92 contributed materials and labor for construction of picnic  
93 shelters or cabins prior to the effective date of this section.  
94 The director shall promulgate a legislative rule in  
95 accordance with the provisions of chapter twenty-nine-a of

96 this code governing the free use of picnic shelters or cab-  
97 ins provided for in this section, the eligibility for free use,  
98 determining the value of the donations of labor and mate-  
99 rials, the appropriate definitions of a group and the maxi-  
100 mum time limit for such use; and

101 (j) Provide within the parks a market for West Virginia  
102 arts, crafts and products, which shall permit gift shops  
103 within the parks to offer for sale items purchased on the  
104 open market from local artists, artisans, craftsmen and  
105 suppliers and local or regional crafts cooperatives.

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## CHAPTER 249

(H. B. 4858—By Delegates Tillis, Manuel, Collins, Jenkins,  
Kime, Smirt and Greear)

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[Passed March 9, 1996; in effect July 1, 1996. Approved by the Governor.]

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AN ACT to repeal articles three and four, chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact article two of said chapter, all relating generally to trademark and service mark registration in this state; definitions; marks which may not be registered; procedures for applying for registration of a mark; requirements for registration; certificate of registration; duration and renewal of registration; current registrations; assignments and changes of name; recordation of related instruments; public records; cancellation of registration; classification of goods and services; liability for fraudulent registration and infringement; injunctive remedies; liability for injuries and dilution; venue for actions; service of process; effect upon common law rights; applicable fees; duties of secretary of state; and legislative intent.

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

That articles three and four, chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as

amended, be repealed; and that article two of said chapter be amended and reenacted, all to read as follows:

## ARTICLE 2. TRADEMARKS IN GENERAL.

- §47-2-1. Definitions.
- §47-2-2. Registrability.
- §47-2-3. Application for registration.
- §47-2-4. Filing of applications.
- §47-2-5. Certificate of registration.
- §47-2-6. Duration and renewal.
- §47-2-7. Assignments, changes of name and other instruments.
- §47-2-8. Records.
- §47-2-9. Cancellation.
- §47-2-10. Classification.
- §47-2-11. Fraudulent registration.
- §47-2-12. Infringement.
- §47-2-13. Injury to business reputation; dilution.
- §47-2-14. Remedies.
- §47-2-15. Forum for actions regarding registration; service on out-of-state registrants.
- §47-2-16. Common law rights.
- §47-2-17. Fees.
- §47-2-18. Severability.
- §47-2-19. Time of taking effect — repeal of prior articles; intent of article.

### §47-2-1. Definitions.

1 As used in this article:

2 (1) The term "trademark" means any word, name,  
3 symbol, or device or any combination thereof used by a  
4 person to identify and distinguish the goods of such per-  
5 son, including a unique product, from those manufactured  
6 and sold by others, and to indicate the source of the  
7 goods, even if that source is unknown.

8 (2) The term "service mark" means any word, name,  
9 symbol, or device or any combination thereof used by a  
10 person, to identify and distinguish the services of one  
11 person, including a unique service, from the services of  
12 others, and to indicate the source of the services, even if  
13 that source is unknown. Titles, character names used by a  
14 person, and other distinctive features of radio or television  
15 programs may be registered as service marks notwith-

16 standing that they, or the programs, may advertise the  
17 goods of the sponsor.

18 (3) The term "mark" includes any trademark or ser-  
19 vice mark, entitled to registration under this article whether  
20 registered or not.

21 (4) The term "trade name" means any name used by a  
22 person to identify a business or vocation of such person.

23 (5) The term "person" and any other word or term  
24 used to designate the applicant or other party entitled to a  
25 benefit or privilege or rendered liable under the provisions  
26 of this article includes a juristic person as well as a natural  
27 person. The term "juristic person" includes a firm, part-  
28 nership, corporation, union, association, or other organiza-  
29 tion capable of suing and being sued in a court of law.

30 (6) The term "applicant" embraces the person filing  
31 an application for registration of a mark under this article,  
32 and the legal representatives, successors, or assigns of such  
33 person.

34 (7) The term "registrant" as used herein embraces the  
35 person to whom the registration of a mark under this arti-  
36 cle is issued, and the legal representatives, successors, or  
37 assigns of such person.

38 (8) The term "use" means the bona fide use of a mark  
39 in the ordinary course of trade, and not made merely to  
40 reserve a right in a mark. For the purposes of this article,  
41 a mark shall be deemed to be in use (A) on goods when it  
42 is placed in any manner on the goods or other containers  
43 or the displays associated therewith or on the tags or labels  
44 affixed thereto, or if the nature of the goods makes such  
45 placement impracticable, then on documents associated  
46 with the goods or their sale, and the goods are sold or  
47 transported in commerce in this state, and (B) on services  
48 when it is used or displayed in the sale or advertising of  
49 services and the services are rendered in this state.

50 (9) A mark shall be deemed to be "abandoned" when  
51 either of the following occurs:

52 (A) When its use has been discontinued with intent  
53 not to resume such use. Intent not to resume may be  
54 inferred from circumstances. Nonuse for two consecutive  
55 years shall constitute prima facie evidence of abandon-  
56 ment.

57 (B) When any course of conduct of the owner, includ-  
58 ing acts of omission as well as commission, causes the  
59 mark to lose its significance as a mark.

60 (10) The term "secretary" means the secretary of the  
61 state or the designee of the secretary charged with the  
62 administration of this article.

63 (11) The term "dilution" means the lessening of the  
64 capacity of registrant's mark to identify and distinguish  
65 goods or services, regardless of the presence or absence of  
66 (A) competition between the parties, or (B) likelihood of  
67 confusion, mistake, or deception.

#### §47-2-2. Registrability.

1 A mark by which the goods or services of any appli-  
2 cant for registration may be distinguished from the goods  
3 or services of others shall not be registered if it:

4 (1) Consists of or comprises immoral, deceptive or  
5 scandalous matter;

6 (2) Consists of or comprises matter which may dispar-  
7 age or falsely suggest a connection with persons, living or  
8 dead, institutions, beliefs, or national symbols, or bring  
9 them into contempt, or disrepute;

10 (3) Consists of or comprises the flag or coat of arms  
11 or other insignia of the United States, or of any state or  
12 municipality, or of any foreign nation, or any simulation  
13 thereof;

14 (4) Consists of or comprises the name, signature or  
15 portrait identifying a particular living individual, except  
16 by the individual's written consent;

17 (5) Consists of a mark which, (A) when used on or in  
18 connection with the goods or services of the applicant, is

19 merely descriptive or deceptively misdescriptive of them,  
20 or (B) when used on or in connection with the goods or  
21 services of the applicant is primarily geographically de-  
22 scriptive or deceptively misdescriptive of them, or (C) is  
23 primarily merely a surname: *Provided*, That nothing in  
24 this subdivision shall prevent the registration of a mark  
25 used by the applicant which has become distinctive of the  
26 applicant's goods or services. The secretary may accept as  
27 evidence that the mark has become distinctive, as used on  
28 or in connection with the applicant's goods or services,  
29 proof of continuous use thereof as a mark by the appli-  
30 cant in this state for the five years before the date on  
31 which the claim of distinctiveness is made; or

32 (6) Consists of or comprises a mark which so resem-  
33 bles a mark registered in this state or a mark or trade name  
34 previously used by another and not abandoned, as to be  
35 likely, when used on or in connection with the goods or  
36 services of the applicant, to cause confusion or mistake or  
37 to deceive.

#### §47-2-3. Application for registration.

1 (a) Subject to the limitations set forth in this article,  
2 any person who uses a mark may file in the office of the  
3 secretary, in a manner complying with the requirements of  
4 the secretary, an application for registration of that mark  
5 setting forth, but not limited to, the following information:

6 (1) The name and business address of the person  
7 applying for such registration; and, if a corporation, the  
8 state of incorporation, or if a partnership, the state in  
9 which the partnership is organized and the names of the  
10 general partners, as specified by the secretary;

11 (2) The goods or services on or in connection with  
12 which the mark is used and the mode or manner in which  
13 the mark is used on or in connection with such goods or  
14 services and the class in which such goods or services fall;

15 (3) The date when the mark was first used anywhere  
16 and the date when it was first used in this state by the ap-  
17 plicant or a predecessor in interest; and



18       (4) A statement that the applicant is the owner of the  
19 mark, that the mark is in use, and that, to the knowledge of  
20 the person verifying the application, no other person has  
21 registered, either federally or in this state, or has the right  
22 to use such mark either in the identical form thereof or in  
23 such near resemblance thereto as to be likely, when ap-  
24 plied to the goods or services of such other person, to  
25 cause confusion, or to cause mistake, or to deceive.

26       (b) The secretary may also require a statement as to  
27 whether an application to register the mark, or portions or  
28 a composite thereof, has been filed by the applicant or a  
29 predecessor in interest in the United States Patent and  
30 Trademark Office; and, if so, the applicant shall provide  
31 full particulars with respect thereto including the filing  
32 date and serial number of each application, the status  
33 thereof and, if any application was finally refused registra-  
34 tion or has otherwise not resulted in a registration, the  
35 reasons therefor.

36       (c) The secretary may also require that a drawing of  
37 the mark, complying with such requirements as the secre-  
38 tary may specify, accompany the application.

39       (d) The application shall be signed and verified be-  
40 fore a notary public by the applicant or by a member of  
41 the firm or an officer of the corporation or association  
42 applying.

43       (e) The application shall be accompanied by three  
44 specimens showing the mark as actually used.

45       (f) The application shall be accompanied by the ap-  
46 plication fee payable to the secretary of state.

#### §47-2-4. Filing of applications.

1       (a) Upon the filing of an application for registration  
2 and payment of the application fee, the secretary may  
3 cause the application to be examined for conformity with  
4 this article.

5       (b) The applicant shall provide any additional perti-  
6 nent information requested by the secretary including a  
7 description of a design mark and may make, or authorize

8 the secretary to make, such amendments to the application  
9 as may be reasonably requested by the secretary or  
10 deemed by applicant to be advisable to respond to any  
11 rejection or objection.

12 (c) The secretary may require the applicant to disclaim  
13 an unregistrable component of a mark otherwise register-  
14 able, and an applicant may voluntarily disclaim a compo-  
15 nent of a mark sought to be registered. No disclaimer  
16 shall prejudice or affect the applicant's or registrant's  
17 rights then existing or thereafter arising in the disclaimed  
18 matter, or the applicant's or registrant's rights of registra-  
19 tion on another application if the disclaimed matter be or  
20 shall have become distinctive of the applicant's or regis-  
21 trant's goods or services.

22 (d) Amendments may be made by the secretary upon  
23 the application submitted by the applicant upon appli-  
24 cant's agreement, or, the secretary may require that an  
25 amended application be filed.

26 (e) If the applicant is found not to be entitled to regis-  
27 tration, the secretary shall advise the applicant thereof and  
28 of the reasons therefor. The applicant shall have a reason-  
29 able period of time specified by the secretary in which to  
30 reply or to amend the application, in which event the ap-  
31 plication shall then be reexamined. This procedure may  
32 be repeated until (1) the secretary finally refuses registra-  
33 tion of the mark, or (2) the applicant fails to reply or  
34 amend within the specified period, whereupon the applica-  
35 tion shall be deemed to have been abandoned.

36 (f) If the secretary finally refuses registration of the  
37 mark, the applicant may seek a writ of mandamus to com-  
38 pel such registration. Such writ may be granted, but with-  
39 out costs to the secretary, on proof that all the statements  
40 in the application are true and that the mark is otherwise  
41 entitled to registration.

42 (g) In the instance of applications concurrently being  
43 processed by the secretary seeking registration of the same  
44 or confusingly similar marks for the same or related  
45 goods or services, the secretary shall grant priority to the

46 applications in order of filing. If a prior-filed application  
47 is granted a registration, the other application or applica-  
48 tions shall then be rejected. Any rejected applicant may  
49 bring an action for cancellation of the registration upon  
50 grounds of prior or superior rights to the mark, in accor-  
51 dance with the provisions of section nine of this article.

#### §47-2-5. Certificate of registration.

1 (a) Upon compliance by the applicant with the re-  
2 quirements of this article, the secretary shall cause a certif-  
3 icate of registration to be issued and delivered to the appli-  
4 cant. The certificate of registration shall be issued under  
5 the signature of the secretary and the seal of the state, and  
6 it shall show the name and business address and, if a cor-  
7 poration, the state of incorporation, or if a partnership, the  
8 state in which the partnership is organized and the names  
9 of the general partners, as specified by the secretary, of the  
10 person claiming ownership of the mark, the date claimed  
11 for the first use of the mark anywhere and the date  
12 claimed for the first use of the mark in this state, the class  
13 of goods or services and a description of the goods or  
14 services on or in connection with which the mark is used, a  
15 reproduction of the mark, the registration date and the  
16 term of the registration.

17 (b) Any certificate of registration issued by the secre-  
18 tary under the provisions hereof or a copy thereof duly  
19 certified by the secretary shall be admissible in evidence as  
20 competent and sufficient proof of the registration of such  
21 mark in any actions or judicial proceedings in any court  
22 of this state.

#### §47-2-6. Duration and renewal.

1 (a) A registration of mark hereunder shall be effective  
2 for a term of ten years from the date of registration and,  
3 upon application filed within six months prior to the expi-  
4 ration of such term, in a manner complying with the re-  
5 quirements of the secretary, the registration may be re-  
6 newed for a like term from the end of the expiring term.  
7 A renewal fee, payable to the secretary, shall accompany  
8 the application for renewal of the registration.

9 (b) A registration may be renewed for successive  
10 periods of ten years in like manner.

11 (c) Any registration in force on the date on which this  
12 article becomes effective shall continue in full force and  
13 effect for the unexpired term thereof or for a term of five  
14 years from the effective date of this section, whichever  
15 shall first expire, and may be renewed by filing an appli-  
16 cation for renewal with the secretary complying with the  
17 requirements of the secretary and paying the aforemen-  
18 tioned renewal fee therefor within six months prior to the  
19 expiration of the registration.

20 (d) All applications for renewal under this article,  
21 whether of registrations made under this article or of reg-  
22 istrations effected under any prior article, shall include a  
23 verified statement that the mark has been and is still in use  
24 and include a specimen showing actual use of the mark on  
25 or in connection with the goods or services.

**§47-2-7. Assignments, changes of name and other instruments.**

1 (a) Any mark and its registration hereunder shall be  
2 assignable with the good will of the business in which the  
3 mark is used, or with that part of the good will of the busi-  
4 ness connected with the use of and symbolized by the  
5 mark. Assignment shall be by instruments in writing duly  
6 executed and may be recorded with the secretary upon the  
7 payment of the recording fee payable to the secretary  
8 who, upon recording of the assignment, shall issue in the  
9 name of the assignee a new certificate for the remainder of  
10 the term of the registration or of the last renewal thereof.  
11 An assignment of any registration under this article shall  
12 be void as against any subsequent purchaser for valuable  
13 consideration without notice, unless it is recorded with the  
14 secretary within three months after the date thereof or  
15 prior to such subsequent purchase.

16 (b) Any registrant or applicant effecting a change of  
17 the name of the person to whom the mark was issued or  
18 for whom an application was filed may record a certificate  
19 of change of name of the registrant or applicant with the  
20 secretary upon the payment of the recording fee. The

21 secretary may issue in the name of the assignee a certifi-  
22 cate of registration of an assigned application. The secre-  
23 tary may issue in the name of the assignee, a new certifi-  
24 cate or registration for the remainder of the term of the  
25 registration or last renewal thereof.

26 (c) Other instruments which relate to a mark regis-  
27 tered or application pending pursuant to this article, such  
28 as, by way of example, licenses, security interests or mort-  
29 gages, may be recorded in the discretion of the secretary,  
30 provided that such instrument is in writing and duly exe-  
31 cuted.

32 (d) Acknowledgment shall be prima facie evidence of  
33 the execution of an assignment or other instrument and,  
34 when recorded by the secretary, the record shall be prima  
35 facie evidence of execution.

36 (e) A photocopy of any instrument referred to in  
37 subsections (a), (b) or (c) of this section shall be accepted  
38 for recording if it is certified by any of the parties thereto,  
39 or their successors, to be a true and correct copy of the  
40 original.

#### §47-2-8. Records.

1 The secretary shall keep for public examination a  
2 record of all marks registered or renewed under this arti-  
3 cle, as well as a record of all documents recorded pursuant  
4 to section seven of this article.

#### §47-2-9. Cancellation.

1 The secretary shall cancel from the register, in whole  
2 or in part:

3 (1) Any registration concerning which the secretary  
4 shall receive a voluntary request for cancellation thereof  
5 from the registrant or the assignee of record;

6 (2) All registrations granted under this article and not  
7 renewed in accordance with the provisions hereof;

8 (3) Any registration concerning which a court of  
9 competent jurisdiction shall find:

- 10 (A) That the registered mark has been abandoned;  
11 (B) That the registrant is not the owner of the mark;  
12 (C) That the registration was granted improperly;  
13 (D) That the registration was obtained fraudulently;  
14 (E) That the mark is or has become the generic name  
15 for the goods or services, or a portion thereof, for which it  
16 has been registered;  
17 (F) That the registered mark is so similar, as to be  
18 likely to cause confusion or mistake or to deceive, to a  
19 mark registered by another person in the United States  
20 Patent and Trademark Office prior to the date of the filing  
21 of the application for registration by the registrant hereun-  
22 der, and not abandoned: *Provided*, That, should the regis-  
23 trant prove that the registrant is the owner of a concurrent  
24 registration of a mark in the United States Patent and  
25 Trademark Office covering an area including this state, the  
26 registration hereunder shall not be cancelled for such area  
27 of the state; or  
28 (4) When a court of competent jurisdiction orders  
29 cancellation of a registration on any ground.

**§47-2-10. Classification.**

1 The secretary shall, by legislative rule promulgated in  
2 accordance with the provisions of chapter twenty-nine-a of  
3 this code, establish a classification of goods and services  
4 for convenience of administration of this article, but not to  
5 limit or extend the applicant's or registrant's rights, and a  
6 single application for registration of a mark may include  
7 any or all goods upon which, or services with which, the  
8 mark is actually being used indicating the appropriate  
9 class or classes of goods or services. When a single appli-  
10 cation includes goods or services which fall within multi-  
11 ple classes, the secretary may require payment of a fee for  
12 each class. To the extent practical, the classification of  
13 goods and services should conform to the classification  
14 adopted by the United States Patent and Trademark Of-  
15 fice. Until approved by the Legislature, the secretary may  
16 effect the purposes of this section by emergency rule.

**§47-2-11. Fraudulent registration.**

1 Any person who shall for himself or herself, or on  
2 behalf of any other person, procure the filing or registra-  
3 tion of any mark in the office of the secretary under the  
4 provisions hereof, by knowingly making any false or  
5 fraudulent representation or declaration, orally or in writ-  
6 ing, or by any other fraudulent means, shall be liable to  
7 pay all damages sustained in consequence of such filing  
8 or registration, to be recovered by or on behalf of the  
9 party injured thereby in any court of competent jurisdic-  
10 tion.

**§47-2-12. Infringement.**

1 Subject to the provisions of section sixteen of this  
2 article, any person who shall:

3 (1) Use, without the consent of the registrant, any  
4 reproduction, counterfeit, copy, or colorable imitation of a  
5 mark registered under this article in connection with the  
6 sale, distribution, offering for sale, or advertising of any  
7 goods or services on or in connection with which such use  
8 is likely to cause confusion or mistake or to deceive as to  
9 the source of origin of such goods or services; or

10 (2) Reproduce, counterfeit, copy or colorably imitate  
11 any such mark and apply such reproduction, counterfeit,  
12 copy or colorable imitation to labels, signs, prints, packag-  
13 es, wrappers, receptacles, or advertisements intended to be  
14 used upon or in connection with the sale or other distribu-  
15 tion in this state of such goods or services; then, such per-  
16 son shall be liable in a civil action by the registrant for any  
17 and all of the remedies provided in section fourteen of this  
18 article, except that under subdivision (b) of said section,  
19 the registrant shall not be entitled to recover profits or  
20 damages unless the acts have been committed with the  
21 intent to cause confusion or mistake or to deceive.

**§47-2-13. Injury to business reputation; dilution.**

1 (a) The owner of a mark which is famous in this state  
2 shall be entitled, subject to the principles of equity, to an  
3 injunction against another's use of a mark, commencing  
4 after the owner's mark becomes famous, which causes

5 dilution of the distinctive quality of the owner's mark, and  
6 to obtain such other relief as is provided in this section. In  
7 determining whether a mark is famous, a court may con-  
8 sider factors such as, but not limited to:

9 (1) The degree of inherent or acquired distinctiveness  
10 of the mark in this state;

11 (2) The duration and extent of use of the mark in  
12 connection with the goods and services;

13 (3) The duration and extent of advertising and public-  
14 ity of the mark in this state;

15 (4) The geographical extent of the trading area in  
16 which the mark is used;

17 (5) The channels of trade for the goods or services  
18 with which the owner's mark is used;

19 (6) The degree of recognition of the owner's mark in  
20 its and in the other's trading areas and channels of trade in  
21 this state; and

22 (7) The nature and extent of use of the same or similar  
23 mark by third parties.

24 (b) The owner shall be entitled only to injunctive  
25 relief in this state in an action brought under this section,  
26 unless the subsequent user wilfully intended to trade on  
27 the owner's reputation or to cause dilution of the owner's  
28 mark. If such wilful intent is proven, the owner shall also  
29 be entitled to the remedies set forth in this chapter, subject  
30 to the discretion of the court and the principles of equity.

#### §47-2-14. Remedies.

1 (a) Any owner of a mark registered under this article  
2 may proceed by suit to enjoin the manufacture, use, dis-  
3 play or sale of any counterfeits or imitations thereof and  
4 any court of competent jurisdiction may grant injunctions  
5 to restrain such manufacture, use, display or sale as may  
6 be by the said court deemed just and reasonable, and may  
7 require the defendants to pay to such owner all profits  
8 derived from and/or all damages suffered by reason of  
9 such wrongful manufacture, use, display or sale; and such



10 court may also order that any such counterfeits or imita-  
11 tions in the possession or under the control of any defen-  
12 dant in such case be delivered to an officer of the court, or  
13 to the complainant, to be destroyed. The court, in its dis-  
14 cretion, may enter judgment for an amount not to exceed  
15 three times such profits and damages and/or reasonable  
16 attorneys' fees of the registrant in such cases where the  
17 court finds the other party committed such wrongful acts  
18 with knowledge or in bad faith or otherwise as according  
19 to the circumstances of the case.

20 (b) The enumeration of any right or remedy herein  
21 shall not affect a registrant's right to prosecute under any  
22 penal law of this state.

**§47-2-15. Forum for actions regarding registration; service on out-of-state registrants.**

1 (a) Actions to require cancellation of a mark regis-  
2 tered pursuant to this article or in mandamus to compel  
3 registration of a mark pursuant to this article shall be  
4 brought in the circuit court of Kanawha County. In an  
5 action in mandamus, the proceeding shall be based solely  
6 upon the record before the secretary. In an action for  
7 cancellation, the secretary shall not be made a party to the  
8 proceeding but shall be notified of the filing of the com-  
9 plaint by the clerk of the court in which it is filed and shall  
10 be given the right to intervene in the action.

11 (b) In any action brought against a nonresident regis-  
12 trant, service may be effected by service upon the regis-  
13 trant in accordance with the provisions of this code and  
14 the rules of civil procedure which prescribe the manner in  
15 which service upon nonresidents may be obtained.

**§47-2-16. Common law rights.**

1 Nothing herein shall adversely affect the rights or the  
2 enforcement of rights in marks acquired in good faith at  
3 any time at common law.

**§47-2-17. Fees.**

1 (a) The secretary shall charge the following fees for  
2 services provided pursuant to the provisions of this article:

3 (1) For an application fee and for a renewal fee, fifty  
4 dollars; and

5 (2) For recording any instrument specified in section  
6 seven of this article, twenty-five dollars.

7 (b) All fees shall be deposited in a special account in  
8 the state treasury. Expenditures from said account shall  
9 be for the purposes set forth in this article and are not  
10 authorized from collections but are to be made only in  
11 accordance with appropriation by the Legislature and in  
12 accordance with the provisions of article three, chapter  
13 twelve of this code and upon the fulfillment of the provi-  
14 sions set forth in article two, chapter five-a of this code:  
15 *Provided*, That for the fiscal year ending the thirtieth day  
16 of June, one thousand nine hundred ninety-seven, expen-  
17 ditures are authorized from collections rather than pursu-  
18 ant to an appropriation by the Legislature. Amounts col-  
19 lected which are found from time to time to exceed the  
20 funds needed for purposes set forth in this article may be  
21 transferred to other accounts or funds and redesignated  
22 for other purposes by appropriation of the Legislature.

**§47-2-18. Severability.**

1 If any provision hereof, or the application of such  
2 provision to any person or circumstance is held invalid,  
3 the remainder of this article shall not be affected thereby.

**§47-2-19. Time of taking effect — repeal of prior articles;  
intent of article.**

1 (a) This article is effective the first day of July, one  
2 thousand nine hundred ninety-six, but shall not affect any  
3 suit, proceeding or appeal then pending.

4 (b) The intent of this article is to provide a system of  
5 state trademark registration and protection substantially  
6 consistent with the federal system of trademark registra-  
7 tion and protection under the "Trademark Act Of 1946,"  
8 as the same has been amended on the effective date of this  
9 article. To that end, the construction given the federal act  
10 should be examined as persuasive authority for interpret-  
11 ing and construing this article.

# CHAPTER 250

(H. B. 4108—By Delegates Thompson, Ryan, Kiss (By Request),  
Pulliam and McGraw)

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[Passed February 15, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section three, article thirteen, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to stopping, standing and parking violations; prohibiting stopping, standing and parking a vehicle in a fire lane.

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

That section three, article thirteen, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

## ARTICLE 13. STOPPING, STANDING AND PARKING.

### §17C-13-3. Stopping, standing or parking prohibited in specified places.

- 1 (a) No person shall stop, stand or park a vehicle,
- 2 except when necessary to avoid conflict with other traffic
- 3 or in compliance with law or the directions of a police
- 4 officer or traffic-control device, in any of the following
- 5 places:
- 6 (1) On a sidewalk;
- 7 (2) In front of a public or private driveway;
- 8 (3) Within an intersection;
- 9 (4) Within fifteen feet of a fire hydrant;
- 10 (5) In a properly designated fire lane;
- 11 (6) On a crosswalk;
- 12 (7) Within twenty feet of a crosswalk at an intersection;

- 13       (8) Within thirty feet upon the approach to any  
14 flashing beacon, stop sign or traffic-control signal located  
15 at the side of a roadway;
- 16       (9) Between a safety zone and the adjacent curb or  
17 within thirty feet of points on the curb immediately  
18 opposite the ends of a safety zone, unless a different  
19 length is indicated by signs or markings;
- 20       (10) Within fifty feet of the nearest rail of a railroad  
21 crossing;
- 22       (11) Within twenty feet of the driveway entrance to  
23 any fire station and on the side of a street opposite the  
24 entrance to any fire station within seventy-five feet of the  
25 entrance (when properly signposted);
- 26       (12) Alongside or opposite any street excavation or  
27 obstruction when stopping, standing or parking would  
28 obstruct traffic;
- 29       (13) On the roadway side of any vehicle stopped or  
30 parked at the edge or curb of a street;
- 31       (14) On any bridge or other elevated structure on a  
32 highway or within a highway tunnel;
- 33       (15) At any place where official signs prohibit  
34 stopping;
- 35       (16) Within twenty feet of any mail receptacle served  
36 regularly by a carrier using a motor vehicle for daily  
37 deliveries, if the parking interferes with or causes delay in  
38 the carrier's schedule;
- 39       (17) On any controlled-access highway;
- 40       (18) At any place on any highway where the safety  
41 and convenience of the traveling public is thereby  
42 endangered.
- 43       (b) No person shall move a vehicle not lawfully under  
44 his or her control into any prohibited area or away from a  
45 curb such distance as is unlawful.

## CHAPTER 251

(H. B. 4151—By Delegates Williams, Mezzatesta, Ryan and Collins)

[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact section twelve, article fourteen, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact sections nineteen and twenty-nine, article fifteen of said chapter, all relating to school bus lighting equipment; rules adopted by the board of education with the advice of the commissioner of motor vehicles; authority of division of highways with reference to lighting devices; and requiring that school buses have two back-up lights with fifty candle-power intensity.

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

That section twelve, article fourteen, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended be amended and reenacted; and that sections nineteen and twenty-nine, article fifteen of said chapter, be amended and reenacted, all to read as follows:

### Article

14. **Miscellaneous Rules.**

15. **Equipment.**

### ARTICLE 14. MISCELLANEOUS RULES.

#### §17C-14-12. School bus rules.

1 (a) The West Virginia board of education by and with  
 2 the advice of the motor vehicle commissioner shall adopt  
 3 and enforce rules consistent with this chapter, including  
 4 the provisions of subsection (c), section nineteen, article  
 5 fifteen of this chapter, to govern the design and operation  
 6 of all school buses used for the transportation of school  
 7 children when owned and operated by any county board  
 8 of education or privately owned and operated under con-  
 9 tract with any county board of education in this state and  
 10 these rules shall by reference be made a part of any such  
 11 contract with a county board of education. Every county

12 board of education, its officers and employees, and every  
13 person employed under contract by a county board of  
14 education shall be subject to these rules.

15 (b) Any officer or employee of any county board of  
16 education who violates any of said rules or who fails to  
17 include the obligation to comply with said rules in any  
18 contract executed by him or her on behalf of a county  
19 board of education is guilty of misconduct and subject to  
20 removal from office or employment. Any person operat-  
21 ing a school bus under contract with a county board of  
22 education who fails to comply with any of said rules is  
23 guilty of breach of contract and the contract shall be can-  
24 celed after notice and hearing by the responsible officers  
25 of the county board of education.

#### ARTICLE 15. EQUIPMENT.

§17C-15-19. Additional lighting equipment.

§17C-15-29. Authority of division of highways with reference to lighting devices.

#### §17C-15-19. Additional lighting equipment.

1 (a) Any motor vehicle may be equipped with not more  
2 than two side cowl or fender lamps which shall emit an  
3 amber or white light without glare.

4 (b) Any motor vehicle may be equipped with not  
5 more than one runningboard courtesy lamp on each side  
6 thereof which shall emit a white or amber light without  
7 glare.

8 (c) Except for school buses as provided in this subsec-  
9 tion, any motor vehicle may be equipped with not more  
10 than two back-up lamps either separately or in combina-  
11 tion with other lamps, but any such back-up lamp shall not  
12 be lighted when the motor vehicle is in forward motion.  
13 School buses used for the transportation of school chil-  
14 dren in this state, whether owned and operated by a county  
15 board of education or privately owned and operated under  
16 contract with a county board of education, shall be  
17 equipped with two back-up lamps, one on each side of the  
18 rear door, with white lens or reflectors, capable of lighting  
19 the roadway and objects to the rear of the bus for safe  
20 backing during darkness, and which, at the option of the

21 county board of education, may each provide fifty candle-  
22 power in illumination intensity instead of thirty-two can-  
23 dlepower.

24 (d) Any vehicle may be equipped with lamps which  
25 may be used for the purpose of warning the operators of  
26 other vehicles of the presence of a vehicular traffic hazard  
27 requiring the exercise of unusual care in approaching,  
28 overtaking or passing, and when so equipped may display  
29 such warning in addition to any other warning signals  
30 required by this article. The lamps used to display such  
31 warning to the front shall be mounted at the same level  
32 and as widely spaced laterally as practicable and shall  
33 display simultaneously flashing white or amber lights, or  
34 any shade of color between white and amber. The lamps  
35 used to display such warning to the rear shall be mounted  
36 at the same level and as widely spaced laterally as practica-  
37 ble, and shall show simultaneously flashing amber or red  
38 lights, or any shade of color between amber and red.

39 (e) Vehicles used by "rural mail carriers" in carrying  
40 or delivering mail in rural areas may be equipped with  
41 amber flashing lights. Such lights shall be on the front  
42 and rear of the vehicle and may be activated when the  
43 vehicle is stopped or decreasing speed in order to stop in  
44 the course of carrying, delivering or picking up mail  
45 along the route.

**§17C-15-29. Authority of division of highways with reference  
to lighting devices.**

1 (a) The division of highways is hereby authorized to  
2 approve or disapprove lighting devices and to issue and  
3 enforce rules establishing standards and specifications for  
4 the approval of such lighting devices, their installation,  
5 adjustment and aiming, and adjustment when in use on  
6 motor vehicles. Such rules shall correlate with and, so far  
7 as practicable, conform to or exceed the then current stan-  
8 dards and specifications of the society of automotive engi-  
9 neers applicable to such equipment.

10 (b) The division of highways is hereby required to  
11 approve or disapprove any lighting device, of a type on  
12 which approval is specifically required in this chapter,

13 within a reasonable time after such device has been sub-  
14 mitted.

15 (c) The division of highways is further authorized to  
16 set up the procedure which shall be followed when any  
17 device is submitted for approval.

18 (d) The division of highways, upon approving any  
19 such lamp or device, shall issue to the applicant a certifi-  
20 cate of approval together with any instructions determined  
21 by him or her.

22 (e) The division of highways shall publish lists of all  
23 lamps and devices by name and type which have been  
24 approved by him or her.

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## CHAPTER 252

(Com. Sub. for H. B. 4862—By Delegates Givens, Johnson, Thomas and Greear)

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[Passed March 7, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to repeal section three, article one, and section nine-a, article nine, both of chapter twenty-one-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said chapter by adding thereto a new article, designated article one-a; to amend and reenact section six, article two of said chapter; to amend said article by adding thereto a new section, designated section six-c; to amend and reenact sections two, three, three-b, four, ten-b, sixteen, seventeen and twenty, article five of said chapter; to amend and reenact sections ten and fifteen, article six of said chapter; to further amend said article by adding thereto a new section, designated section one-c; to amend and reenact section fifteen, article eight, section nine, article nine, and section seventeen, article ten, all of said chapter, all relating generally to unemployment compensation and other payments due the commissioner of the bureau of employment programs, definitions, powers of the commissioner, allowing for rules to restrict certain delinquent employers from having authority to conduct business, criminal penalties, rates of



reorganized employers, enhancements to ability of commissioner to collect payments due, interest rate and penalty for past due payments, updating weekly benefit table, voluntary withholding of tax payments from unemployment compensation benefits, payment of funds from unemployment trust fund and Reed Act appropriation.

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

That section three, article one, and section nine-a, article nine, both of chapter twenty-one-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that said chapter be further amended by adding thereto a new article, designated article one-a; that section six, article two of said chapter be amended and reenacted; that said article be further amended by adding thereto a new section, designated section six-c; that sections two, three, three-b, four, ten-b, sixteen, seventeen and twenty, article five of said chapter be amended and reenacted; that sections ten and fifteen, article six of said chapter be amended and reenacted; that said article be further amended by adding thereto a new section, designated section one-c; and that section fifteen, article eight, section nine, article nine, and section seventeen, article ten, all of said chapter, be amended and reenacted, all to read as follows:

## **CHAPTER 21A. BUREAU OF EMPLOYMENT PROGRAMS.**

### **Article**

- 1A. Definitions.**
- 2. The Commissioner of the Bureau of Employment Programs.**
- 5. Employer Coverage and Responsibility.**
- 6. Employee Eligibility; Benefits.**
- 8. Unemployment Compensation Fund.**
- 9. Unemployment Compensation Administration Fund.**
- 10. General Provisions.**

### **ARTICLE 1A. DEFINITIONS.**

- §21A-1A-1. Construction of terms.
- §21A-1A-2. Administration fund.
- §21A-1A-3. Annual payroll.
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- §21A-1A-27. Total and partial employment.
- §21A-1A-28. Wages.
- §21A-1A-29. Week.
- §21A-1A-30. Weekly benefit rate.
- §21A-1A-31. Year.

**§21A-1A-1. Construction of terms.**

- 1 The terms and phrases defined by this article have the
- 2 stated meanings when used in this chapter unless the con-
- 3 text clearly requires otherwise.

**§21A-1A-2. Administration fund.**

- 1 "Administration fund" means the employment security
- 2 administration fund, from which the administrative ex-
- 3 penses under this chapter shall be paid.

**§21A-1A-3. Annual payroll.**

- 1 "Annual payroll" means the total amount of wages for
- 2 employment paid by an employer during a twelve-month
- 3 period ending with the thirtieth day of June of any calen-
- 4 dar year.

**§21A-1A-4. Average annual payroll.**

- 1 "Average annual payroll" means the average of the last
- 2 three annual payrolls of an employer.

**§21A-1A-5. Base period.**

- 1 "Base period" means the first four out of the last five
- 2 completed calendar quarters immediately preceding the
- 3 first day of the individual's benefit year.

**§21A-1A-6. Base period employer.**

- 1 "Base period employer" means any employer who in
- 2 the base period for any benefit year paid wages to an
- 3 individual who filed claim for unemployment compensa-
- 4 tion within such benefit year.

**§21A-1A-7. Base period wages.**

- 1 "Base period wages" means wages paid to an individual
- 2 during the base period by all the individual's base period
- 3 employers.

**§21A-1A-8. Benefit year.**

- 1 "Benefit year" with respect to an individual means the
- 2 fifty-two-week period beginning with the first day of the
- 3 calendar week in which a valid claim is effective, and
- 4 thereafter the fifty-two-week period beginning with the
- 5 first day of the calendar week in which such individual
- 6 next files a valid claim for benefits after the termination of
- 7 his or her last preceding benefit year: *Provided*, That if a
- 8 claim is effective on the first day of a quarter, the benefit
- 9 year will be fifty-three weeks in order to prevent an over-
- 10 lapping of the base period wages: *Provided, however*, That
- 11 for any benefit year beginning on or after the first day of
- 12 January, one thousand nine hundred ninety-five, if a claim
- 13 is effective on the second day of a quarter and the benefit
- 14 year includes the twenty-ninth day of February, the bene-
- 15 fit year will be fifty-three weeks in order to prevent an
- 16 overlapping of the base period wages. An initial claim for
- 17 benefits filed in accordance with the provisions of this
- 18 chapter is a valid claim within the purposes of this defini-
- 19 tion if the individual has been paid wages in his or her
- 20 base period sufficient to make him or her eligible for
- 21 benefits under the provisions of this chapter.

**§21A-1A-9. Benefits.**

1 "Benefits" means the money payable to an individual  
2 with respect to his or her unemployment.

**§21A-1A-10. Board.**

1 "Board" means board of review.

**§21A-1A-11. Calendar quarter.**

1 "Calendar quarter" means the period of three consecu-  
2 tive calendar months ending on the thirty-first day of  
3 March, the thirtieth day of June, the thirtieth day of Sep-  
4 tember, the thirty-first day of December or the equivalent  
5 thereof as the commissioner may by rule prescribe.

**§21A-1A-12. Commissioner.**

1 "Commissioner" means the bureau of employment  
2 programs' commissioner.

**§21A-1A-13. Computation date.**

1 "Computation date" means the thirtieth day of June the  
2 year immediately preceding the first day of January on  
3 which an employer's contribution rate becomes effective.

**§21A-1A-14. Employing unit.**

1 "Employing unit" means an individual, or type of  
2 organization, including any partnership, association, trust,  
3 estate, joint-stock company, insurance company, corpora-  
4 tion (domestic or foreign), state or political subdivision  
5 thereof, or their instrumentalities, as provided in paragraph  
6 (B), subdivision (9) of the definition of "employment" in  
7 this article institution of higher education, or the receiver,  
8 trustee in bankruptcy, trustee or successor thereof, or the  
9 legal representative of a deceased person, which has in its  
10 employ one or more individuals performing service within  
11 this state.

**§21A-1A-15. Employer.**

1 "Employer" means:

2 (1) Any employing unit which for some portion of a  
3 day, not necessarily simultaneously, in each of twenty  
4 different calendar weeks, which weeks need not be consec-

5     utive, within either the current calendar year, or the pre-  
6     ceding calendar year, has had in employment four or  
7     more individuals irrespective of whether the same individ-  
8     uals were or were not employed on each of such days;

9         (2) Any employing unit which is or becomes a liable  
10     employer under any federal unemployment tax act;

11         (3) Any employing unit which has acquired or ac-  
12     quires the organization, trade or business, or substantially  
13     all the assets thereof, of an employing unit which at the  
14     time of such acquisition was an employer subject to this  
15     chapter;

16         (4) Any employing unit which, in any one calendar  
17     quarter, in any calendar year, has in employment four or  
18     more individuals and has paid wages for employment in  
19     the total sum of five thousand dollars or more, or which,  
20     after such date, has paid wages for employment in any  
21     calendar year in the sum total of twenty thousand dollars  
22     or more;

23         (5) Any employing unit which, in any three-week  
24     period, in any calendar year, has in employment ten or  
25     more individuals;

26         (6) For the effective period of its election pursuant to  
27     section three, article five of this chapter, any employing  
28     unit which has elected to become subject to this chapter;

29         (7) Any employing unit which: (A) In any calendar  
30     quarter in either the current or preceding calendar year  
31     paid for service in employment wages of one thousand  
32     five hundred dollars or more; or (B) for some portion of a  
33     day in each of twenty different calendar weeks, whether or  
34     not such weeks were consecutive, in either the current or  
35     the preceding calendar year had in employment at least  
36     one individual (irrespective of whether the same individual  
37     was in employment in each such day) except as provided  
38     in subdivisions (10) and (11) of this section;

39         (8) Any employing unit for which service in employ-  
40     ment, as defined in subdivision (9) of the definition of  
41     "employment" in this article is performed;

42 (9) Any employing unit for which service in employ-  
43 ment, as defined in subdivision (10) of the definition of  
44 "employment" in this article is performed;

45 (10) Any employing unit for which agricultural labor,  
46 as defined in subdivision (12) of the definition of "em-  
47 ployment", is performed; or

48 (11) Any employing unit for which domestic service  
49 in employment, as defined in subdivision (13) of the defi-  
50 nition of "employment", is performed.

### §21A-1A-16. Employment.

1 "Employment", subject to the other provisions of this  
2 article, means:

3 (1) Service, including service in interstate commerce,  
4 performed for wages or under any contract of hire, written  
5 or oral, express or implied;

6 (2) Any service performed by an employee, as defined  
7 in Section 3306(i) of the federal Unemployment Tax Act,  
8 including service in interstate commerce;

9 (3) Any service performed, including service in inter-  
10 state commerce, by any officer of a corporation;

11 (4) An individual's entire service, performed within or  
12 both within and without this state if: (A) The service is  
13 localized in this state; or (B) the service is not localized in  
14 any state but some of the service is performed in this state  
15 and: (i) The base of operations, or, if there is no base of  
16 operations, then the place from which such service is di-  
17 rected or controlled, is in this state; or (ii) the base of op-  
18 erations or place from which such service is directed or  
19 controlled is not in any state in which some part of the  
20 service is performed but the individual's residence is in this  
21 state;

22 (5) Service not covered under subdivision (4) of this  
23 section and performed entirely without this state with re-  
24 spect to no part of which contributions are required and  
25 paid under an unemployment compensation law of any  
26 other state or of the federal government, is employment  
27 subject to this chapter if the individual performing such

28 services is a resident of this state and the commissioner  
29 approves the election of the employing unit for whom  
30 such services are performed that the entire service of such  
31 individual is employment subject to this chapter;

32 (6) Service is localized within a state, if: (A) The ser-  
33 vice is performed entirely within such state; or (B) the  
34 service is performed both within and without such state,  
35 but the service performed without such state is incidental  
36 to the individual's service within this state, as, for example,  
37 is temporary or transitory in nature or consists of isolated  
38 transactions;

39 (7) Services performed by an individual for wages are  
40 employment subject to this chapter unless and until it is  
41 shown to the satisfaction of the commissioner that: (A)  
42 Such individual has been and will continue to be free from  
43 control or direction over the performance of such services,  
44 both under his or her contract of service and in fact; and  
45 (B) such service is either outside the usual course of the  
46 business for which such service is performed or that such  
47 service is performed outside of all the places of business  
48 of the enterprise for which such service is performed; and  
49 (C) such individual is customarily engaged in an independ-  
50 ently established trade, occupation, profession or busi-  
51 ness;

52 (8) All service performed by an officer or member of  
53 the crew of an American vessel (as defined in Section 305  
54 of an act of Congress entitled Social Security Act Amend-  
55 ment of 1946, approved the tenth day of August, one  
56 thousand nine hundred forty-six), on or in connection  
57 with such vessel, provided that the operating office, from  
58 which the operations of such vessel operating on navigable  
59 waters within and without the United States is ordinarily  
60 and regularly supervised, managed, directed and con-  
61 trolled, is within this state;

62 (9) (A) Service performed by an individual in the  
63 employ of this state or any of its instrumentalities (or in  
64 the employ of this state and one or more other states or  
65 their instrumentalities) for a hospital or institution of high-  
66 er education located in this state: *Provided*, That such  
67 service is excluded from "employment" as defined in the

68 federal Unemployment Tax Act solely by reason of Sec-  
69 tion 3306(c)(7) of that act and is not excluded from "em-  
70 ployment" under subdivision (11), section seventeen of  
71 this article;

72 (B) Service performed in the employ of this state or  
73 any of its instrumentalities or political subdivisions thereof  
74 or any of its instrumentalities or any instrumentality of  
75 more than one of the foregoing or any instrumentality of  
76 any foregoing and one or more other states or political  
77 subdivisions: *Provided*, That such service is excluded  
78 from "employment" as defined in the federal Unemploy-  
79 ment Tax Act by Section 3306(c)(7) of that act and is not  
80 excluded from "employment" under subdivision (15),  
81 section seventeen of this article; and

82 (C) Service performed in the employ of a nonprofit  
83 educational institution which is not an institution of higher  
84 education;

85 (10) Service performed by an individual in the em-  
86 ploy of a religious, charitable, educational or other organi-  
87 zation but only if the following conditions are met:

88 (A) The service is excluded from "employment" as  
89 defined in the federal Unemployment Tax Act solely by  
90 reason of Section 3306(c)(8) of that act; and

91 (B) The organization had four or more individuals in  
92 employment for some portion of a day in each of twenty  
93 different weeks, whether or not such weeks were consecu-  
94 tive, within either the current or preceding calendar year,  
95 regardless of whether they were employed at the same  
96 moment of time;

97 (11) Service of an individual who is a citizen of the  
98 United States, performed outside the United States after  
99 the thirty-first day of December, one thousand nine hun-  
100 dred seventy-one (except in Canada and in the case of the  
101 Virgin Islands after the thirty-first day of December, one  
102 thousand nine hundred seventy-one, and before the first  
103 day of January, the year following the year in which the  
104 secretary of labor approves for the first time an unem-  
105 ployment insurance law submitted to him or her by the  
106 Virgin Islands for approval) in the employ of an Ameri-



107 can employer (other than service which is considered  
108 "employment" under the provisions of subdivision (4), (5)  
109 or (6) of this section or the parallel provisions of another  
110 state's law) if:

111 (A) The employer's principal place of business in the  
112 United States is located in this state; or

113 (B) The employer has no place of business in the  
114 United States, but: (i) The employer is an individual who  
115 is a resident of this state; or (ii) the employer is a corpora-  
116 tion which is organized under the laws of this state; or (iii)  
117 the employer is a partnership or a trust and the number of  
118 the partners or trustees who are residents of this state is  
119 greater than the number who are residents of any one  
120 other state; or

121 (C) None of the criteria of paragraphs (A) and (B) of  
122 this subdivision is met but the employer has elected cover-  
123 age in this state or, the employer having failed to elect  
124 coverage in any state, the individual has filed a claim for  
125 benefits, based on such service, under the law of this state.

126 (D) An "American employer", for purposes of this  
127 subdivision, means a person who is: (i) An individual who  
128 is a resident of the United States; or (ii) a partnership if  
129 two thirds or more of the partners are residents of the  
130 United States; or (iii) a trust, if all of the trustees are resi-  
131 dents of the United States; or (iv) a corporation organized  
132 under the laws of the United States or of any state;

133 (12) Service performed by an individual in agricultur-  
134 al labor as defined in subdivision (5), section seventeen of  
135 this article when:

136 (A) Such service is performed for a person who: (i)  
137 During any calendar quarter in either the current or the  
138 preceding calendar year paid remuneration in cash of  
139 twenty thousand dollars or more to individuals employed  
140 in agricultural labor including labor performed by an  
141 alien referred to in paragraph (B) of this subdivision; or  
142 (ii) for some portion of a day in each of twenty different  
143 calendar weeks, whether or not such weeks were consecu-  
144 tive, in either the current or the preceding calendar year,  
145 employed in agricultural labor, including labor performed

146 by an alien referred to in paragraph (B) of this subdivi-  
147 sion, ten or more individuals, regardless of whether they  
148 were employed at the same moment of time;

149 (B) Such service is not performed in agricultural labor  
150 if performed before the first day of January, one thousand  
151 nine hundred ninety-five, by an individual who is an alien  
152 admitted to the United States to perform service in agricul-  
153 tural labor pursuant to Sections 214(c) and 101(a)(15)(H)  
154 of the Immigration and Nationality Act;

155 (C) For the purposes of the definition of employment,  
156 any individual who is a member of a crew furnished by a  
157 crew leader to perform service in agricultural labor for  
158 any other person shall be treated as an employee of such  
159 crew leader: (i) If such crew leader holds a valid certifi-  
160 cate of registration under the Migrant and Seasonal Agri-  
161 cultural Worker Protection Act; or substantially all the  
162 members of such crew operate or maintain tractors, mech-  
163 anized harvesting or crop-dusting equipment, or any  
164 other mechanized equipment, which is provided by such  
165 crew leader; and (ii) if such individual is not an employee  
166 of such other person within the meaning of subdivision  
167 (7) of the definition of employer;

168 (D) For the purposes of this subdivision, in the case of  
169 any individual who is furnished by a crew leader to per-  
170 form service in agricultural labor for any other person and  
171 who is not treated as an employee of such crew leader  
172 under paragraph (C) of this subdivision: (i) Such other  
173 person and not the crew leader shall be treated as the em-  
174 ployer of such individual; and (ii) such other person shall  
175 be treated as having paid cash remuneration to such indi-  
176 vidual in an amount equal to the amount of cash remuner-  
177 ation paid to such individual by the crew leader (either on  
178 his or her own behalf or on behalf of such other person)  
179 for the service in agricultural labor performed for such  
180 other person; and

181 (E) For the purposes of this subdivision, the term  
182 "crew leader" means an individual who: (i) Furnishes  
183 individuals to perform service in agricultural labor for any  
184 other person; (ii) pays (either on his or her own behalf or  
185 on behalf of such other person) the individuals so fur-

186 nished by him or her for the service in agricultural labor  
187 performed by them; and (iii) has not entered into a written  
188 agreement with such other person under which such indi-  
189 vidual is designated as an employee of such other person;

190 (13)(A) The term "employment" includes domestic  
191 service in a private home, local college club or local chap-  
192 ter of a college fraternity or sorority performed for a  
193 person who paid cash remuneration of one thousand dol-  
194 lars or more in any calendar quarter in the current calen-  
195 dar year or the preceding calendar year to individuals  
196 employed in such domestic service.

197 (B) Notwithstanding the foregoing definition of "em-  
198 ployment", if the services performed during one half or  
199 more of any pay period by an employee for the person  
200 employing him or her constitute employment, all the ser-  
201 vices of such employee for such period are employment;  
202 but if the services performed during more than one half of  
203 any such pay period by an employee for the person em-  
204 ploying him or her do not constitute employment, then  
205 none of the services of such employee for such period are  
206 employment.

**§21A-1A-17. Employment does not include.**

1 The term "employment" does not include:

2 (1) Service performed in the employ of this state or  
3 any political subdivision thereof, or any instrumentality of  
4 this state or its subdivisions, except as otherwise provided  
5 herein;

6 (2) Service performed directly in the employ of an-  
7 other state, or its political subdivisions, except as otherwise  
8 provided in paragraph (A), subdivision (9) of the defini-  
9 tion of "employment";

10 (3) Service performed in the employ of the United  
11 States or any instrumentality of the United States exempt  
12 under the constitution of the United States from the pay-  
13 ments imposed by this law, except that to the extent that  
14 the Congress of the United States shall permit states to  
15 require any instrumentalities of the United States to make  
16 payments into an unemployment fund under a state un-

17 employment compensation law, all of the provisions of  
18 this law shall be applicable to such instrumentalities and to  
19 service performed for such instrumentalities in the same  
20 manner, to the same extent and on the same terms as to all  
21 other employers, employing units, individuals and servic-  
22 es: *Provided*, That if this state is not certified for any year  
23 by the secretary of labor under Section 1603(c) of the  
24 federal Internal Revenue Code, the payments required of  
25 such instrumentalities with respect to such year shall be  
26 refunded by the commissioner from the fund in the same  
27 manner and within the same period as is provided in sec-  
28 tion nineteen, article five of this chapter, with respect to  
29 payments erroneously collected;

30 (4) Service performed with respect to which unem-  
31 ployment compensation is payable under the Railroad  
32 Unemployment Insurance Act and service with respect to  
33 which unemployment benefits are payable under an un-  
34 employment compensation system for maritime employ-  
35 ees established by an act of Congress. The commissioner  
36 may enter into agreements with the proper agency estab-  
37 lished under such an act of Congress to provide reciprocal  
38 treatment to individuals who, after acquiring potential  
39 rights to unemployment compensation under an act of  
40 Congress, or who have, after acquiring potential rights to  
41 unemployment compensation under an act of Congress,  
42 acquired rights to benefit under this chapter. Such agree-  
43 ment shall become effective ten days after such publica-  
44 tions which shall comply with the general rules of the  
45 department;

46 (5) Service performed by an individual in agricultural  
47 labor, except as provided in subdivision (12) of the defini-  
48 tion of "employment" in this article. For purposes of this  
49 subdivision, the term "agricultural labor" includes all ser-  
50 vices performed:

51 (A) On a farm, in the employ of any person, in con-  
52 nection with cultivating the soil, or in connection with  
53 raising or harvesting any agricultural or horticultural com-  
54 modity, including the raising, shearing, feeding, caring for,  
55 training and management of livestock, bees, poultry and  
56 fur-bearing animals and wildlife;

57 (B) In the employ of the owner or tenant or other  
58 operator of a farm, in connection with the operation, man-  
59 agement, conservation, improvement or maintenance of  
60 such farm and its tools and equipment, or in salvaging  
61 timber or clearing land of brush and other debris left by a  
62 hurricane, if the major part of such service is performed  
63 on a farm;

64 (C) In connection with the production or harvesting of  
65 any commodity defined as an agricultural commodity in  
66 section fifteen (g) of the Agricultural Marketing Act, as  
67 amended, or in connection with the ginning of cotton, or  
68 in connection with the operation or maintenance of ditch-  
69 es, canals, reservoirs or waterways, not owned or operated  
70 for profit, used exclusively for supplying and storing  
71 water for farming purposes;

72 (D) (i) In the employ of the operator of a farm in  
73 handling, planting, drying, packing, packaging, process-  
74 ing, freezing, grading, storing or delivering to storage or  
75 to market or to a carrier for transportation to market, in its  
76 unmanufactured state, any agricultural or horticultural  
77 commodity; but only if such operator produced more  
78 than one half of the commodity with respect to which such  
79 service is performed; or (ii) in the employ of a group of  
80 operators of farms (or a cooperative organization of which  
81 such operators are members) in the performance of ser-  
82 vice described in subparagraph (i) of this paragraph, but  
83 only if such operators produced more than one half of the  
84 commodity with respect to which such service is per-  
85 formed; but the provisions of subparagraphs (i) and (ii) of  
86 this paragraph are not applicable with respect to service  
87 performed in connection with commercial canning or  
88 commercial freezing or in connection with any agricultur-  
89 al or horticultural commodity after its delivery to a termi-  
90 nal market for distribution for consumption;

91 (E) On a farm operated for profit if such service is not  
92 in the course of the employer's trade or business or is  
93 domestic service in a private home of the employer. As  
94 used in this subdivision, the term "farm" includes stock,  
95 dairy, poultry, fruit, fur-bearing animals, truck farms,  
96 plantations, ranches, greenhouses, ranges and nurseries, or

97 other similar land areas or structures used primarily for  
98 the raising of any agricultural or horticultural commodi-  
99 ties;

100 (6) Domestic service in a private home except as pro-  
101 vided in subdivision (13) of the definition of "employ-  
102 ment" in this article;

103 (7) Service performed by an individual in the employ  
104 of his or her son, daughter or spouse;

105 (8) Service performed by a child under the age of  
106 eighteen years in the employ of his or her father or moth-  
107 er;

108 (9) Service as an officer or member of a crew of an  
109 American vessel, performed on or in connection with such  
110 vessel, if the operating office, from which the operations  
111 of the vessel operating on navigable waters within or with-  
112 out the United States are ordinarily and regularly super-  
113 vised, managed, directed and controlled, is without this  
114 state;

115 (10) Service performed by agents of mutual fund  
116 broker-dealers or insurance companies, exclusive of in-  
117 dustrial insurance agents, or by agents of investment com-  
118 panies, who are compensated wholly on a commission  
119 basis;

120 (11) Service performed: (A) In the employ of a  
121 church or convention or association of churches, or an  
122 organization which is operated primarily for religious  
123 purposes and which is operated, supervised, controlled or  
124 principally supported by a church or convention or asso-  
125 ciation of churches; or (B) by a duly ordained, commis-  
126 sioned or licensed minister of a church in the exercise of  
127 his or her ministry or by a member of a religious order in  
128 the exercise of duties required by such order; or (C) in a  
129 facility conducted for the purpose of carrying out a pro-  
130 gram of rehabilitation for individuals whose earning ca-  
131 pacity is impaired by age or physical or mental deficiency  
132 or injury or providing remunerative work for individuals  
133 who because of their impaired physical or mental capacity  
134 cannot be readily absorbed in the competitive labor mar-  
135 ket by an individual receiving such rehabilitation or remu-

136 nerative work; or (D) as part of an unemployment  
137 work-relief or work-training program assisted or financed,  
138 in whole or in part, by any federal agency or an agency of  
139 a state or political subdivision thereof, by an individual  
140 receiving such work relief or work training; or (E) by an  
141 inmate of a custodial or penal institution;

142 (12) Service performed in the employ of a school,  
143 college or university, if such service is performed: (A) By  
144 a student who is enrolled and is regularly attending classes  
145 at such school, college or university; or (B) by the spouse  
146 of such a student, if such spouse is advised, at the time  
147 such spouse commences to perform such service, that: (i)  
148 The employment of such spouse to perform such service  
149 is provided under a program to provide financial assis-  
150 tance to such student by such school, college or university;  
151 and (ii) such employment will not be covered by any  
152 program of unemployment insurance;

153 (13) Service performed by an individual who is en-  
154 rolled at a nonprofit or public educational institution  
155 which normally maintains a regular faculty and curricu-  
156 lum and normally has a regularly organized body of stu-  
157 dents in attendance at the place where its educational activ-  
158 ities are carried on as a student in a full-time program,  
159 taken for credit at such institution, which combines aca-  
160 demic instruction with work experience, if such service is  
161 an integral part of such program, and such institution has  
162 so certified to the employer, except that this subdivision  
163 does not apply to service performed in a program estab-  
164 lished for or on behalf of an employer or group of em-  
165 ployers;

166 (14) Service performed in the employ of a hospital, if  
167 such service is performed by a patient of the hospital, as  
168 defined in this article; and

169 (15) Service in the employ of a governmental entity  
170 referred to in subdivision (9) of the definition of "employ-  
171 ment" in this article if such service is performed by an  
172 individual in the exercise of duties: (A) As an elected  
173 official; (B) as a member of a legislative body, or a mem-  
174 ber of the judiciary, of a state or political subdivision; (C)  
175 as a member of the state national guard or air national

176 guard; (D) as an employee serving on a temporary basis in  
177 case of fire, storm, snow, earthquake, flood or similar  
178 emergency; (E) in a position which, under or pursuant to  
179 the laws of this state, is designated as: (i) A major  
180 nontenured policymaking or advisory position; or (ii) a  
181 policymaking or advisory position the performance of the  
182 duties of which ordinarily does not require more than  
183 eight hours per week.

184 Notwithstanding the foregoing exclusions from the  
185 definition of "employment", services, except agricultural  
186 labor and domestic service in a private home, are in em-  
187 ployment if with respect to such services a tax is required  
188 to be paid under any federal law imposing a tax against  
189 which credit may be taken for contributions required to be  
190 paid into a state unemployment compensation fund, or  
191 which as a condition for full tax credit against the tax  
192 imposed by the federal Unemployment Tax Act are re-  
193 quired to be covered under this chapter.

#### **§21A-1A-18. Employment office.**

1 "Employment office" means a free employment office  
2 or branch thereof, operated by this state, or any free pub-  
3 lic employment office maintained as a part of a state con-  
4 trolled system of public employment offices in any other  
5 state.

#### **§21A-1A-19. Fund.**

1 "Fund" means the unemployment compensation fund  
2 established by this chapter.

#### **§21A-1A-20. Hospital.**

1 "Hospital" means an institution which has been li-  
2 censed, certified or approved by the state department of  
3 health as a hospital.

#### **§21A-1A-21. Institution of higher education.**

1 "Institution of higher education" means an educational  
2 institution which:

3 (1) Admits as regular students only individuals having  
4 a certificate of graduation from a high school, or the rec-  
5 ognized equivalent of such a certificate;



6 (2) Is legally authorized in this state to provide a pro-  
7 gram of education beyond high school;

8 (3) Provides an educational program for which it  
9 awards a bachelor's or higher degree, or provides a pro-  
10 gram which is acceptable for full credit toward such a  
11 degree, or provides a program of postgraduate or postdoc-  
12 toral studies, or provides a program of training to prepare  
13 students for gainful employment in a recognized occupa-  
14 tion; and

15 (4) Is a public or other nonprofit institution.

16 Notwithstanding any of the foregoing provisions of  
17 this definition all colleges and universities in this state are  
18 institutions of higher education.

**§21A-1A-22. Payments.**

1 "Payments" means the money required to be paid or  
2 that may be voluntarily paid into the state unemployment  
3 compensation fund as provided in article five of this chap-  
4 ter.

**§21A-1A-23. Reorganized employer.**

1 "Reorganized employer" means: (1) An employer that  
2 alters its legal status, including changing from a sole pro-  
3 prietorship or a partnership to a corporation; or (2) an  
4 employer that otherwise changes its trade name or busi-  
5 ness identity while remaining under substantially the same  
6 ownership.

**§21A-1A-24. Separated from employment.**

1 "Separated from employment" means, for the purposes  
2 of this chapter, the total severance, whether by quitting,  
3 discharge or otherwise, of the employer-employee rela-  
4 tionship.

**§21A-1A-25. State.**

1 "State" includes, in addition to the states of the United  
2 States, Puerto Rico, District of Columbia and the Virgin  
3 Islands.

**§21A-1A-26. Successor employer.**

1 "Successor employer" means an employer that ac-  
2 quires, by sale or otherwise, the entire organization, trade  
3 or business, or substantially all the assets thereof of another  
4 employer.

**§21A-1A-27. Total and partial unemployment.**

1 "Total and partial unemployment" means:

2 (1) An individual is totally unemployed in any week  
3 in which such individual is separated from employment  
4 for an employing unit and during which he or she per-  
5 forms no services and with respect to which no wages are  
6 payable to him or her.

7 (2) An individual who has not been separated from  
8 employment is partially unemployed in any week in which  
9 due to lack of full-time work wages payable to him or her  
10 are less than his or her weekly benefit amount plus sixty  
11 dollars: *Provided*, That said individual must have earnings  
12 of at least sixty-one dollars.

**§21A-1A-28. Wages.**

1 (a) "Wages" means all remuneration for personal ser-  
2 vice, including commissions, gratuities customarily re-  
3 ceived by an individual in the course of employment from  
4 persons other than the employing unit, as long as such  
5 gratuities equal or exceed an amount of not less than  
6 twenty dollars each month and which are required to be  
7 reported to the employer by the employee, bonuses, and  
8 the cash value of all remuneration in any medium other  
9 than cash except for agricultural labor and domestic ser-  
10 vice.

11 (b) The term "wages" does not include:

12 (1) That part of the remuneration which, after remu-  
13 neration equal to eight thousand dollars is paid during a  
14 calendar year to an individual by an employer or his or  
15 her predecessor with respect to employment during any  
16 calendar year, is paid to such individual by such employer  
17 during such calendar year unless that part of the remuner-  
18 ation is subject to a tax under a federal law imposing a tax  
19 against which credit may be taken for contributions re-  
20 quired to be paid into a state unemployment fund. For

21 the purposes of this section, the term "employment" in-  
22 cludes service constituting employment under any unem-  
23 ployment compensation law of another state; or which as a  
24 condition for full tax credit against the tax imposed by the  
25 Federal Unemployment Tax Act is required to be covered  
26 under this chapter; and, except that for the purposes of  
27 sections one, ten, eleven and thirteen, article six of this  
28 chapter, all remuneration earned by an individual in em-  
29 ployment shall be credited to the individual and included  
30 in his or her computation of base period wages: *Provided,*  
31 That the remuneration paid to an individual by an em-  
32 ployer with respect to employment in another state or  
33 other states upon which contributions were required of  
34 and paid by such employer under an unemployment com-  
35 pensation law of such other state or states shall be included  
36 as a part of the remuneration equal to the amounts of  
37 eight thousand dollars herein referred to. In applying  
38 such limitation on the amount of remuneration that is  
39 taxable, an employer shall be accorded the benefit of all  
40 or any portion of such amount which may have been paid  
41 by its predecessor or predecessors: *Provided, however,*  
42 That if the definition of the term "wages" as contained in  
43 Section 3306(b) of the Internal Revenue Code of 1954, as  
44 amended, is amended to include remuneration in excess of  
45 eight thousand dollars, paid to an individual by an em-  
46 ployer under the federal Unemployment Tax Act during  
47 any calendar year, wages for the purposes of this defini-  
48 tion shall include remuneration paid in a calendar year to  
49 an individual by an employer subject to this chapter or his  
50 or her predecessor with respect to employment during any  
51 calendar year up to an amount equal to the amount of  
52 remuneration taxable under the federal Unemployment  
53 Tax Act;

54 (2) The amount of any payment made (including any  
55 amount paid by an employer for insurance or annuities, or  
56 into a fund, to provide for any such payment), to, or on  
57 behalf of, an individual in its employ or any of his or her  
58 dependents, under a plan or system established by an  
59 employer which makes provision for individuals in its  
60 employ generally (or for such individuals and their de-  
61 pendents), or for a class or classes of such individuals (or

62 for a class or classes of such individuals and their depen-  
63 dents), on account of: (A) Retirement; or (B) sickness or  
64 accident disability payments made to an employee under  
65 an approved state workers' compensation law; or (C) medi-  
66 cal or hospitalization expenses in connection with sickness  
67 or accident disability; or (D) death;

68 (3) Any payment made by an employer to an individ-  
69 ual in its employ (including any amount paid by an em-  
70 ployer for insurance or annuities, or into a fund, to pro-  
71 vide for any such payment) on account of retirement;

72 (4) Any payment made by an employer on account of  
73 sickness or accident disability, or medical or hospitaliza-  
74 tion expenses in connection with sickness or accident  
75 disability, to, or on behalf of, an individual in its employ  
76 after the expiration of six calendar months following the  
77 last calendar month in which such individual worked for  
78 such employer;

79 (5) Any payment made by an employer to, or on  
80 behalf of, an individual in its employ or his or her benefi-  
81 ciary: (A) From or to a trust described in Section 401(a)  
82 which is exempt from tax under Section 501(a) of the  
83 federal Internal Revenue Code at the time of such pay-  
84 ments unless such payment is made to such individual as  
85 an employee of the trust as remuneration for services  
86 rendered by such individual and not as a beneficiary of  
87 the trust; or (B) under or to an annuity plan which, at the  
88 time of such payment, is a plan described in Section 403  
89 (a) of the federal Internal Revenue Code;

90 (6) The payment by an employer of the tax imposed  
91 upon an employer under Section 3101 of the federal  
92 Internal Revenue Code with respect to remuneration paid  
93 to an employee for domestic service in a private home or  
94 the employer of agricultural labor;

95 (7) Remuneration paid by an employer in any medi-  
96 um other than cash to an individual in its employ for ser-  
97 vice not in the course of the employer's trade or business;

98 (8) Any payment (other than vacation or sick pay)  
99 made by an employer to an individual in its employ after  
100 the month in which he or she attains the age of sixty-five,

101 if he or she did not work for the employer in the period  
102 for which such payment is made;

103 (9) Payments, not required under any contract of hire,  
104 made to an individual with respect to his or her period of  
105 training or service in the armed forces of the United States  
106 by an employer by which such individual was formerly  
107 employed; and

108 (10) Vacation pay, severance pay or savings plans  
109 received by an individual before or after becoming totally  
110 or partially unemployed but earned prior to becoming  
111 totally or partially unemployed: *Provided*, That the term  
112 totally or partially unemployed does not include: (A)  
113 Employees who are on vacation by reason of the request  
114 of the employees or their duly authorized agent, for a  
115 vacation at a specific time, and which request by the em-  
116 ployees or their agent is acceded to by their employer; (B)  
117 employees who are on vacation by reason of the employ-  
118 er's request provided they are so informed at least ninety  
119 days prior to such vacation; or (C) employees who are on  
120 vacation by reason of the employer's request where such  
121 vacation is in addition to the regular vacation and the  
122 employer compensates such employee at a rate equal to or  
123 exceeding their regular daily rate of pay during the vaca-  
124 tion period.

125 (c) The reasonable cash value of remuneration in any  
126 medium other than cash shall be estimated and determined  
127 in accordance with rules prescribed by the commissioner,  
128 except for remuneration other than cash for services per-  
129 formed in agricultural labor and domestic service.

**§21A-1A-29. Week.**

1 "Week" means a calendar week, ending at midnight  
2 Saturday, or the equivalent thereof, as determined in ac-  
3 cordance with the rules prescribed by the commissioner.

**§21A-1A-30. Weekly benefit rate.**

1 "Weekly benefit rate" means the maximum amount of  
2 benefit an eligible individual will receive for one week of  
3 total unemployment.

**§21A-1A-31. Year.**

1 "Year" means a calendar year or the equivalent thereof,  
2 as determined by the commissioner.

**ARTICLE 2. THE COMMISSIONER OF THE BUREAU OF EM-  
PLOYMENT PROGRAMS.**

§21A-2-6. Powers and duties generally.

§21A-2-6c. Payment withholding and interception.

**§21A-2-6. Powers and duties generally.**

1 The commissioner is the executive and administrative  
2 head of the bureau and has the power and duty to:

3 (1) Exercise general supervision of and make rules  
4 for the government of the bureau;

5 (2) Prescribe uniform rules pertaining to investiga-  
6 tions, departmental hearings, and promulgate rules;

7 (3) Supervise fiscal affairs and responsibilities of the  
8 bureau;

9 (4) Prescribe the qualifications of, appoint, remove,  
10 and fix the compensation of the officers and employees of  
11 the bureau, subject to the provisions of section ten, article  
12 four of this chapter, relating to the board of review;

13 (5) Organize and administer the bureau so as to com-  
14 ply with the requirements of this chapter and chapter  
15 twenty-three of this code and to satisfy any conditions  
16 established in applicable federal legislation;

17 (6) Make reports in such form and containing such  
18 information as the United States department of labor may  
19 from time to time require, and comply with such provi-  
20 sions as the United States department of labor may from  
21 time to time find necessary to assure the correctness and  
22 verification of such reports;

23 (7) Make available to any agency of the United States  
24 charged with the administration of public works or assis-  
25 tance through public employment, upon its request, the  
26 name, address, ordinary occupation and employment  
27 status of each recipient of unemployment compensation,  
28 and a statement of the recipient's rights to further compen-  
29 sation under this chapter;

- 30 (8) Keep an accurate and complete record of all bu-  
31 reau proceedings; record and file all bonds and contracts  
32 and assume responsibility for the custody and preservation  
33 of all papers and documents of the bureau;
- 34 (9) Sign and execute in the name of the state, by "The  
35 Bureau of Employment Programs", any contract or agree-  
36 ment with the federal government, its agencies, other states,  
37 their subdivisions, or private persons;
- 38 (10) Prescribe a salary scale to govern compensation  
39 of appointees and employees of the bureau;
- 40 (11) Make the original determination of right in  
41 claims for benefits;
- 42 (12) Make recommendations and an annual report to  
43 the governor concerning the condition, operation, and  
44 functioning of the bureau;
- 45 (13) Invoke any legal or special remedy for the en-  
46 forcement of orders or the provisions of this chapter and  
47 chapter twenty-three of this code;
- 48 (14) Exercise any other power necessary to standard-  
49 ize administration, expedite bureau business, assure the  
50 establishment of fair rules and promote the efficiency of  
51 the service;
- 52 (15) Keep an accurate and complete record and pre-  
53 pare a monthly report of the number of persons employed  
54 and unemployed in the state, which report shall be made  
55 available upon request to members of the public and  
56 press;
- 57 (16) Provide at bureau expense a program of continu-  
58 ing professional, technical and specialized instruction for  
59 the personnel of the bureau;
- 60 (17) In addition to the authority granted to the com-  
61 missioner by section eighteen of this article and notwith-  
62 standing anything to the contrary elsewhere in this code,  
63 utilize any attorney regularly employed by the bureau or  
64 the office of the attorney general to represent the commis-  
65 sioner, the bureau or any of its divisions in any matter. In  
66 addition, the commissioner, with the approval of the com-  
67 pensation programs performance council, is authorized to

68 retain counsel for any purpose in the administration of  
69 this chapter or in the administration of chapter  
70 twenty-three of this code relating to the collection of any  
71 amounts due from employers to the bureau or any of its  
72 divisions. The compensation programs performance  
73 council shall solicit proposals from counsel who are inter-  
74 ested in representing the commissioner, the bureau or any  
75 of its divisions under the terms of this subdivision. There-  
76 after, the compensation programs performance council  
77 shall select such attorneys as it determines necessary to  
78 pursue the collection objectives of this subdivision.

79 (A) Payment to any such retained counsel may either  
80 be by hourly or other fixed fee, or as determined by the  
81 court or administrative law judge as provided for below.  
82 A contingency fee payable from the amount recovered by  
83 judgment or settlement for the commissioner, the bureau  
84 or any of its divisions is only permitted, to the extent not  
85 prohibited by federal law, when the assets of a defendant  
86 or respondent are depleted so that a full recovery plus  
87 attorneys' fees is not possible.

88 (B) In the event that any collections action, other than  
89 a collections action against a claimant, initiated either by  
90 retained counsel or other counsel on behalf of the com-  
91 missioner, the bureau or any of its divisions results in a  
92 judgment or settlement in favor of the commissioner, the  
93 bureau or any of its divisions, then the court or, if there  
94 was no judicial component to the action, the administrative  
95 law judge, shall determine the amount of attorneys' fees  
96 that shall be paid by the defendants or respondents to the  
97 retained or other counsel representing the commissioner,  
98 the bureau or any of its divisions. If the court is to deter-  
99 mine the amount of attorneys' fees, it shall include in its  
100 determination the amount of fee that should be paid for  
101 the representation of the commissioner, the bureau or its  
102 divisions in pursuing the administrative component, if any,  
103 of the action. The amount so paid shall be fixed by the  
104 court or the administrative law judge in an amount no less  
105 than twenty percent of its recovery. Any additional  
106 amount of attorneys' fees shall be determined by use of  
107 the following factors:



108 (i) The counsel's normal hourly rate or, if the counsel  
109 is an employee of the bureau or is an employee of the  
110 office of the attorney general, such hourly rate as the  
111 court or the administrative law judge shall determine to be  
112 customary based upon the attorney's experience and skill  
113 level;

114 (ii) The number of hours actually expended on the  
115 action;

116 (iii) The complexity of the issues involved in the ac-  
117 tion;

118 (iv) The degree of risk involved in the case with regard  
119 to the probability of success or failure;

120 (v) The overhead costs incurred by counsel with re-  
121 gard to the use of paralegals and other office staff, experts,  
122 and investigators; and

123 (vi) The public purpose served or public objective  
124 achieved by the attorney in obtaining the judgment or  
125 settlement on behalf of the commissioner, the bureau or  
126 any of its divisions.

127 (C) Notwithstanding the provisions of paragraph (B)  
128 of this subdivision, if the commissioner, bureau or any of  
129 its divisions and the defendants or respondents to any  
130 administrative or judicial action settle the action, then the  
131 parties may negotiate a separate settlement of attorneys'  
132 fees to be paid by the defendants or respondents above  
133 and beyond the amount recovered by the commissioner,  
134 the bureau or any of its divisions. In the event that such a  
135 settlement of attorneys' fees is made, it must be submitted  
136 to the court or administrative law judge for approval.

137 (D) Any attorney regularly employed by the bureau  
138 or by the office of the attorney general may not receive  
139 any remuneration for his or her services other than such  
140 attorney's regular salary. Any attorneys' fees awarded for  
141 such an employed attorney shall be payable to the com-  
142 missioner;

143 (18) With the approval of the compensation programs  
144 performance council created pursuant to section one,  
145 article three of this chapter, to promulgate rules under

146 which agencies of this state shall not grant, issue, or renew  
147 any contract, license, permit, certificate, or other authority  
148 to conduct a trade, profession, or business to or with any  
149 employing unit whose account is in default with the com-  
150 missioner with regard to the administration of this chapter  
151 and with regard to the administration of chapter  
152 twenty-three of this code. The term "agency" includes any  
153 unit of state government such as officers, agencies, divi-  
154 sions, departments, boards, commissions, authorities, or  
155 public corporations. An employing unit is not in default  
156 if it has entered into repayment agreements with the ap-  
157 propriate divisions of the bureau and remains in compli-  
158 ance with its obligations under the repayment agreements.

159 The rules shall provide that, before granting, issuing,  
160 or renewing any contract, license, permit, certificate, or  
161 other authority to conduct a trade, profession, or business  
162 to or with any employing unit, the designated agencies  
163 shall review a list or lists, provided by the appropriate  
164 divisions of the bureau, of employers that are in default.  
165 If the employing unit's name is not on the list, the agency,  
166 unless it has actual knowledge that the employing unit is  
167 in default with a division of the bureau, may grant, issue,  
168 or renew the contract, license, permit, certificate, other  
169 authority to conduct a trade, profession, or business. The  
170 list may be provided to the agency in the form of a com-  
171 puterized database or databases that the agency can access.  
172 Any objections to such refusal to issue or renew shall be  
173 reviewed under the appropriate provisions of this chapter  
174 or of chapter twenty-three of this code, or both, whichever  
175 is applicable. The rules provided for by this subdivision  
176 shall be promulgated pursuant to the provisions of subdivi-  
177 sions (b) and (c), section seven, article three of this chap-  
178 ter as if they were rules being promulgated for the purpos-  
179 es of chapter twenty-three of this code. The prohibition  
180 against granting, issuing, or renewing any contract, license,  
181 permit, certificate, or other authority under this subdivi-  
182 sion are not operative until the rules are promulgated and  
183 are in effect, except as provided in subdivision (6), section  
184 eight, article three, chapter twenty-two or otherwise by law.

185 The rules may be promulgated or implemented in  
186 phases so that specific agencies or specific types of con-

187 tracts, licenses, permits, certificates, or other authority to  
188 conduct trades, professions, or businesses will be subject  
189 to the rules beginning on different dates. The presump-  
190 tions of ownership or control contained in the division of  
191 environmental protection's surface mining reclamation  
192 regulations promulgated under the provisions of article  
193 three, chapter twenty-two of this code are not applicable or  
194 controlling in determining the identity of employing units  
195 who are in default for the purposes of this subdivision.  
196 The rules shall also provide a procedure allowing any  
197 agency or interested person, after being covered under the  
198 rules for at least one year, to petition the council to be  
199 exempt from the provisions of the rules. Rules subjecting  
200 all applicable agencies and contracts, licenses, permits,  
201 certificates, or other authority to conduct trades, profes-  
202 sions, or businesses to the requirements of this subdivision  
203 shall be promulgated no later than the first day of January,  
204 two thousand; and

205 (19) Deposit to the credit of the appropriate special  
206 revenue account or fund, notwithstanding any other provi-  
207 sion of this code and to the extent allowed by federal law,  
208 all amounts of delinquent payments or overpayments,  
209 interest and penalties thereon, and attorneys' fees and  
210 costs collected under the provisions of this chapter and  
211 chapter twenty-three of this code. The amounts collected  
212 shall not be treated by the auditor or treasurer as part of  
213 the general revenue of the state.

**§21A-2-6c. Payment withholding and interception.**

1 (a) All state, county, district and municipal officers  
2 and agents making contracts on behalf of the state of West  
3 Virginia or any political subdivision thereof shall withhold  
4 payment in the final settlement of such contracts until the  
5 receipt of a certificate from the commissioner to the effect  
6 that all payments, interest and penalties thereon accrued  
7 against the contractor under this chapter and under chap-  
8 ter twenty-three of this code have been paid or that provi-  
9 sions satisfactory to the commissioner have been made for  
10 payment. Any official violating this subsection is guilty  
11 of a misdemeanor and, on conviction thereof, shall be  
12 fined not more than one thousand dollars or county im-

13    prisoned for not more than one year in the jail, or both  
14    fined and imprisoned.

15       (b) Any agency of the state, for the limited purpose  
16    of intercepting, pursuant to section sixteen, article five of  
17    this chapter and pursuant to section five-a of article two,  
18    chapter twenty-three of this code, any payment by or  
19    through the state to an employer who is in default in pay-  
20    ment of contributions, premiums, deposits, interest, or  
21    penalties under the provisions of this chapter or of chapter  
22    twenty-three of this code, shall assist the commissioner in  
23    collecting the payment that is due. For this purpose, dis-  
24    closure of joint delinquency and default lists of employers'  
25    with respect to unemployment compensation and workers'  
26    compensation contributions, premiums, interest, deposits,  
27    or penalties is authorized. The lists may be in the form of  
28    a computerized database to be accessed by the auditor, the  
29    department of tax and revenue, the department of admin-  
30    istration, the division of highways, or other appropriate  
31    state agency or officer.

#### **ARTICLE 5. EMPLOYER COVERAGE AND RESPONSIBILITY.**

§21A-5-2. Termination of coverage.

§21A-5-3. Voluntary coverage; elective coverage by political subdivi-  
sions.

§21A-5-3b. Financing benefits paid to employees of governmental entities;  
liability of governmental entities for payments.

§21A-5-4. Required payments; failure to make required payments; criminal  
penalties.

§21A-5-10b. Transfer of business.

§21A-5-16. Collection of payments.

§21A-5-17. Interest and rate on past-due payments; penalties for late pay-  
ment and reporting.

§21A-5-20. Qualifying wages for regular benefits of newly covered workers  
during transition period on the basis of previously uncovered  
services.

#### **§21A-5-2. Termination of coverage.**

1       Except as otherwise provided in section three of this  
2    article, an employing unit, with the exception of any em-  
3    ploying unit for which service in employment is defined

4 in subdivision (10), section sixteen, article one-a of this  
5 chapter, shall cease to be an employer subject to this chap-  
6 ter only as of the first day of any calendar year and only  
7 if it files with the commissioner not later than January  
8 thirty-first of such year, a written application for termina-  
9 tion of coverage, as of such first day of January, and the  
10 commissioner finds that within the preceding calendar  
11 year the employing unit did not pay wages of one thou-  
12 sand five hundred dollars or more in any calendar quarter  
13 for employment subject to this chapter and during that  
14 calendar year no service was performed for it with respect  
15 to which it was liable for any tax against which credit may  
16 be taken for contributions required to be paid into the  
17 unemployment compensation fund of this state; and any  
18 employing unit for which service in employment is de-  
19 fined in subdivision (10), section sixteen, article one-a of  
20 this chapter, shall cease to be an employer subject to this  
21 chapter only as of the first day of any calendar year and  
22 only if it files with the commissioner not later than Janu-  
23 ary thirty-first of such year, a written application for ter-  
24 mination of coverage, as of such first day of January, and  
25 the commissioner finds that there were no twenty different  
26 days, each day being in a different calendar week within  
27 the preceding calendar year, within which such employing  
28 unit had four or more individuals in employment subject  
29 to this chapter: *Provided*, That the commissioner may for  
30 good cause extend the time for filing application for ter-  
31 mination of coverage, effective as of the first day of the  
32 next succeeding quarter after the application is approved.

**§21A-5-3. Voluntary coverage; elective coverage by political subdivisions.**

1 (a) An employing unit, not otherwise subject to the  
2 provisions of this chapter, which files with the commis-  
3 sioner its written election to become an employer subject  
4 hereto for not less than two calendar years, shall, with the  
5 written approval of such election by the commissioner,  
6 become an employer subject hereto to the same extent as  
7 all other employers, as of the date stated in such approval,  
8 and shall cease to be subject hereto as of January one of

9 any calendar year subsequent to such two calendar years,  
10 only if during January of such year it has filed with the  
11 commissioner a written notice to that effect.

12 (b) Any employing unit for which services that do not  
13 constitute employment as defined in this chapter are per-  
14 formed, may file with the commissioner a written election  
15 that all such services performed by individuals in its em-  
16 ploy in one or more distinct establishments or places of  
17 business are employment for all the purposes of this chap-  
18 ter for not less than two calendar years. Upon the written  
19 approval of such election by the commissioner, such ser-  
20 vices are employment subject to this chapter from and  
21 after the date stated in such approval. Such services shall  
22 cease to be deemed employment subject hereto as of Janu-  
23 ary first of any calendar year subsequent to such two cal-  
24 endar years, only if during January of such year such  
25 employing unit has filed with the commissioner a written  
26 notice to that effect.

27 (c) An employing unit which is or becomes an em-  
28 ployer subject to this chapter within any calendar year is  
29 subject to this chapter during the whole of such calendar  
30 year.

31 (d) Any political subdivision of this state may elect to  
32 cover under this chapter service performed by employees  
33 in all of the hospitals and institutions of higher education,  
34 as defined in sections twenty and twenty-one, article  
35 one-a of this chapter, operated by such political subdivi-  
36 sion. Any such election of coverage is to be made by  
37 filing with the commissioner a notice of such election at  
38 least thirty days prior to the effective date of such election.  
39 Any political subdivision electing coverage under this  
40 subsection shall make payments in lieu of contributions  
41 with respect to benefits attributable to such employment as  
42 provided with respect to nonprofit organizations in section  
43 three-a of this article. The provisions of section fifteen,  
44 article six of this chapter with respect to benefit rights  
45 based on service for state and nonprofit institutions of  
46 higher education are applicable also to service covered by

47 an election under this subsection. The amounts required to  
48 be paid in lieu of contributions by any political subdivi-  
49 sion under this subsection shall be billed and payment  
50 made as provided in section thirteen of this article with  
51 respect to similar payments by nonprofit organizations.  
52 An election under this subsection may be terminated, by  
53 filing with the commissioner written notice not later than  
54 thirty days preceding the last day of the calendar year in  
55 which the termination is to be effective. Such termination  
56 becomes effective as of the first day of the next ensuing  
57 calendar year with respect to services performed after that  
58 date.

**§21A-5-3b. Financing benefits paid to employees of govern-  
mental entities; liability of governmental enti-  
ties for payments.**

1 Benefits paid to employees of governmental entities  
2 referred to in paragraph (B), subdivision (9), section six-  
3 teen, article one-a of this chapter, shall be financed in the  
4 same manner and in accordance with the provisions of  
5 section three-a, article five of this chapter; except that for  
6 extended benefits reimbursement shall be one hundred  
7 percent of the benefits paid.

8 Any governmental entity which, pursuant to the provi-  
9 sions of this chapter, is, or becomes, subject to this chapter,  
10 is liable for payments and shall pay contributions in ac-  
11 cordance with the provisions of this article and of this  
12 chapter, unless it elects to make payments in lieu of contri-  
13 butions as set forth in section three-a.

14 Governmental entities electing to make payments in  
15 lieu of contributions are liable for the full amount of ex-  
16 tended benefits paid for weeks of unemployment.

**§21A-5-4. Required payments; failure to make required pay-  
ments; criminal penalties.**

1 (a) An employer is liable for payments in respect to  
2 wages paid for employment occurring during each year in  
3 which he or she is subject to this chapter.

4 (b) Any person, firm, partnership, company, corpora-  
5 tion, or association who, as an employer, is subject to the  
6 provisions of this chapter, and who knowingly and willful-  
7 ly fails to make any payment or file a report as required  
8 by the provisions of this chapter within the time periods  
9 specified by law, is guilty of an offense as follows:

10 (1) Any employer who knowingly and willfully fails  
11 to make any payment or file a report within the time peri-  
12 od specified by law for two calendar quarters, which quar-  
13 ters need not be consecutive but are within twenty-five  
14 quarters of each other, is guilty of a misdemeanor and:

15 (A) Upon a first conviction under this subdivision,  
16 shall be fined not less than five hundred dollars nor more  
17 than one thousand dollars; or

18 (B) Upon a second conviction under this subdivision,  
19 shall be fined not less than one thousand dollars nor more  
20 than five thousand dollars, imprisoned for not longer than  
21 thirty days or both fined and imprisoned.

22 (2) Any employer who, having been twice convicted  
23 of the offense specified in subdivision (1) of this subsec-  
24 tion, knowingly and willfully fails to make any payment  
25 or file a report as required by the provisions of this chap-  
26 ter within the time period specified by law for two calen-  
27 dar quarters, which quarters need not be consecutive but  
28 are within twenty-five quarters of each other, is guilty of a  
29 felony and, upon conviction thereof, shall be fined not less  
30 than five thousand dollars nor more than ten thousand  
31 dollars, or imprisoned in the penitentiary for a definite  
32 term of imprisonment which is not less than one year nor  
33 more than two years, or both fined and imprisoned.

34 (3) Any employer who knowingly and willfully fails  
35 to make any payment or file a report within the time peri-  
36 od specified by law for four calendar quarters, which  
37 quarters need not be consecutive but are within thirty six  
38 quarters of each other, is guilty of a felony and, upon  
39 conviction thereof, shall be fined not less than five thou-  
40 sand dollars nor more than twenty-five thousand dollars,  
41 or imprisoned in the penitentiary for a definite term of



42 imprisonment which is not less than one year nor more  
43 than two years, or both fined and imprisoned.

44 (c) In charging a person with a second or subsequent  
45 offense under the provisions of paragraph (B), subdivision  
46 (1), subsection (b) of this section or under subdivision (2),  
47 subsection (b) of this section, the warrant, indictment or  
48 information must set forth the date and particulars of the  
49 previous offense or offenses. No person may be convict-  
50 ed of a second or subsequent offense unless the conviction  
51 for the previous offense has become final and unless a  
52 prior offense occurred within the ten year period next  
53 preceding the second or subsequent offense. The venue  
54 for prosecution of any violation of this subsection is either  
55 the county in which the defendant's principal business  
56 operations are located or in Kanawha County where the  
57 fund is located.

**§21A-5-10b. Transfer of business.**

1 If a subject employer transfers his or her entire orga-  
2 nization, trade or business, or substantially all the assets  
3 thereof, to another employer, the commissioner shall com-  
4 bine the contribution records and the benefit experience  
5 records of the transferring and acquiring employers. The  
6 acquiring employer's contribution rate for the remainder  
7 of the calendar year shall not be affected by the transfer  
8 but such rate shall apply to the whole of his or her busi-  
9 ness, including the portion acquired by the transfer,  
10 through the following thirty-first day of December. If a  
11 subject employer makes such transfer to an employing  
12 unit which is not an employer on the date of the transfer,  
13 such subject employer's rate continues as the rate of the  
14 acquiring employing unit until the next effective rate date.  
15 If an employing unit acquires simultaneously the entire  
16 organization, trade or business, or substantially all the  
17 assets thereof, of two or more covered employers, the  
18 successor shall be assigned as a contribution rate the then  
19 current rate of the transferring employer which had, in the  
20 calendar quarter immediately preceding the date of the  
21 transfer, the higher or highest payroll. If a subject em-  
22 ployer transfers his or her entire organization, trade or

23 business, or substantially all the assets thereof, to two or  
24 more employers or employing units, apportionment of the  
25 contribution records and benefit experience records of the  
26 transferring employer shall be made between the acquir-  
27 ing units in accordance with the ratio that the total assets  
28 acquired by each transferee bears to the total assets trans-  
29 ferred by the transferring employer as of the date of the  
30 transfers. The current contribution rate of the transferring  
31 employer continues as the rate of each transferee who or  
32 which is an employing unit until the next effective rate  
33 date; the current contribution rate of each transferee who  
34 or which is an employer continues as his or her or its rate  
35 until the next effective rate date. For the succeeding cal-  
36 endar year the rate of each transferee shall be determined  
37 as provided in section ten of this article. As to any trans-  
38 fers which occur prior to the thirty-first day of July of the  
39 current calendar year such rate remains effective for the  
40 balance of that calendar year: *Provided*, That if the trans-  
41 fers occur subsequent to the thirty-first day of July such  
42 rate remains effective for the balance of that calendar year  
43 and the rate for the succeeding calendar year shall, not-  
44 withstanding anything to the contrary provided in section  
45 seven of this article, be recomputed on the basis of the  
46 combined experience of the transferring employers as of  
47 the thirty-first day of July of the year in which the trans-  
48 fers occur. In case the transferring employer is delinquent  
49 in the payment of contributions or interest thereon the  
50 acquiring employer is not entitled to any benefit of the  
51 contribution record of the transferring employer unless  
52 payment of such delinquent contributions and interest  
53 thereon is assumed by the acquiring employer. The com-  
54 missioner shall upon joint request of the transferor and  
55 transferee furnish the transferee a statement of the amount  
56 of any contribution and interest due and unpaid by the  
57 transferor. A statement so furnished is controlling for the  
58 purposes of the foregoing proviso.

59 The provisions of this section do not apply to any  
60 employer which is established through the assistance of  
61 any state economic development agency irrespective of  
62 the contribution rate of any related predecessor.

63 A reorganized employer keeps the contribution rate  
64 of the employing unit before the reorganization until the  
65 thirty-first day of December immediately following the  
66 date of reorganization and is liable for all contributions,  
67 interest and penalties owed by the employing unit. Effec-  
68 tive with the first day of January of the calendar year im-  
69 mediately following reorganization, a reorganized em-  
70 ployer will have his or her contribution rate based on all  
71 of his or her experience with the fund in accordance with  
72 section ten of this article. If the predecessor does not  
73 remain in business after the transfer of all or part of the  
74 assets, business, organization, or trade of the predecessor  
75 employer: (1) The successor employer is liable for all  
76 contributions, interest and penalties owed by the predeces-  
77 sor employer at the time of the transfer; and (2) if two or  
78 more successor employers receive the transfer, the succes-  
79 sor employers are liable in the same proportion as the  
80 assets of the unit being transferred is to the total assets of  
81 the predecessor employer.

**§21A-5-16. Collection of payments.**

1 (a) The commissioner in the name of the state may  
2 commence a civil action against an employer who, after  
3 due notice, defaults in any payment, interest or penalty  
4 thereon required by this chapter. Civil actions under this  
5 section shall be given preference on the calendar of the  
6 court over all other civil actions except petitions for judi-  
7 cial review under article seven of this chapter and cases  
8 arising under the workers' compensation law. Upon pre-  
9 vailing in any such civil action, the commissioner is enti-  
10 tled to recover attorneys' fees and costs of action from the  
11 employer.

12 (b) Any payment, interest and penalty thereon due  
13 and unpaid under this chapter is a debt due the state in  
14 favor of the commissioner. It is a personal obligation of  
15 the employer immediately due and owing and is, in addi-  
16 tion thereto, a lien that may be enforced as other judg-  
17 ment liens are enforced through the provisions of chapter  
18 thirty-eight of this code and the same shall be deemed by  
19 the circuit court to be a judgment lien for this purpose

20 against all the property of the employer: *Provided*, That  
21 no such lien is enforceable as against a purchaser (includ-  
22 ing lien creditor) of real estate or personal property for a  
23 valuable consideration, without notice, unless docketed as  
24 provided in article ten-c, chapter thirty-eight of this code.

25 (c) In addition to all other civil remedies prescribed  
26 herein the commissioner may in the name of the state,  
27 after giving appropriate notice as required by due process,  
28 distrain upon any personal property, including intangibles,  
29 of any employer delinquent for any payment, interest and  
30 penalty thereon. If the commissioner has good reason to  
31 believe that such property or a substantial portion thereof  
32 is about to be removed from the county in which it is  
33 situated, upon giving appropriate notice, either before or  
34 after the seizure, as is proper in the circumstances, he or  
35 she may likewise distrain in the name of the state before  
36 such delinquency occurs. For purposes of effecting a  
37 distraint under this subsection, the commissioner may  
38 require the services of a sheriff of any county in the state  
39 in levying distress in the county in which the sheriff is an  
40 officer and in which the employer's personal property is  
41 situated. A sheriff so collecting any payments, interest  
42 and penalties thereon is entitled to compensation as  
43 provided by law for his or her services in the levy and  
44 enforcement of executions. Upon prevailing in any dis-  
45 traint action, the commissioner is entitled to recover his or  
46 her attorney fees and costs of action from the employer.

47 (d) In case a business subject to the payments, interest  
48 and penalties thereon imposed under this chapter is oper-  
49 ated in connection with a receivership or insolvency pro-  
50 ceeding in any state court in this state, the court under  
51 whose direction such business is operated shall, by the  
52 entry of a proper order or decree in the cause, make pro-  
53 vision, so far as the assets in administration will permit, for  
54 the regular payment of such payments as the same be-  
55 come due.

56 (e) The secretary of state of this state shall withhold  
57 the issuance of any certificate of dissolution or withdrawal  
58 in the case of any corporation organized under the laws of

59 this state, or organized under the laws of another state and  
60 admitted to do business in this state, until notified by the  
61 commissioner that all payments, interest and penalties  
62 thereon against any such corporation which is an employ-  
63 er under this chapter have been paid or that provision  
64 satisfactory to the commissioner has been made for pay-  
65 ment.

66 (f) In any case where an employer defaults in pay-  
67 ments, interest or penalties thereon, for as many as two  
68 calendar quarters, which quarters need not be consecutive,  
69 and remains delinquent after due notice, the commission-  
70 er may bring action in the circuit court of Kanawha Coun-  
71 ty to enjoin that employer from continuing to carry on  
72 the business in which such liability was incurred: *Provid-*  
73 *ed*, That the commissioner may as an alternative to this  
74 action require such delinquent employer to file a bond in  
75 the form prescribed by the commissioner with satisfactory  
76 surety in an amount not less than fifty percent more than  
77 the payments, interest and penalties due.

78 (g) Amounts of payments and penalties collected  
79 under this section shall be deposited to the credit of the  
80 unemployment compensation trust fund. Amounts of  
81 interest, attorneys' fees and costs collected under this  
82 section shall be paid into the employment security special  
83 administration fund. Any such amounts are not to be  
84 treated by the auditor or treasurer as part of the general  
85 revenue of the state.

**§21A-5-17. Interest and rate on past-due payments; penalties  
for late payment and reporting.**

1 (a) Payments, including penalties, unpaid on the date  
2 on which due and payable, as prescribed by the commis-  
3 sioner, shall bear interest at the rate of one percent per  
4 month until payment plus accrued interest is received by  
5 the commissioner. Interest shall be compounded quarter-  
6 ly until payment plus accrued interest is received by the  
7 commissioner.

8 Interest collected pursuant to this section shall be paid  
9 into the employment security special administration fund.

10 (b) Each employer who fails to timely pay, in whole  
11 or in part, the contribution due with any report for any  
12 quarter commencing on and after the first day of July, one  
13 thousand nine hundred ninety-six, shall pay a late pay-  
14 ment penalty of the greater of fifty dollars or ten percent  
15 of the contribution due, but not to exceed five hundred  
16 dollars. Such late penalty is due immediately along with  
17 the payment of the outstanding amount of contribution.  
18 Penalties collected pursuant to this section shall be paid  
19 into the unemployment compensation trust fund.

**§21A-5-20. Qualifying wages for regular benefits of newly covered workers during transition period on the basis of previously uncovered services.**

1 Wages for insured work includes wages paid for pre-  
2 viously uncovered service. For the purposes of this sec-  
3 tion, the term "previously uncovered services" means ser-  
4 vices:

5 (1) Which were not employment as defined in section  
6 sixteen, article one-a of this chapter, or by election pursu-  
7 ant to section three, article five of this chapter, at any time  
8 during the one-year period ending December thirty-one,  
9 one thousand nine hundred seventy-five; and

10 (2) Which (A) Are agricultural labor, or domestic  
11 services as defined in subdivisions (12) and (13), section  
12 sixteen, article one-a of this chapter or (B) are services  
13 performed by an employee of this state or a political sub-  
14 division thereof, or a nonprofit educational institution as  
15 provided in paragraphs (B) and (C), subdivision (9),  
16 section sixteen, article one-a of this chapter; except to the  
17 extent that assistance under Title II of the Emergency Jobs  
18 and Unemployment Assistance Act of 1974 was paid on  
19 the basis of such services.

**ARTICLE 6. EMPLOYEE ELIGIBILITY; BENEFITS.**

§21A-6-1c. Voluntary withholding program.

§21A-6-10. Benefit rate — Total unemployment; annual computation and publication of rates.

§21A-6-15. Benefit payments for service with nonprofit organizations, state hospitals, institutions of higher education, educational institutions and governmental entities.

**§21A-6-1c. Voluntary withholding program.**

1 (a) An individual filing a new claim for unemploy-  
2 ment compensation shall, at the time of filing such claim,  
3 be advised by the appropriate bureau employee that:

4 (1) Unemployment compensation is subject to federal  
5 income tax;

6 (2) Requirements exist pertaining to estimated tax  
7 payments;

8 (3) The individual may elect to have federal income  
9 tax deducted and withheld from the individual's payment  
10 of unemployment compensation at the amount specified  
11 in the federal internal revenue code; and

12 (4) The individual may change a previously elected  
13 withholding status.

14 (b) Amounts deducted and withheld from unemploy-  
15 ment compensation shall remain in the unemployment  
16 fund until transferred to the federal taxing authority as  
17 payment of income tax.

18 (c) The commissioner shall follow all procedures  
19 specified by the United States department of labor and the  
20 federal internal revenue service pertaining to the deduct-  
21 ing and withholding of income tax.

22 (d) Amounts shall be deducted and withheld in accor-  
23 dance with the priorities established in rules developed by  
24 the commissioner.

25 (e) This section shall not be effective prior to pay-  
26 ments made after the thirty-first day of December, one  
27 thousand nine hundred and ninety-six.

**§21A-6-10. Benefit rate — Total unemployment; annual com-  
putation and publication of rates.**

1        Each eligible individual who is totally unemployed in  
2 any week shall be paid benefits with respect to that week at  
3 the weekly rate appearing in Column (C) in the benefit  
4 table in this section, on the line on which in Column (A)  
5 there is indicated the employee's wage class, except as  
6 otherwise provided under the term "total and partial unem-  
7 ployment" in section twenty-seven, article one-a of this  
8 chapter. The employee's wage class shall be determined  
9 by his or her base period wages as shown in Column (B)  
10 in the benefit table. The right of an employee to receive  
11 benefits shall not be prejudiced nor the amount thereof be  
12 diminished by reason of failure by an employer to pay  
13 either the wages earned by the employee or the contribu-  
14 tion due on such wages. An individual who is totally un-  
15 employed but earns in excess of sixty dollars as a result of  
16 odd-job or subsidiary work, or is paid a bonus in any  
17 benefit week shall be paid benefits for such week in ac-  
18 cordance with the provisions of this chapter pertaining to  
19 benefits for partial unemployment.

20        The maximum benefit for each wage class shall be  
21 equal to twenty-six times the weekly benefit rate.

22        The maximum benefit rate shall be sixty-six and  
23 two-thirds percent of the average weekly wage in West  
24 Virginia.

25        On the first day of July of each year, the commis-  
26 sioner shall determine the maximum weekly benefit rate upon  
27 the basis of the formula set forth above and shall establish  
28 wage classes as are required, increasing or decreasing the  
29 amount of the base period wages required for each wage  
30 class by one hundred fifty dollars, establishing the weekly  
31 benefit rate for each wage class by rounded dollar amount  
32 to be fifty-five percent of one fifty-second of the median  
33 dollar amount of wages in the base period for such wage  
34 class, and establishing the maximum benefit for each wage  
35 class as an amount equal to twenty-six times the weekly  
36 benefit rate. The maximum weekly benefit rate, when  
37 computed by the commissioner, in accordance with the  
38 foregoing provisions, shall be rounded to the next lowest  
39 multiple of one dollar.



**BENEFIT TABLE**

A		B		C	Maximum Benefit in Benefit Year for Total and/or Partial Un- employ- ment	
Wage Class		Wages in Base Period		Weekly Benefit Rate		
Under		\$2,200.00		Ineligible		
1	1	\$2,200.00	-	2,349.99	24.00	\$ 624.00
2	2	2,350.00	-	2,499.99	25.00	650.00
3	3	2,500.00	-	2,649.99	27.00	702.00
4	4	2,650.00	-	2,799.99	28.00	728.00
5	5	2,800.00	-	2,949.99	30.00	780.00
6	6	2,950.00	-	3,099.99	31.00	806.00
7	7	3,100.00	-	3,249.99	33.00	858.00
8	8	3,250.00	-	3,399.99	35.00	910.00
9	9	3,400.00	-	3,549.99	36.00	936.00
10	10	3,550.00	-	3,699.99	38.00	988.00
11	11	3,700.00	-	3,849.99	39.00	1,014.00
12	12	3,850.00	-	3,999.99	41.00	1,066.00
13	13	4,000.00	-	4,149.99	43.00	1,118.00
14	14	4,150.00	-	4,299.99	44.00	1,144.00
15	15	4,300.00	-	4,449.99	46.00	1,196.00
16	16	4,450.00	-	4,599.99	47.00	1,222.00
17	17	4,600.00	-	4,749.99	49.00	1,274.00
18	18	4,750.00	-	4,899.99	51.00	1,326.00
19	19	4,900.00	-	5,049.99	52.00	1,352.00
20	20	5,050.00	-	5,199.99	54.00	1,404.00
21	21	5,200.00	-	5,349.99	55.00	1,430.00
22	22	5,350.00	-	5,499.99	57.00	1,482.00

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23	23	5,500.00	-	5,649.99	58.00	1,508.00
24	24	5,650.00	-	5,799.99	60.00	1,560.00
25	25	5,800.00	-	5,949.99	62.00	1,612.00
26	26	5,950.00	-	6,099.99	63.00	1,638.00
27	27	6,100.00	-	6,249.99	65.00	1,690.00
28	28	6,250.00	-	6,399.99	66.00	1,716.00
29	29	6,400.00	-	6,549.99	68.00	1,768.00
30	30	6,550.00	-	6,699.99	70.00	1,820.00
31	31	6,700.00	-	6,849.99	71.00	1,846.00
32	32	6,850.00	-	6,999.99	73.00	1,898.00
33	33	7,000.00	-	7,149.99	74.00	1,924.00
34	34	7,150.00	-	7,299.99	76.00	1,976.00
35	35	7,300.00	-	7,449.99	78.00	2,028.00
36	36	7,450.00	-	7,599.99	79.00	2,054.00
37	37	7,600.00	-	7,749.99	81.00	2,106.00
38	38	7,750.00	-	7,899.99	82.00	2,132.00
39	39	7,900.00	-	8,049.99	84.00	2,184.00
40	40	8,050.00	-	8,199.99	85.00	2,210.00
41	41	8,200.00	-	8,349.99	87.00	2,262.00
42	42	8,350.00	-	8,499.99	89.00	2,314.00
43	43	8,500.00	-	8,649.99	90.00	2,340.00
44	44	8,650.00	-	8,799.99	92.00	2,392.00
45	45	8,800.00	-	8,949.99	93.00	2,418.00
46	46	8,950.00	-	9,099.99	95.00	2,470.00
47	47	9,100.00	-	9,249.99	97.00	2,522.00
48	48	9,250.00	-	9,399.99	98.00	2,548.00
49	49	9,400.00	-	9,549.99	100.00	2,600.00
50	50	9,550.00	-	9,699.99	101.00	2,626.00

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## UNEMPLOYMENT COMPENSATION

2033

51	51	9,700.00	-	9,849.99	103.00	2,678.00
52	52	9,850.00	-	9,999.99	104.00	2,704.00
53	53	10,000.00	-	10,149.99	106.00	2,756.00
54	54	10,150.00	-	10,299.99	108.00	2,808.00
55	55	10,300.00	-	10,449.99	109.00	2,834.00
56	56	10,450.00	-	10,599.99	111.00	2,886.00
57	57	10,600.00	-	10,749.99	112.00	2,912.00
58	58	10,750.00	-	10,899.99	114.00	2,964.00
59	59	10,900.00	-	11,049.99	116.00	3,016.00
60	60	11,050.00	-	11,199.99	117.00	3,042.00
61	61	11,200.00	-	11,349.99	119.00	3,094.00
62	62	11,350.00	-	11,499.99	120.00	3,120.00
63	63	11,500.00	-	11,649.99	122.00	3,172.00
64	64	11,650.00	-	11,799.99	124.00	3,224.00
65	65	11,800.00	-	11,949.99	125.00	3,250.00
66	66	11,950.00	-	12,099.99	127.00	3,302.00
67	67	12,100.00	-	12,249.99	128.00	3,328.00
68	68	12,250.00	-	12,399.99	130.00	3,380.00
69	69	12,400.00	-	12,549.99	131.00	3,406.00
70	70	12,550.00	-	12,699.99	133.00	3,458.00
71	71	12,700.00	-	12,849.99	135.00	3,510.00
72	72	12,850.00	-	12,999.99	136.00	3,536.00
73	73	13,000.00	-	13,149.99	138.00	3,588.00
74	74	13,150.00	-	13,299.99	139.00	3,614.00
75	75	13,300.00	-	13,449.99	141.00	3,666.00
76	76	13,450.00	-	13,599.99	143.00	3,718.00
77	77	13,600.00	-	13,749.99	144.00	3,744.00
78	78	13,750.00	-	13,899.99	146.00	3,796.00

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## UNEMPLOYMENT COMPENSATION

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79	79	13,900.00	-	14,049.99	147.00	3,822.00
80	80	14,050.00	-	14,199.99	149.00	3,874.00
81	81	14,200.00	-	14,349.99	150.00	3,900.00
82	82	14,350.00	-	14,499.99	152.00	3,952.00
83	83	14,500.00	-	14,649.99	154.00	4,004.00
84	84	14,650.00	-	14,799.99	155.00	4,030.00
85	85	14,800.00	-	14,949.99	157.00	4,082.00
86	86	14,950.00	-	15,099.99	158.00	4,108.00
87	87	15,100.00	-	15,249.99	160.00	4,160.00
88	88	15,250.00	-	15,399.99	162.00	4,212.00
89	89	15,400.00	-	15,549.99	163.00	4,238.00
90	90	15,550.00	-	15,699.99	165.00	4,290.00
91	91	15,700.00	-	15,849.99	166.00	4,316.00
92	92	15,850.00	-	15,999.99	168.00	4,368.00
93	93	16,000.00	-	16,149.99	170.00	4,420.00
94	94	16,150.00	-	16,299.99	171.00	4,446.00
95	95	16,300.00	-	16,449.99	173.00	4,498.00
96	96	16,450.00	-	16,599.99	174.00	4,524.00
97	97	16,600.00	-	16,749.99	176.00	4,576.00
98	98	16,750.00	-	16,899.99	177.00	4,602.00
99	99	16,900.00	-	17,049.99	179.00	4,654.00
100	100	17,050.00	-	17,199.99	181.00	4,706.00
101	101	17,200.00	-	17,349.99	182.00	4,732.00
102	102	17,350.00	-	17,499.99	184.00	4,784.00
103	103	17,500.00	-	17,649.99	185.00	4,810.00
104	104	17,650.00	-	17,799.99	187.00	4,862.00
105	105	17,800.00	-	17,949.99	189.00	4,914.00
106	106	17,950.00	-	18,099.99	190.00	4,940.00

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## UNEMPLOYMENT COMPENSATION

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107	107	18,100.00	-	18,249.99	192.00	4,992.00
108	108	18,250.00	-	18,399.99	193.00	5,018.00
109	109	18,400.00	-	18,549.99	195.00	5,070.00
110	110	18,550.00	-	18,699.99	196.00	5,096.00
111	111	18,700.00	-	18,849.99	198.00	5,148.00
112	112	18,850.00	-	18,999.99	200.00	5,200.00
113	113	19,000.00	-	19,149.99	201.00	5,226.00
114	114	19,150.00	-	19,299.99	203.00	5,278.00
115	115	19,300.00	-	19,449.99	204.00	5,304.00
116	116	19,450.00	-	19,599.99	206.00	5,356.00
117	117	19,600.00	-	19,749.99	208.00	5,408.00
118	118	19,750.00	-	19,899.99	209.00	5,434.00
119	119	19,900.00	-	20,049.99	211.00	5,486.00
120	120	20,050.00	-	20,199.99	212.00	5,512.00
121	121	20,200.00	-	20,349.99	214.00	5,564.00
122	122	20,350.00	-	20,499.99	216.00	5,616.00
123	123	20,500.00	-	20,649.99	217.00	5,642.00
124	124	20,650.00	-	20,799.99	219.00	5,694.00
125	125	20,800.00	-	20,949.99	220.00	5,720.00
126	126	20,950.00	-	21,099.99	222.00	5,772.00
127	127	21,100.00	-	21,249.99	223.00	5,798.00
128	128	21,250.00	-	21,399.99	225.00	5,850.00
129	129	21,400.00	-	21,549.99	227.00	5,902.00
130	130	21,550.00	-	21,699.99	228.00	5,928.00
131	131	21,700.00	-	21,849.99	230.00	5,980.00
132	132	21,850.00	-	21,999.99	231.00	6,006.00
133	133	22,000.00	-	22,149.99	233.00	6,058.00
134	134	22,150.00	-	22,299.99	235.00	6,110.00

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135	135	22,300.00	-	22,449.99	236.00	6,136.00
136	136	22,450.00	-	22,599.99	238.00	6,188.00
137	137	22,600.00	-	22,749.99	239.00	6,214.00
138	138	22,750.00	-	22,899.99	241.00	6,266.00
139	139	22,900.00	-	23,049.99	243.00	6,318.00
140	140	23,050.00	-	23,199.99	244.00	6,344.00
141	141	23,200.00	-	23,349.99	246.00	6,396.00
142	142	23,350.00	-	23,499.99	247.00	6,422.00
143	143	23,500.00	-	23,649.99	249.00	6,474.00
144	144	23,650.00	-	23,799.99	250.00	6,500.00
145	145	23,800.00	-	23,949.99	252.00	6,552.00
146	146	23,950.00	-	24,099.99	254.00	6,604.00
147	147	24,100.00	-	24,249.99	255.00	6,630.00
148	148	24,250.00	-	24,399.99	257.00	6,682.00
149	149	24,400.00	-	24,549.99	258.00	6,708.00
150	150	24,550.00	-	24,699.99	260.00	6,760.00
151	151	24,700.00	-	24,849.99	262.00	6,812.00
152	152	24,850.00	-	24,999.99	263.00	6,838.00
153	153	25,000.00	-	25,149.99	265.00	6,890.00
154	154	25,150.00	-	25,299.99	266.00	6,916.00
155	155	25,300.00	-	25,449.99	268.00	6,968.00
156	156	25,450.00	-	25,599.99	269.00	6,994.00
157	157	25,600.00	-	25,749.99	271.00	7,046.00
158	158	25,750.00	-	25,899.99	273.00	7,098.00
159	159	25,900.00	-	26,049.99	274.00	7,124.00
160	160	26,050.00	-	26,199.99	276.00	7,176.00
161	161	26,200.00	-	26,349.99	277.00	7,202.00
162	162	26,350.00	-	26,499.99	279.00	7,254.00

163	163	26,500.00	-	26,649.99	281.00	7,306.00
164	164	26,650.00	-	26,799.99	282.00	7,332.00
165	165	26,800.00	-	26,949.99	284.00	7,384.00
166	166	26,950.00	-	27,099.99	285.00	7,410.00
167	167	27,100.00	-	27,249.99	287.00	7,462.00
168	168	27,250.00	-	27,399.99	289.00	7,514.00
169	169	27,400.00	-	AND OVER	290.00	7,540.00

170 After he or she has established such wage classes, the  
171 commissioner shall prepare and publish a table setting  
172 forth such information.

173 Average weekly wage shall be computed by dividing  
174 the number of employees in West Virginia earning wages  
175 in covered employment into the total wages paid to em-  
176 ployees in West Virginia in covered employment, and by  
177 further dividing said result by fifty-two, and shall be deter-  
178 mined from employer wage and contribution reports for  
179 the previous calendar year which are furnished to the  
180 department on or before the first day of June following  
181 such calendar year. The average weekly wage, as deter-  
182 mined by the commissioner, shall be rounded to the next  
183 higher dollar.

184 The computation and determination of rates as afore-  
185 said shall be completed annually before the first day of  
186 July, and any such new wage class, with its corresponding  
187 wages in base period, weekly benefit rate, and maximum  
188 benefit in a benefit year established by the commissioner  
189 in the foregoing manner effective on the first day of July,  
190 shall apply only to a new claim established by a claimant  
191 on and after said first day of July, and does not apply to  
192 continued claims of a claimant based on his or her new  
193 claim established before said first day of July.

**§21A-6-15. Benefit payments for service with nonprofit orga-  
nizations, state hospitals, institutions of higher  
education, educational institutions and govern-  
mental entities.**

1 (a) Benefits based on service in employment as de-  
2 fined in subdivisions (9) and (10), section sixteen, article  
3 one-a of this chapter, are payable in the same amount, on  
4 the same terms and subject to the same conditions as com-  
5 pensation payable on the basis of other service subject to  
6 this chapter; except that benefits based on service in an  
7 instructional, research or principal administrative capacity  
8 in an institution of higher education shall not be paid to  
9 an individual for any week of unemployment which be-  
10 gins during the period between two successive academic  
11 years, or during a similar period between two regular  
12 terms, whether or not successive, or during a period of  
13 paid sabbatical leave provided for in the individual's con-  
14 tract, if the individual has a contract or contracts to per-  
15 form services, in any such capacity for any institution or  
16 institutions of higher education for both such academic  
17 years or both such terms.

18 (b) Benefits based on service in employment defined  
19 in subdivisions (9) and (10), section sixteen, article  
20 one-a of this chapter, are payable in the same amount, on  
21 the same terms and subject to the same conditions as bene-  
22 fits payable on the basis of other service subject to this  
23 chapter, except that:

24 (1) With respect to services in an instructional, research  
25 or principal administrative capacity for an educational  
26 institution, benefits shall not be paid based on such servic-  
27 es for any week commencing during the period between  
28 two successive academic years or terms, or during a similar  
29 period between two regular but not successive terms, or  
30 during a period of paid sabbatical leave provided for in  
31 the individual's contract, to any individual if such individ-  
32 ual performs such services in the first of such academic  
33 years or terms and if there is a contract or a reasonable  
34 assurance that such individual will perform services in any  
35 such capacity for any educational institution in the second  
36 of such academic years or terms or after such holiday or  
37 vacation period.

38 (2) With respect to services in any other capacity for  
39 an educational institution, benefits shall not be paid on the  
40 basis of such services to any individual for any week



41 which commences during a period between two successive  
42 academic years or terms if such individual performs such  
43 services in the first of such academic years or terms and  
44 there is a reasonable assurance that such individual will  
45 perform such services in the second of such academic  
46 years or terms, except that if compensation is denied to  
47 any individual under this subsection and such individual  
48 was not offered an opportunity to perform such services  
49 for the educational institution for the second of such aca-  
50 demic years or terms, such individual is entitled to a retro-  
51 active payment of compensation for each week for which  
52 the individual filed a timely claim for compensation and  
53 for which compensation was denied solely by reason of  
54 this clause.

55 (3) With respect to services described in subdivisions  
56 (1) and (2) of this subsection, benefits shall not be paid  
57 to any individual for any week which commences during  
58 an established and customary vacation period or holiday  
59 recess if such individual performs such services in the  
60 period immediately before such vacation period or holi-  
61 day recess, and there is a reasonable assurance that such  
62 individual will perform such services in the period imme-  
63 diately following such vacation period or holiday recess.

64 (4) Benefits payable on the basis of services in any  
65 such capacities as specified in subdivisions (1) and (2) of  
66 this subsection shall be denied as specified in subdivisions  
67 (1), (2) and (3) of this subsection to any individual who  
68 performed such services in an educational institution while  
69 in the employ of an educational service agency. For pur-  
70 poses of this subdivision the term "educational service  
71 agency" means a governmental agency or governmental  
72 entity which is established and operated exclusively for the  
73 purpose of providing such services to one or more educa-  
74 tional institutions.

#### ARTICLE 8. UNEMPLOYMENT COMPENSATION FUND.

**§21A-8-15. Administrative use of money credited to account of state in unemployment trust fund pursuant to §903 of Social Security Act.**

1 (a) Money credited to the account of this state in the  
2 unemployment trust fund by the secretary of the treasury  
3 of the United States of America pursuant to section nine  
4 hundred three of the Social Security Act, as amended, may  
5 not be requisitioned from this state's account or used  
6 except for the payment of benefits and for the payment of  
7 expenses incurred for the administration of this chapter.  
8 Such money may be requisitioned pursuant to section ten  
9 of this article for the payment of benefits. Such money  
10 may also be requisitioned and used for the payment of  
11 expenses incurred for the administration of this chapter  
12 but only pursuant to a specific appropriation by the Legis-  
13 lature and only if the expenses are incurred and the mon-  
14 ey requisitioned after the enactment of an appropriation  
15 law which specifies the purposes for which such money is  
16 appropriated and the amounts appropriated therefor.  
17 Such appropriation is subject to the following conditions:

18 (1) The period within which such money may be obli-  
19 gated is limited to a period ending not more than two  
20 years after the effective date of the appropriation law; and

21 (2) The amount which may be obligated is limited to  
22 an amount which does not exceed the amount by which  
23 (A) the aggregate of the amounts transferred to the ac-  
24 count of this state pursuant to section 903 of the social  
25 security act exceeds, (B) the aggregate of the amounts  
26 used by this state pursuant to this chapter and charged  
27 against the amounts transferred to the account of this state.

28 (b) For purposes of subdivision (2) of subsection (a),  
29 amounts obligated for administrative purposes pursuant to  
30 an appropriation shall be chargeable against transferred  
31 amounts at the exact time the obligation is entered into.  
32 The appropriation, obligation, and expenditure or other  
33 disposition of money appropriated under subdivision (2)  
34 shall be accounted for in accordance with standards estab-  
35 lished by the United States secretary of labor.

36 (c) Money requisitioned for the payment of expenses  
37 of administration pursuant to this section shall be deposit-  
38 ed in the employment security administration fund, but,  
39 until expended, shall remain a part of the unemployment  
40 compensation fund. The commissioner shall maintain a

41 separate record of the deposit, obligation, expenditure, and  
42 return of funds so deposited. If any money so deposited  
43 is, for any reason, not to be expended for the purpose for  
44 which it was appropriated, or, if it remains unexpended at  
45 the end of the period specified by the law appropriating  
46 such money, it shall be withdrawn and returned to the  
47 secretary of the treasury of the United States for credit to  
48 this state's account in the unemployment trust fund.

**ARTICLE 9. UNEMPLOYMENT COMPENSATION ADMINISTRATION FUND.**

**§21A-9-9. Reed Act appropriations.**

1 (a) There is hereby appropriated out of funds made  
2 available to this state under section 903 of the Social Secu-  
3 rity Act, as amended, the sum of four hundred thirty-four  
4 thousand five hundred seventy-four dollars and eighty  
5 four cents, or so much thereof as may be necessary, to be  
6 used, for the purpose of property improvements and/or  
7 automation enhancements of the unemployment insurance  
8 or job service activities within the bureau of employment  
9 programs.

10 (b) No part of the money hereby appropriated may be  
11 obligated after the ninth day of March, one thousand nine  
12 hundred ninety-eight.

13 (c) The amount obligated pursuant to this section shall  
14 not exceed at any time the amount by which (1) the ag-  
15 gregate of the amounts transferred to the account of this  
16 state pursuant to section 903 of the Social Security Act  
17 exceeds (2) the aggregate of the amounts obligated for  
18 administration and paid out for benefits and required by  
19 law to be charged against the amounts transferred to the  
20 account of this state.

21 (d) This section is effective on and after the ninth day  
22 of March, one thousand nine hundred ninety-six.

**ARTICLE 10. GENERAL PROVISIONS.**

**§21A-10-17. Right to amend or repeal chapter; application of certain provisions.**

1       The Legislature reserves the right to amend or repeal  
2 all or any part of this chapter and no private rights shall  
3 vest against any legislative amendment or change or re-  
4 peal. All rights, privileges, or immunities conferred by  
5 this chapter or by acts done pursuant thereto shall exist  
6 subject to the power of the Legislature to amend or repeal  
7 this chapter at any time.

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## CHAPTER 253

(S. B. 88—By Senators Wooton, Anderson, Bowman, Buckalew, Deem, Dittmar,  
Grubb, Miller, Oliverio, Ross, Schoonover, Scott, Wagner and Yoder)

[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to amend and reenact article one-a, chapter fifty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the uniform certification of questions of law act; defining certain terms; authorizing the supreme court of appeals to certify questions of law to other jurisdictions; authorizing the supreme court of appeals to answer and to reformulate questions of law certified to it from other jurisdictions; providing for certification orders and for the delivery of records to the receiving court; setting forth contents of certification order; providing for notification to the certifying court and establishing preference for consideration of certified question; establishing governing procedures; providing for a written opinion; allocating fees and costs; providing for severability and construction of act; and setting forth a short title.

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

That article one-a, chapter fifty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 1A. UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT.

§51-1A-1.     Definitions.

§51-1A-2.     Power to certify.

- §51-1A-3. Power to answer.
- §51-1A-4. Power to amend question.
- §51-1A-5. Certification order; record.
- §51-1A-6. Contents of certification order.
- §51-1A-7. Notice; preference.
- §51-1A-8. Procedures.
- §51-1A-9. Opinion.
- §51-1A-10. Cost of certification.
- §51-1A-11. Severability.
- §51-1A-12. Construction.
- §51-1A-13. Short title.

**§51-1A-1. Definitions.**

1 As used in this article:

2 (1) "State" means a state of the United States, the Dis-  
3 trict of Columbia, the Commonwealth of Puerto Rico or  
4 any territory or insular possession subject to the jurisdic-  
5 tion of the United States.

6 (2) "Tribe" means a native American tribe, band or  
7 village recognized by federal law or formally acknowl-  
8 edged by a state.

**§51-1A-2. Power to certify.**

1 The supreme court of appeals of West Virginia, on the  
2 motion of a party to a pending cause or its own motion,  
3 may certify a question of law to the highest court of an-  
4 other state or of a tribe or of Canada, a Canadian province  
5 or territory, Mexico or a Mexican state if:

6 (1) The pending cause involves a question to be decid-  
7 ed under the law of the other state or of the tribe or of  
8 Canada, the Canadian province or territory, Mexico or the  
9 Mexican state;

10 (2) The answer to the question may be determinative  
11 of an issue in the pending cause; and

12 (3) The question is one for which no answer is provid-  
13 ed by a controlling appellate decision, constitutional pro-  
14 vision or statute of the other state or of the tribe or of  
15 Canada, the Canadian province or territory, Mexico or the  
16 Mexican state.

**§51-1A-3. Power to answer.**

1       The supreme court of appeals of West Virginia may  
2 answer a question of law certified to it by any court of the  
3 United States or by the highest appellate court or the inter-  
4 mediate appellate court of another state or of a tribe or of  
5 Canada, a Canadian province or territory, Mexico or a  
6 Mexican state, if the answer may be determinative of an  
7 issue in a pending cause in the certifying court and if  
8 there is no controlling appellate decision, constitutional  
9 provision or statute of this state.

**§51-1A-4. Power to amend question.**

1       The supreme court of appeals of West Virginia may  
2 reformulate a question certified to it.

**§51-1A-5. Certification order; record.**

1       The court certifying a question shall issue a certifica-  
2 tion order and shall forward it to the designated receiving  
3 court. Before responding to a certified question, the re-  
4 ceiving court may require the certifying court to deliver its  
5 record, or any portion of the record, to the receiving  
6 court.

**§51-1A-6. Contents of certification order.**

1       (a) A certification order must contain:

2       (1) The question of law to be answered;

3       (2) The facts relevant to the question, showing fully  
4 the nature of the controversy out of which the question  
5 arose;

6       (3) A statement acknowledging that the receiving  
7 court may reformulate the question; and

8       (4) The names and addresses of counsel of record and  
9 unrepresented parties.

10       (b) If the parties cannot agree upon a statement of  
11 facts, then the certifying court shall determine the relevant  
12 facts and shall state them as a part of its certification order.

**§51-1A-7. Notice; preference.**

1       The supreme court of appeals of West Virginia, acting  
2 as the receiving court, shall notify the certifying court of

- 3 its acceptance or rejection of the question; and in accord-
- 4 dance with notions of comity and fairness, it shall respond
- 5 to an accepted certified question as soon as practicable.

**§51-1A-8. Procedures.**

- 1 After the supreme court of appeals of West Virginia
- 2 has accepted a certified question, proceedings are gov-
- 3 erned by the rules and statutes of this state governing
- 4 briefs, arguments and other appellate procedures. Proce-
- 5 dures for certification from this state to a receiving court
- 6 shall be those provided in the rules and statutes of the
- 7 receiving forum.

**§51-1A-9. Opinion.**

- 1 The supreme court of appeals of West Virginia shall
- 2 state in a written opinion the law answering the certified
- 3 question and send a copy of the opinion to the certifying
- 4 court, to counsel of record and to unrepresented parties.

**§51-1A-10. Cost of certification.**

- 1 Fees and costs are the same as in civil appeals docket-
- 2 ed before the supreme court of appeals of West Virginia
- 3 and shall be equally divided between the parties unless
- 4 otherwise ordered by the certifying court.

**§51-1A-11. Severability.**

- 1 If any provision of this article or its application to any
- 2 person, court or circumstance is held invalid, the invalidity
- 3 does not affect other provisions or applications of this
- 4 article which can be given effect without the invalid provi-
- 5 sion or application, and to this end the provisions of this
- 6 article are severable.

**§51-1A-12. Construction.**

- 1 This article shall be construed as to effectuate its gen-
- 2 eral purpose to make uniform the law of those jurisdic-
- 3 tions which enact it.

**§51-1A-13. Short title.**

- 1 This article may be cited as the "Uniform Certification
- 2 of Questions of Law Act".

## CHAPTER 254

(H. B. 4669—By Delegates Beane, Doyle, Walters and Jenkins)

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[Passed March 9, 1996; in effect July 1, 1996. Approved by the Governor.]

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AN ACT to amend and reenact section one hundred five, article one, chapter forty-six of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section five hundred twelve, article two of said chapter; to amend and reenact article five of said chapter; and to amend and reenact sections one hundred three, one hundred four, one hundred five, one hundred six, three hundred four and three hundred five, article nine of said chapter, all relating to letters of credit generally; general provisions; applicable law; sales; payment by buyer before inspection; short title; definitions; scope of provisions; formal requirements; consideration; issuance, amendment, cancellation and duration of letters of credit; rights and obligations of confirmer, nominated person and adviser; rights and obligations of issuer; forged or fraudulent document; warranties; remedies; transfer of letter of credit; transfer by operation of law; assignment of proceeds; statute of limitations; choice of law and forum; subrogation rights of issuer, applicant and nominated person; effective date; applicability; savings provisions; secured transactions; perfection of security interests in multiple state transactions; excluded transactions; definitions and index of definitions; expanded definitions; perfecting security interest in written letter of credit; when possession of collateral perfects security interest; and conforming amendments.

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

That section one hundred five, article one, chapter forty-six of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that section five hundred twelve, article two of said chapter be amended and reenacted; that article five of said chapter be amended and reenacted; that sections one hundred three, one hundred four, one hundred five, one hundred six, three hundred four and three



hundred five, article nine of said chapter be amended and reenacted, all to read as follows:

**Article**

1. **General Provisions.**
2. **Sales.**
5. **Letters of Credit.**
9. **Secured Transactions; Sales of Accounts and Chattel Paper.**

**ARTICLE 1. GENERAL PROVISIONS.**

**\*§46-1-105. Territorial application of this chapter; parties' power to choose applicable law.**

1 (1) Except as provided hereafter in this section, when a  
2 transaction bears a reasonable relation to this state and also  
3 to another state or nation the parties may agree that the  
4 law either of this state or of such other state or nation shall  
5 govern their rights and duties. Failing such agreement this  
6 chapter applies to transactions bearing an appropriate  
7 relation to this state.

8 (2) Where one of the following provisions of this  
9 chapter specifies the applicable law, that provision governs  
10 and a contrary agreement is effective only to the extent  
11 permitted by the law (including the conflict of laws rules)  
12 so specified:

13 Sections 2A-105 and 2A-106, applicability of the  
14 article on leases.

15 Section 2-402, rights of creditors against sold goods.

16 Section 4-102, applicability of the article on bank  
17 deposits and collections.

18 Section 5-116, letters of credit.

19 Section 8-106, applicability of the article on invest-  
20 ment securities.

21 Section 9-103, perfection provisions of the article on  
22 secured transactions.

**ARTICLE 2. SALES.**

**§46-2-512. Payment by buyer before inspection.**

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\*Clerk's Note: This section was also amended by H. B. 4371 (Chapter 160), which passed prior to this act.

1 (1) Where the contract requires payment before in-  
2 spection nonconformity of the goods does not excuse the  
3 buyer from so making payment unless:

4 (a) The nonconformity appears without inspection; or

5 (b) Despite tender of the required documents the cir-  
6 cumstances would justify injunction against honor under  
7 this chapter (section 5-109(b)).

8 (2) Payment pursuant to subsection (1) does not con-  
9 stitute an acceptance of goods or impair the buyer's right  
10 to inspect or any of his remedies.

#### ARTICLE 5. LETTERS OF CREDIT.

§46-5-101. Short title.

§46-5-102. Definitions.

§46-5-103. Scope.

§46-5-104. Formal requirements.

§46-5-105. Consideration.

§46-5-106. Issuance, amendment, cancellation and duration.

§46-5-107. Confirmer, nominated person and adviser.

§46-5-108. Issuer's rights and obligations.

§46-5-109. Fraud and forgery.

§46-5-110. Warranties.

§46-5-111. Remedies.

§46-5-112. Transfer of letter of credit.

§46-5-113. Transfer by operation of law.

§46-5-114. Assignment of proceeds.

§46-5-115. Statute of limitations.

§46-5-116. Choice of law and forum.

§46-5-117. Subrogation of issuer, applicant and nominated person.

§46-5-118. Effective date.

§46-5-119. Applicability.

§46-5-120. Savings clause.

#### §46-5-101. Short title.

1 This article may be cited as "Uniform Commercial  
2 Code-Letters of Credit".

#### §46-5-102. Definitions.

1 (a) In this article:

2 (1) "Adviser" means a person who, at the request of the  
3 issuer, a confirmer, or another adviser, notifies or requests  
4 another adviser to notify the beneficiary that a letter of  
5 credit has been issued, confirmed, or amended;

6 (2) "Applicant" means a person at whose request or for  
7 whose account a letter of credit is issued. The term in-  
8 cludes a person who requests an issuer to issue a letter of  
9 credit on behalf of another if the person making the re-  
10 quest undertakes an obligation to reimburse the issuer;

11 (3) "Beneficiary" means a person who under the terms  
12 of a letter of credit is entitled to have its complying pre-  
13 sentation honored. The term includes a person to whom  
14 drawing rights have been transferred under a transferable  
15 letter of credit;

16 (4) "Confirmer" means a nominated person who un-  
17 dertakes, at the request or with the consent of the issuer, to  
18 honor a presentation under a letter of credit issued by  
19 another;

20 (5) "Dishonor" of a letter of credit means failure time-  
21 ly to honor or to take an interim action, such as accep-  
22 tance of a draft, that may be required by the letter of cred-  
23 it;

24 (6) "Document" means a draft or other demand, docu-  
25 ment of title, investment security, certificate, invoice, or  
26 other record, statement, or representation of fact, law, right,  
27 or opinion (i) which is presented in a written or other  
28 medium permitted by the letter of credit or, unless prohib-  
29 ited by the letter of credit, by the standard practice re-  
30 ferred to in section 5-108(e) and (ii) which is capable of  
31 being examined for compliance with the terms and condi-  
32 tions of the letter of credit. A document may not be oral;

33 (7) "Good faith" means honesty in fact in the conduct  
34 or transaction concerned;

35 (8) "Honor" of a letter of credit means performance of  
36 the issuer's undertaking in the letter of credit to pay or  
37 deliver an item of value. Unless the letter of credit other-  
38 wise provides, "honor" occurs:

39 (i) Upon payment,

40 (ii) If the letter of credit provides for acceptance, upon  
41 acceptance of a draft and, at maturity, its payment, or

42 (iii) If the letter of credit provides for incurring a  
43 deferred obligation, upon incurring the obligation and, at  
44 maturity, its performance;

45 (9) "Issuer" means a bank or other person that issues a  
46 letter of credit, but does not include an individual who  
47 makes an engagement for personal, family, or household  
48 purposes;

49 (10) "Letter of credit" means a definite undertaking  
50 that satisfies the requirements of section-104 by an issuer  
51 to a beneficiary at the request or for the account of an  
52 applicant or, in the case of a financial institution, to itself  
53 or for its own account, to honor a documentary presenta-  
54 tion by payment or delivery of an item of value;

55 (11) "Nominated person" means a person whom the  
56 issuer (i) designates or authorizes to pay, accept, negotiate,  
57 or otherwise give value under a letter of credit and (ii)  
58 undertakes by agreement or custom and practice to reim-  
59 burse;

60 (12) "Presentation" means delivery of a document to  
61 an issuer or nominated person for honor or giving of  
62 value under a letter of credit;

63 (13) "Presenter" means a person making a presentation  
64 as or on behalf of a beneficiary or nominated person;

65 (14) "Record" means information that is inscribed on a  
66 tangible medium, or that is stored in an electronic or other  
67 medium and is retrievable in perceivable form; and

68 (15) "Successor of a beneficiary" means a person who  
69 succeeds to substantially all of the rights of a beneficiary  
70 by operation of law, including a corporation with or into  
71 which the beneficiary has been merged or consolidated, an  
72 administrator, executor, personal representative, trustee in  
73 bankruptcy, debtor in possession, liquidator, and receiver.

74 (b) Definitions in other articles applying to this article  
75 and the sections in which they appear are:

76 "Accept" or "Acceptance" Section 3-409.

77 "Value" Sections 3-303, 4-211.

78 (c) Article 1 contains certain additional general defini-  
79 tions and principles of construction and interpretation  
80 applicable throughout this article.

#### §46-5-103. Scope.

1 (a) This article applies to letters of credit and to certain  
2 rights and obligations arising out of transactions involving  
3 letters of credit.

4 (b) The statement of a rule in this article does not by  
5 itself require, imply, or negate application of the same or a  
6 different rule to a situation not provided for, or to a per-  
7 son not specified, in this article.

8 (c) With the exception of this subsection, subsections  
9 (a) and (d), sections 5-102(a)(9) and (10), 5-106(d), and  
10 5-114(d), and except to the extent prohibited in sections  
11 1-102(3) and 5-117(d), the effect of this article may be  
12 varied by agreement or by a provision stated or incorpo-  
13 rated by reference in an undertaking. A term in an agree-  
14 ment or undertaking generally excusing liability or gener-  
15 ally limiting remedies for failure to perform obligations is  
16 not sufficient to vary obligations prescribed by this article.

17 (d) Rights and obligations of an issuer to a beneficiary  
18 or a nominated person under a letter of credit are inde-  
19 pendent of the existence, performance, or nonperform-  
20 ance of a contract or arrangement out of which the letter  
21 of credit arises or which underlies it, including contracts or  
22 arrangements between the issuer and the applicant and  
23 between the applicant and the beneficiary.

#### §46-5-104. Formal requirements.

1 A letter of credit, confirmation, advice, transfer,  
2 amendment, or cancellation may be issued in any form  
3 that is a record and is authenticated (i) by a signature or  
4 (ii) in accordance with the agreement of the parties or the  
5 standard practice referred to in section 5-108(e).

#### §46-5-105. Consideration.

1 Consideration is not required to issue, amend, transfer,  
2 or cancel a letter of credit, advice, or confirmation.

**§46-5-106. Issuance, amendment, cancellation and duration.**

1 (a) A letter of credit is issued and becomes enforce-  
2 able according to its terms against the issuer when the  
3 issuer sends or otherwise transmits it to the person request-  
4 ed to advise or to the beneficiary. A letter of credit is  
5 revocable only if it so provides.

6 (b) After a letter of credit is issued, rights and obliga-  
7 tions of a beneficiary, applicant, confirmer, and issuer are  
8 not affected by an amendment or cancellation to which  
9 that person has not consented except to the extent the  
10 letter of credit provides that it is revocable or that the issu-  
11 er may amend or cancel the letter of credit without that  
12 consent.

13 (c) If there is no stated expiration date or other provi-  
14 sion that determines its duration, a letter of credit expires  
15 one year after its stated date of issuance or, if none is stat-  
16 ed, after the date on which it is issued.

17 (d) A letter of credit that states that it is perpetual ex-  
18 pires five years after its stated date of issuance, or if none  
19 is stated, after the date on which it is issued.

**§46-5-107. Confirmer, nominated person and adviser.**

1 (a) A confirmer is directly obligated on a letter of  
2 credit and has the rights and obligations of an issuer to the  
3 extent of its confirmation. The confirmer also has rights  
4 against and obligations to the issuer as if the issuer were an  
5 applicant and the confirmer had issued the letter of credit  
6 at the request and for the account of the issuer.

7 (b) A nominated person who is not a confirmer is not  
8 obligated to honor or otherwise give value for a presenta-  
9 tion.

10 (c) A person requested to advise may decline to act as  
11 an adviser. An adviser that is not a confirmer is not obli-  
12 gated to honor or give value for a presentation. An advis-  
13 er undertakes to the issuer and to the beneficiary accurate-  
14 ly to advise the terms of the letter of credit, confirmation,  
15 amendment, or advice received by that person and under-  
16 takes to the beneficiary to check the apparent authenticity  
17 of the request to advise. Even if the advice is inaccurate,

18 the letter of credit, confirmation, or amendment is en-  
19 forceable as issued.

20 (d) A person who notifies a transferee beneficiary of  
21 the terms of a letter of credit, confirmation, amendment, or  
22 advice has the rights and obligations of an adviser under  
23 subsection (c). The terms in the notice to the transferee  
24 beneficiary may differ from the terms in any notice to the  
25 transferor beneficiary to the extent permitted by the letter  
26 of credit, confirmation, amendment, or advice received by  
27 the person who so notifies.

#### §46-5-108. Issuer's rights and obligations.

1 (a) Except as otherwise provided in section 5-109, an  
2 issuer shall honor a presentation that, as determined by the  
3 standard practice referred to in subsection (e), appears on  
4 its face strictly to comply with the terms and conditions of  
5 the letter of credit. Except as otherwise provided in sec-  
6 tion 5-113 and unless otherwise agreed with the applicant,  
7 an issuer shall dishonor a presentation that does not ap-  
8 pear so to comply.

9 (b) An issuer has a reasonable time after presentation,  
10 but not beyond the end of the seventh business day of the  
11 issuer after the day of its receipt of documents:

12 (1) To honor,

13 (2) If the letter of credit provides for honor to be  
14 completed more than seven business days after presenta-  
15 tion, to accept a draft or incur a deferred obligation, or

16 (3) To give notice to the presenter of discrepancies in  
17 the presentation.

18 (c) Except as otherwise provided in subsection (d), an  
19 issuer is precluded from asserting as a basis for dishonor  
20 any discrepancy if timely notice is not given, or any dis-  
21 crepancy not stated in the notice if timely notice is given.

22 (d) Failure to give the notice specified in subsection  
23 (b) or to mention fraud, forgery, or expiration in the no-  
24 tice does not preclude the issuer from asserting as a basis  
25 for dishonor fraud or forgery as described in section

26 5-109(a) or expiration of the letter of credit before pre-  
27 sentation.

28 (e) An issuer shall observe standard practice of finan-  
29 cial institutions that regularly issue letters of credit. Deter-  
30 mination of the issuer's observance of the standard prac-  
31 tice is a matter of interpretation for the court. The court  
32 shall offer the parties a reasonable opportunity to present  
33 evidence of the standard practice.

34 (f) An issuer is not responsible for:

35 (1) The performance or nonperformance of the un-  
36 derlying contract, arrangement, or transaction;

37 (2) An act or omission of others; or

38 (3) Observance or knowledge of the usage of a partic-  
39 ular trade other than the standard practice referred to in  
40 subsection (e).

41 (g) If an undertaking constituting a letter of credit  
42 under section 5-102(a)(10) contains nondocumentary  
43 conditions, an issuer shall disregard the nondocumentary  
44 conditions and treat them as if they were not stated.

45 (h) An issuer that has dishonored a presentation shall  
46 return the documents or hold them at the disposal of, and  
47 send advice to that effect to, the presenter.

48 (i) An issuer that has honored a presentation as per-  
49 mitted or required by this article:

50 (1) Is entitled to be reimbursed by the applicant in  
51 immediately available funds not later than the date of its  
52 payment of funds;

53 (2) Takes the documents free of claims of the benefi-  
54 ciary or presenter;

55 (3) Is precluded from asserting a right of recourse on  
56 a draft under sections 3-414 and 3-415;

57 (4) Except as otherwise provided in sections 5-110  
58 and 5-117, is precluded from restitution of money paid or  
59 other value given by mistake to the extent the mistake  
60 concerns discrepancies in the documents or tender which  
61 are apparent on the face of the presentation; and



62 (5) Is discharged to the extent of its performance  
63 under the letter of credit unless the issuer honored a pre-  
64 sentation in which a required signature of a beneficiary  
65 was forged.

**§46-5-109. Fraud and forgery.**

1 (a) If a presentation is made that appears on its face  
2 strictly to comply with the terms and conditions of the  
3 letter of credit, but a required document is forged or mate-  
4 rially fraudulent, or honor of the presentation would facil-  
5 itate a material fraud by the beneficiary on the issuer or  
6 applicant:

7 (1) The issuer shall honor the presentation, if honor is  
8 demanded by (i) A nominated person who has given value  
9 in good faith and without notice of forgery or material  
10 fraud, (ii) a confirmer who has honored its confirmation  
11 in good faith, (iii) a holder in due course of a draft drawn  
12 under the letter of credit which was taken after acceptance  
13 by the issuer or nominated person, or (iv) an assignee of  
14 the issuer's or nominated person's deferred obligation that  
15 was taken for value and without notice of forgery or mate-  
16 rial fraud after the obligation was incurred by the issuer or  
17 nominated person; and

18 (2) The issuer, acting in good faith, may honor or  
19 dishonor the presentation in any other case.

20 (b) If an applicant claims that a required document is  
21 forged or materially fraudulent or that honor of the pre-  
22 sentation would facilitate a material fraud by the benefi-  
23 ciary on the issuer or applicant, a court of competent juris-  
24 diction may temporarily or permanently enjoin the issuer  
25 from honoring a presentation or grant similar relief  
26 against the issuer or other persons only if the court finds  
27 that:

28 (1) The relief is not prohibited under the law applica-  
29 ble to an accepted draft or deferred obligation incurred by  
30 the issuer;

31 (2) A beneficiary, issuer, or nominated person who  
32 may be adversely affected is adequately protected against  
33 loss that it may suffer because the relief is granted;

34 (3) All of the conditions to entitle a person to the  
35 relief under the law of this state have been met; and

36 (4) On the basis of the information submitted to the  
37 court, the applicant is more likely than not to succeed  
38 under its claim of forgery or material fraud and the per-  
39 son demanding honor does not qualify for protection  
40 under subsection (a)(1).

**§46-5-110. Warranties.**

1 (a) If its presentation is honored, the beneficiary war-  
2 rants:

3 (1) To the issuer, any other person to whom presenta-  
4 tion is made, and the applicant that there is no fraud or  
5 forgery of the kind described in section 5-109(a); and

6 (2) To the applicant that the drawing does not violate  
7 any agreement between the applicant and beneficiary or  
8 any other agreement intended by them to be augmented  
9 by the letter of credit.

10 (b) The warranties in subsection (a) are in addition to  
11 warranties arising under articles 3, 4, 7, and 8 because of  
12 the presentation or transfer of documents covered by any  
13 of those articles.

**§46-5-111. Remedies.**

1 (a) If an issuer wrongfully dishonors or repudiates its  
2 obligation to pay money under a letter of credit before  
3 presentation, the beneficiary, successor, or nominated  
4 person presenting on its own behalf may recover from the  
5 issuer the amount that is the subject of the dishonor or  
6 repudiation. If the issuer's obligation under the letter of  
7 credit is not for the payment of money, the claimant may  
8 obtain specific performance or, at the claimant's election,  
9 recover an amount equal to the value of performance  
10 from the issuer. In either case, the claimant may also  
11 recover incidental but not consequential damages. The  
12 claimant is not obligated to take action to avoid damages  
13 that might be due from the issuer under this subsection.  
14 If, although not obligated to do so, the claimant avoids  
15 damages, the claimant's recovery from the issuer must be  
16 reduced by the amount of damages avoided. The issuer

17 has the burden of proving the amount of damages avoid-  
18 ed. In the case of repudiation the claimant need not pres-  
19 ent any document.

20 (b) If an issuer wrongfully dishonors a draft or de-  
21 mand presented under a letter of credit or honors a draft  
22 or demand in breach of its obligation to the applicant, the  
23 applicant may recover damages resulting from the breach,  
24 including incidental but not consequential damages, less  
25 any amount saved as a result of the breach.

26 (c) If an adviser or nominated person other than a  
27 confirmer breaches an obligation under this article or an  
28 issuer breaches an obligation not covered in subsection (a)  
29 or (b), a person to whom the obligation is owed may re-  
30 cover damages resulting from the breach, including inci-  
31 dental but not consequential damages, less any amount  
32 saved as a result of the breach. To the extent of the con-  
33 firmation, a confirmer has the liability of an issuer speci-  
34 fied in this subsection and subsections (a) and (b).

35 (d) An issuer, nominated person, or adviser who is  
36 found liable under subsections (a), (b), or (c) shall pay  
37 interest on the amount owed thereunder from the date of  
38 wrongful dishonor or other appropriate date.

39 (e) Reasonable attorney's fees and other expenses of  
40 litigation must be awarded to the prevailing party in an  
41 action in which a remedy is sought under this article.

42 (f) Damages that would otherwise be payable by a  
43 party for breach of an obligation under this article may be  
44 liquidated by agreement or undertaking, but only in an  
45 amount or by a formula that is reasonable in light of the  
46 harm anticipated.

#### §46-5-112. Transfer of letter of credit.

1 (a) Except as otherwise provided in section 5-113,  
2 unless a letter of credit provides that it is transferable, the  
3 right of a beneficiary to draw or otherwise demand perfor-  
4 mance under a letter of credit may not be transferred.

5 (b) Even if a letter of credit provides that it is transfer-  
6 able, the issuer may refuse to recognize or carry out a  
7 transfer if:

8 (1) The transfer would violate applicable law; or

9 (2) The transferor or transferee has failed to comply  
10 with any requirement stated in the letter of credit or any  
11 other requirement relating to transfer imposed by the  
12 issuer which is within the standard practice referred to in  
13 section 5-108(e) or is otherwise reasonable under the  
14 circumstances.

**§46-5-113. Transfer by operation of law.**

1 (a) A successor of a beneficiary may consent to  
2 amendments, sign and present documents, and receive  
3 payment or other items of value in the name of the benefi-  
4 ciary without disclosing its status as a successor.

5 (b) A successor of a beneficiary may consent to  
6 amendments, sign and present documents, and receive  
7 payment or other items of value in its own name as the  
8 disclosed successor of the beneficiary. Except as other-  
9 wise provided in subsection (e), an issuer shall recognize a  
10 disclosed successor of a beneficiary as beneficiary in full  
11 substitution for its predecessor upon compliance with the  
12 requirements for recognition by the issuer of a transfer of  
13 drawing rights by operation of law under the standard  
14 practice referred to in section 5-108(e) or, in the absence  
15 of such a practice, compliance with other reasonable pro-  
16 cedures sufficient to protect the issuer.

17 (c) An issuer is not obliged to determine whether a  
18 purported successor is a successor of a beneficiary or  
19 whether the signature of a purported successor is genuine  
20 or authorized.

21 (d) Honor of a purported successor's apparently com-  
22 plying presentation under subsections (a) or (b) has the  
23 consequences specified in section 5-108(i) even if the  
24 purported successor is not the successor of a beneficiary.  
25 Documents signed in the name of the beneficiary or of a  
26 disclosed successor by a person who is neither the benefi-  
27 ciary nor the successor of the beneficiary are forged doc-  
28 uments for the purposes of section 5-109.

29 (e) An issuer whose rights of reimbursement are not  
30 covered by subsection (d) or substantially similar law and

31 any confirmer or nominated person may decline to recog-  
32 nize a presentation under subsection (b).

33 (f) A beneficiary whose name is changed after the  
34 issuance of a letter of credit has the same rights and obli-  
35 gations as a successor of a beneficiary under this section.

**§46-5-114. Assignment of proceeds.**

1 (a) In this section, "proceeds of a letter of credit"  
2 means the cash, check, accepted draft, or other item of  
3 value paid or delivered upon honor or giving of value by  
4 the issuer or any nominated person under the letter of  
5 credit. The term does not include a beneficiary's drawing  
6 rights or documents presented by the beneficiary.

7 (b) A beneficiary may assign its right to part or all of  
8 the proceeds of a letter of credit. The beneficiary may do  
9 so before presentation as a present assignment of its right  
10 to receive proceeds contingent upon its compliance with  
11 the terms and conditions of the letter of credit.

12 (c) An issuer or nominated person need not recognize  
13 an assignment of proceeds of a letter of credit until it  
14 consents to the assignment.

15 (d) An issuer or nominated person has no obligation  
16 to give or withhold its consent to an assignment of pro-  
17 ceeds of a letter of credit, but consent may not be unrea-  
18 sonably withheld if the assignee possesses and exhibits the  
19 letter of credit and presentation of the letter of credit is a  
20 condition to honor.

21 (e) Rights of a transferee beneficiary or nominated  
22 person are independent of the beneficiary's assignment of  
23 the proceeds of a letter of credit and are superior to the  
24 assignee's right to the proceeds.

25 (f) Neither the rights recognized by this section be-  
26 tween an assignee and an issuer, transferee beneficiary, or  
27 nominated person nor the issuer's or nominated person's  
28 payment of proceeds to an assignee or a third person  
29 affect the rights between the assignee and any person  
30 other than the issuer, transferee beneficiary, or nominated  
31 person. The mode of creating and perfecting a security  
32 interest in or granting an assignment of a beneficiary's

33 rights to proceeds is governed by Article 9 or other law.  
34 Against persons other than the issuer, transferee beneficia-  
35 ry, or nominated person, the rights and obligations arising  
36 upon the creation of a security interest or other assign-  
37 ment of a beneficiary's right to proceeds and its perfection  
38 are governed by Article 9 or other law.

**§46-5-115. Statute of limitations.**

1 An action to enforce a right or obligation arising un-  
2 der this article must be commenced within one year after  
3 the expiration date of the relevant letter of credit or one  
4 year after the cause of action accrues, whichever occurs  
5 later. A cause of action accrues when the breach occurs,  
6 regardless of the aggrieved party's lack of knowledge of  
7 the breach.

**§46-5-116. Choice of law and forum.**

1 (a) The liability of an issuer, nominated person, or  
2 adviser for action or omission is governed by the law of  
3 the jurisdiction chosen by an agreement in the form of a  
4 record signed or otherwise authenticated by the affected  
5 parties in the manner provided in section 5-104 or by a  
6 provision in the person's letter of credit, confirmation, or  
7 other undertaking. The jurisdiction whose law is chosen  
8 need not bear any relation to the transaction.

9 (b) Unless subsection (a) applies, the liability of an  
10 issuer, nominated person, or adviser for action or omission  
11 is governed by the law of the jurisdiction in which the  
12 person is located. The person is considered to be located  
13 at the address indicated in the person's undertaking. If  
14 more than one address is indicated, the person is consid-  
15 ered to be located at the address from which the person's  
16 undertaking was issued. For the purpose of jurisdiction,  
17 choice of law, and recognition of interbranch letters of  
18 credit, but not enforcement of a judgment, all branches of  
19 a bank are considered separate juridical entities and a  
20 bank is considered to be located at the place where its  
21 relevant branch is considered to be located under this  
22 subsection.

23 (c) Except as otherwise provided in this subsection, the  
24 liability of an issuer, nominated person, or adviser is gov-

25 erned by any rules of custom or practice, such as the uni-  
26 form customs and practice for documentary credits, to  
27 which the letter of credit, confirmation, or other undertak-  
28 ing is expressly made subject. If (i) this article would  
29 govern the liability of an issuer, nominated person, or  
30 adviser under subsection (a) or (b), (ii) the relevant under-  
31 taking incorporates rules of custom or practice, and (iii)  
32 there is conflict between this article and those rules as  
33 applied to that undertaking, those rules govern except to  
34 the extent of any conflict with the nonvariable provisions  
35 specified in section 5-103(c).

36 (d) If there is conflict between this article and articles  
37 3, 4, 4A, or 9, this article governs.

38 (e) The forum for settling disputes arising out of an  
39 undertaking within this article may be chosen in the man-  
40 ner and with the binding effect that governing law may be  
41 chosen in accordance with subsection (a).

**§46-5-117. Subrogation of issuer, applicant and nominated person.**

1 (a) An issuer that honors a beneficiary's presentation is  
2 subrogated to the rights of the beneficiary to the same  
3 extent as if the issuer were a secondary obligor of the  
4 underlying obligation owed to the beneficiary and of the  
5 applicant to the same extent as if the issuer were the sec-  
6 ondary obligor of the underlying obligation owed to the  
7 applicant.

8 (b) An applicant that reimburses an issuer is subrogat-  
9 ed to the rights of the issuer against any beneficiary, pre-  
10 senter, or nominated person to the same extent as if the  
11 applicant were the secondary obligor of the obligations  
12 owed to the issuer and has the rights of subrogation of the  
13 issuer to the rights of the beneficiary stated in subsection  
14 (a).

15 (c) A nominated person who pays or gives value  
16 against a draft or demand presented under a letter of cred-  
17 it is subrogated to the rights of:

18       (1) The issuer against the applicant to the same extent  
19 as if the nominated person were a secondary obligor of  
20 the obligation owed to the issuer by the applicant;

21       (2) The beneficiary to the same extent as if the nomi-  
22 nated person were a secondary obligor of the underlying  
23 obligation owed to the beneficiary; and

24       (3) The applicant to same extent as if the nominated  
25 person were a secondary obligor of the underlying obliga-  
26 tion owed to the applicant.

27       (d) Notwithstanding any agreement or term to the  
28 contrary, the rights of subrogation stated in subsections (a)  
29 and (b) do not arise until the issuer honors the letter of  
30 credit or otherwise pays and the rights in subsection (c) do  
31 not arise until the nominated person pays or otherwise  
32 gives value. Until then, the issuer, nominated person, and  
33 the applicant do not derive under this section present or  
34 prospective rights forming the basis of a claim, defense, or  
35 excuse.

**§46-5-118. Effective date.**

1       The reenactment of this article shall become effective  
2 on the first day of July, one thousand nine hundred  
3 ninety-six.

**§46-5-119. Applicability.**

1       This article applies to a letter of credit that is issued on  
2 or after the effective date of the reenactment of this article.  
3 This article does not apply to a transaction, event, obliga-  
4 tion, or duty arising out of or associated with a letter of  
5 credit that was issued before the first day of July, one  
6 thousand nine hundred ninety-six.

**§46-5-120. Savings clause.**

1       A transaction arising out of or associated with a letter  
2 of credit that was issued before the effective date of the  
3 reenactment of this article in the year one thousand nine  
4 hundred ninety-six and the rights, obligations, and inter-  
5 ests flowing from that transaction are governed by any  
6 statute or other law amended by the reenactment of this  
7 article as if the amendment had not occurred and may be



8 terminated, completed, consummated, or enforced under  
9 that statute or other law.

**ARTICLE 9. SECURED TRANSACTIONS; SALES OF ACCOUNTS  
AND CHATTEL PAPER.**

- §46-9-103. Perfection of security interests in multiple state transactions.  
§46-9-104. Transactions excluded from article.  
§46-9-105. Definitions and index of definitions.  
§46-9-106. Definitions: "Account"; "general intangibles".  
§46-9-304. Perfection of security interest in instruments, documents,  
proceeds of a written letter of credit, and goods covered by  
documents; perfection by permissive filing; temporary  
perfection without filing or transfer of possession.  
§46-9-305. When possession by secured party perfects security interest  
without filing.

**§46-9-103. Perfection of security interests in multiple state  
transactions.**

1 (1) *Documents, instruments, letters of credit, and ordi-*  
2 *nary goods. —*

3 (a) This subsection applies to documents, instruments,  
4 rights to proceeds of written letters of credit, and goods  
5 other than those covered by a certificate of title described  
6 in subsection (2) of this section, mobile goods described  
7 in subsection (3), and minerals described in subsection (5)  
8 of this section.

9 (b) Except as otherwise provided in this subsection,  
10 perfection and the effect of perfection or nonperfection of  
11 a security interest in collateral are governed by the law of  
12 the jurisdiction where the collateral is when the last event  
13 occurs on which is based the assertion that the security  
14 interest is perfected or unperfected.

15 (c) If the parties to a transaction creating a purchase  
16 money security interest in goods in one jurisdiction un-  
17 derstand at the time that the security interest attaches that  
18 the goods will be kept in another jurisdiction, then the law  
19 of the other jurisdiction governs the perfection and the  
20 effect of perfection or nonperfection of the security inter-  
21 est from the time it attaches until thirty days after the debt-  
22 or receives possession of the goods and thereafter if the

23 goods are taken to the other jurisdiction before the end of  
24 the thirty-day period.

25 (d) When collateral is brought into and kept in this  
26 state while subject to a security interest perfected under the  
27 law of the jurisdiction from which the collateral was re-  
28 moved, the security interest remains perfected, but if ac-  
29 tion is required by Part 3 of this article to perfect the secu-  
30 rity interest:

31 (i) If the action is not taken before the expiration of  
32 the period of perfection in the other jurisdiction or the  
33 end of four months after the collateral is brought into this  
34 state, whichever period first expires, the security interest  
35 becomes unperfected at the end of that period and is  
36 thereafter deemed to have been unperfected as against a  
37 person who became a purchaser after removal;

38 (ii) If the action is taken before the expiration of the  
39 period specified in paragraph (i) of this subdivision, the  
40 security interest continues perfected thereafter;

41 (iii) For the purpose of priority over a buyer of con-  
42 sumer goods (subsection (2) of section 9-307), the period  
43 of the effectiveness of a filing in the jurisdiction from  
44 which the collateral is removed is governed by the rules  
45 with respect to perfection in paragraphs (i) and (ii) of this  
46 subdivision.

47 (2) *Certificate of title.* —

48 (a) This subsection applies to goods covered by a  
49 certificate of title issued under a statute of this state or of  
50 another jurisdiction under the law of which indication of a  
51 security interest on the certificate is required as a condi-  
52 tion of perfection.

53 (b) Except as otherwise provided in this subsection,  
54 perfection and the effect of perfection or nonperfection of  
55 the security interest are governed by the law (including the  
56 conflict of laws rules) of the jurisdiction issuing the certi-  
57 ficate until four months after the goods are removed from  
58 that jurisdiction and thereafter until the goods are regis-  
59 tered in another jurisdiction, but in any event not beyond  
60 surrender of the certificate. After the expiration of that

61 period, the goods are not covered by the certificate of title  
62 within the meaning of this section.

63 (c) Except with respect to the rights of a buyer de-  
64 scribed in the next paragraph, a security interest, perfected  
65 in another jurisdiction otherwise than by notation on a  
66 certificate of title, in goods brought into this state and  
67 thereafter covered by a certificate of title issued by this  
68 state is subject to the rules stated in subdivision (d) subsec-  
69 tion (1) of this section.

70 (d) If goods are brought into this state while a security  
71 interest therein is perfected in any manner under the law  
72 of the jurisdiction from which the goods are removed and  
73 a certificate of title is issued by this state and the certificate  
74 does not show that the goods are subject to the security  
75 interest or that they may be subject to security interests not  
76 shown on the certificate, the security interest is subordinate  
77 to the rights of a buyer of the goods who is not in the  
78 business of selling goods of that kind to the extent that he  
79 gives value and receives delivery of the goods after issu-  
80 ance of the certificate and without knowledge of the secu-  
81 rity interest.

82 (3) *Accounts, general intangibles and mobile goods.*—

83 (a) This subsection applies to accounts (other than an  
84 account described in subsection (5) of this section on  
85 minerals) and general intangibles (other than uncerti-  
86 ficated securities) and to goods which are mobile and  
87 which are of a type normally used in more than one juris-  
88 diction, such as motor vehicles, trailers, rolling stock, air-  
89 planes, shipping containers, road building and construc-  
90 tion machinery and commercial harvesting machinery and  
91 the like, if the goods are equipment or are inventory  
92 leased or held for lease by the debtor to others, and are  
93 not covered by a certificate of title described in subsection  
94 (2) of this section.

95 (b) The law (including the conflict of laws rules) of  
96 the jurisdiction in which the debtor is located governs the  
97 perfection and the effect of perfection or nonperfection of  
98 the security interest.

99 (c) If, however, the debtor is located in a jurisdiction  
100 which is not a part of the United States, and which does

101 not provide for perfection of the security interest by filing  
102 or recording in that jurisdiction, the law of the jurisdiction  
103 in the United States in which the debtor has its major execu-  
104 tive office in the United States governs the perfection and  
105 the effect of perfection or nonperfection of the security  
106 interest through filing. In the alternative, if the debtor is  
107 located in a jurisdiction which is not a part of the United  
108 States or Canada and the collateral is accounts or general  
109 intangibles for money due or to become due, the security  
110 interest may be perfected by notification to the account  
111 debtor. As used in this paragraph, "United States" includes  
112 its territories and possessions and the Commonwealth of  
113 Puerto Rico.

114 (d) A debtor shall be deemed located at his place of  
115 business if he has one, at his chief executive office if he  
116 has more than one place of business, otherwise at his resi-  
117 dence. If, however, the debtor is a foreign air carrier un-  
118 der the federal Aviation Act of 1958, as amended, it shall  
119 be deemed located at the designated office of the agent  
120 upon whom service of process may be made on behalf of  
121 the foreign air carrier.

122 (e) A security interest perfected under the law of the  
123 jurisdiction of the location of the debtor is perfected until  
124 the expiration of four months after a change of the debt-  
125 or's location to another jurisdiction, or until perfection  
126 would have ceased by the law of the first jurisdiction,  
127 whichever period first expires. Unless perfected in the  
128 new jurisdiction before the end of that period, it becomes  
129 unperfected thereafter and is deemed to have been unper-  
130 fected as against a person who became a purchaser after  
131 the change.

132 (4) *Chattel paper.* —

133 The rules stated for goods in subsection (1) of this  
134 section apply to a possessory security interest in chattel  
135 paper. The rules stated for accounts in subsection (3) of  
136 this section apply to a nonpossessory security interest in  
137 chattel paper, but the security interest may not be perfect-  
138 ed by notification to the account debtor.

139 (5) *Minerals.* —

140 Perfection and the effect of perfection or  
141 nonperfection of a security interest which is created by a  
142 debtor who has an interest in minerals or the like (includ-  
143 ing oil and gas) before extraction and which attaches  
144 thereto as extracted, or which attaches to an account result-  
145 ing from the sale thereof at the wellhead or minehead are  
146 governed by the law (including the conflict of laws rules)  
147 of the jurisdiction wherein the wellhead or minehead is  
148 located.

149 (6) *Investment property.* —

150 (a) This subsection applies to investment property.

151 (b) Except as otherwise provided in subdivision (f) of  
152 this section, during the time that a security certificate is  
153 located in a jurisdiction, perfection of a security interest,  
154 the effect of perfection or nonperfection, and the priority  
155 of a security interest in the certificated security represent-  
156 ed thereby are governed by the local law of that jurisdic-  
157 tion.

158 (c) Except as otherwise provided in subdivision (f) of  
159 this section, perfection of a security interest, the effect of  
160 perfection or nonperfection, and the priority of a security  
161 interest in an uncertificated security are governed by the  
162 local law of the issuer's jurisdiction as specified in section  
163 8-110(d).

164 (d) Except as otherwise provided in subdivision (f) of  
165 this section, perfection of a security interest, the effect of  
166 perfection or nonperfection, and the priority of a security  
167 interest in a security entitlement or securities account are  
168 governed by the local law of the securities intermediary's  
169 jurisdiction as specified in section 8-110(e).

170 (e) Except as otherwise provided in paragraph (f),  
171 perfection of a security interest, the effect of perfection or  
172 nonperfection, and the priority of a security interest in a  
173 commodity contract or commodity account are governed  
174 by the local law of the commodity intermediary's jurisdic-  
175 tion. The following rules determine a "commodity inter-  
176 mediary's jurisdiction" for purposes of this paragraph:

177 (i) If an agreement between the commodity intermedi-  
178 ary and commodity customer specifies that it is governed

179 by the law of a particular jurisdiction, that jurisdiction is  
180 the commodity intermediary's jurisdiction.

181 (ii) If an agreement between the commodity interme-  
182 diary and commodity customer does not specify the gov-  
183 erning law as provided in paragraph (i) of this subdivi-  
184 sion, but expressly specifies that the commodity account is  
185 maintained at an office in a particular jurisdiction, that  
186 jurisdiction is the commodity intermediary's jurisdiction.

187 (iii) If an agreement between the commodity interme-  
188 diary and commodity customer does not specify a juris-  
189 diction as provided in paragraphs (i) or (ii) of this subdivi-  
190 sion, the commodity intermediary's jurisdiction is the  
191 jurisdiction in which is located the office identified in an  
192 account statement as the office serving the commodity  
193 customer's account.

194 (iv) If an agreement between the commodity interme-  
195 diary and commodity customer does not specify a juris-  
196 diction as provided in subparagraph (i) or (ii) of this sub-  
197 division and an account statement does not identify an  
198 office serving the commodity customer's account as pro-  
199 vided in paragraph (iii) of this subdivision, the commodity  
200 intermediary's jurisdiction is the jurisdiction in which is  
201 located the chief executive office of the commodity inter-  
202 mediary.

203 (f) Perfection of a security interest by filing, automatic  
204 perfection of a security interest in investment property  
205 granted by a broker or securities intermediary, and auto-  
206 matic perfection of a security interest in a commodity  
207 contract or commodity account granted by a commodity  
208 intermediary are governed by the local law of the jurisdic-  
209 tion in which the debtor is located.

**§46-9-104. Transactions excluded from article.**

1 This article does not apply:

2 (a) to a security interest subject to any statute of the  
3 United States such as the Ship Mortgage Act, 1920, to the  
4 extent that such statute governs the rights of parties to and  
5 third parties affected by transactions in particular types of  
6 property; or

- 7           (b) To a landlord's lien; or
- 8           (c) to a lien given by statute or other rule of law for  
9 services or materials except as provided in section 9-310  
10 on priority of such liens; or
- 11           (d) To a transfer of a claim for wages, salary or other  
12 compensation of an employee; or
- 13           (e) To a transfer by a government or governmental  
14 subdivision or agency; or
- 15           (f) To a sale of accounts or chattel paper as part of a  
16 sale of the business out of which they arose, or an assign-  
17 ment of accounts or chattel paper which is for the purpose  
18 of collection only, or a transfer of a right to payment  
19 under a contract to an assignee who is also to do the per-  
20 formance under the contract or a transfer of a single ac-  
21 count to an assignee in whole or partial satisfaction of a  
22 preexisting indebtedness; or
- 23           (g) To a transfer of an interest in or claim in or under  
24 any policy of insurance, except as provided with respect to  
25 proceeds (section 9-306) and priorities in proceeds (sec-  
26 tion 9-312); or
- 27           (h) To a right represented by a judgment (other than a  
28 judgment taken on a right to payment which was collater-  
29 al); or
- 30           (i) To any right of setoff; or
- 31           (j) Except to the extent that provision is made for  
32 fixtures in section 9-313, to the creation or transfer of an  
33 interest in or lien on real estate, including a lease or rents  
34 thereunder; or
- 35           (k) To a transfer in whole or in part of any claim aris-  
36 ing out of tort; or
- 37           (l) To a transfer of an interest in any deposit account  
38 (subsection (1) of section 9-105), except as provided with  
39 respect to proceeds (section 9-306) and priorities in pro-  
40 ceeds (section 9-312); or
- 41           (m) To a transfer of an interest in a letter of credit  
42 other than the rights to proceeds of written letter of credit.

**\*§46-9-105. Definitions and index of definitions.**

1 (1) In this article unless the context otherwise requires:

2 (a) "Account debtor" means the person who is obligat-  
3 ed on an account, chattel paper or general intangible;

4 (b) "Chattel paper" means a writing or writings which  
5 evidence both a monetary obligation and a security inter-  
6 est in or a lease of specific goods, but a charter or other  
7 contract involving the use or hire of a vessel is not chattel  
8 paper. When a transaction is evidenced both by such a  
9 security agreement or a lease and by an instrument or a  
10 series of instruments, the group of writings taken together  
11 constitutes chattel paper;

12 (c) "Collateral" means the property subject to a securi-  
13 ty interest, and includes accounts, and chattel paper which  
14 have been sold;

15 (d) "Debtor" means the person who owes payment or  
16 other performance of the obligation secured, whether or  
17 not he owns or has rights in the collateral, and includes the  
18 seller of accounts, or chattel paper. Where the debtor and  
19 the owner of the collateral are not the same person, the  
20 term "debtor" means the owner of the collateral in any  
21 provision of the article dealing with the collateral, the  
22 obligor in any provision dealing with the obligation, and  
23 may include both where the context so requires;

24 (e) "Deposit account" means a demand, time, savings,  
25 passbook or like account maintained with a bank, savings  
26 and loan association, credit union or like organization,  
27 other than an account evidenced by a certificate of depos-  
28 it;

29 (f) "Document" means document of title as defined in  
30 the general definitions of article 1 (section 1-201), and a  
31 receipt of the kind described in subsection (2) of section  
32 7-201;

33 (g) "Encumbrance" includes real estate mortgages and  
34 other liens on real estate and all other rights in real estate  
35 that are not ownership interests;

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\*Clerk's Note: This section was also amended by S. B. 157 (Chapter 255), which passed prior to this act.



36 (h) "Goods" includes all things which are moveable at  
37 the time the security interest attaches or which are fix-  
38 tures (section 9-313), but does not include money, docu-  
39 ments, instruments, investment property, commodity con-  
40 tracts, accounts, chattel paper, general intangibles, or min-  
41 erals or the like (including oil and gas) before extraction.  
42 "Goods" also includes standing timber which is to be cut  
43 and removed under a conveyance or contract for sale, the  
44 unborn young of animals, and growing crops;

45 (i) "Instrument" means a negotiable instrument (de-  
46 fined in section 3-104), or any other writing which evi-  
47 dences a right to the payment of money and is not itself a  
48 security agreement or lease and is of a type which is in  
49 ordinary course of business transferred by delivery with  
50 any necessary endorsement or assignment including, but  
51 not limited to, all certificated certificates of deposit. The  
52 term does not include investment property;

53 (j) "Mortgage" means a consensual interest created by a  
54 real estate mortgage, a trust deed on real estate, or the like;

55 (k) An advance is made "pursuant to commitment" if  
56 the secured party has bound himself to make it, whether or  
57 not a subsequent event of default or other event not within  
58 his control has relieved or may relieve him from his obli-  
59 gation;

60 (l) "Security agreement" means an agreement which  
61 creates or provides for a security interest;

62 (m) "Secured party" means a lender, seller or other  
63 person in whose favor there is a security interest, including  
64 a person to whom accounts or chattel paper have been  
65 sold. When the holders of obligations issued under an  
66 indenture of trust, equipment trust agreement or the like  
67 are represented by a trustee or other person, the represen-  
68 tative is the secured party;

69 (n) "Transmitting utility" means any person primarily  
70 engaged in the railroad, street railway or trolley bus busi-  
71 ness, the electric or electronics communications transmis-  
72 sion business, the transmission of goods by pipeline, or the  
73 transmission or the production and transmission of elec-

74 tricity, steam, gas or water, or the provision of sewer ser-  
75 vice.

76 (2) Other definitions applying to this article and the  
77 sections in which they appear are:

78 "Account". Section 9-106.

79 "Attach". Section 9-203.

80 "Commodity contract". Section 9-115.

81 "Commodity customer". Section 9-115.

82 "Commodity intermediary". Section 9-115.

83 "Construction mortgage". Section 9-313(1).

84 "Consumer goods". Section 9-109(1).

85 "Control". Section 9-115.

86 "Equipment". Section 9-109(2).

87 "Farm products". Section 9-109(3).

88 "Fixture". Section 9-313(1).

89 "Fixture filing". Section 9-313(1).

90 "General intangibles". Section 9-106.

91 "Inventory". Section 9-109(4).

92 "Investment property". Section 9-115.

93 "Lien creditor". Section 9-301(3).

94 "Proceeds". Section 9-306(1).

95 "Purchase money security interest". Section 9-107.

96 "United States". Section 9-103.

97 (3) The following definitions in other articles apply to  
98 this article:

99 "Broker". Section 8-102.

100 "Certificated security". Section 8-102.

101 "Check". Section 3-104.

102	"Clearing corporation".	Section 8-102.
103	"Contract for sale".	Section 2-106.
104	"Control".	Section 8-106.
105	"Delivery".	Section 8-301.
106	"Entitlement holder".	Section 8-102.
107	"Financial asset".	Section 8-102.
108	"Holder in due course".	Section 3-302.
109	"Letter of credit".	Section 5-102.
110	"Note".	Section 3-104.
111	"Proceeds of a letter of credit".	Section 5-114(a).
112	"Sale".	Section 2-106.
113	"Securities intermediary".	Section 8-102.
114	"Security".	Section 8-102.
115	"Security certificate".	Section 8-102.
116	"Security entitlement".	Section 8-102.
117	"Uncertificated security".	Section 8-102.
118	(4) In addition, article 1 contains general definitions and	
119	principles of construction and interpretation applicable	
120	throughout this article.	

**§46-9-106. Definitions: "Account"; "general intangibles".**

1 "Account" means any right to payment for goods sold  
2 or leased or for services rendered which is not evidenced  
3 by an instrument or chattel paper, whether or not it has  
4 been earned by performance. "General intangibles"  
5 means any personal property (including things in action)  
6 other than goods, accounts, chattel paper, documents,  
7 instruments, investment property, rights to proceeds of  
8 written letters of credit and money. All rights to payment  
9 earned or unearned under a charter or other contract in-  
10 volving the use or hire of a vessel and all rights incident to  
11 the charter or contract are accounts.

**§46-9-304. Perfection of security interest in instruments, documents, proceeds of a written letter of credit, and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession.**

1           (1) A security interest in chattel paper or negotiable  
2 documents may be perfected by filing. A security interest  
3 in the rights to proceeds of a written letter of credit can be  
4 perfected only by the secured party's taking possession of  
5 the letter of credit. A security interest in money or instru-  
6 ments (other than instruments which constitute part of  
7 chattel paper) can be perfected only by the secured party's  
8 taking possession, except as provided in subsections (4)  
9 and (5) of this section and subsections (2) and (3) of sec-  
10 tion 9-306 on proceeds.

11           (2) During the period that goods are in the possession  
12 of the issuer of a negotiable document therefor, a security  
13 interest in the goods is perfected by perfecting a security  
14 interest in the document, and any security interest in the  
15 goods otherwise perfected during such period is subject  
16 thereto.

17           (3) A security interest in goods in the possession of a  
18 bailee other than one who has issued a negotiable docu-  
19 ment therefor is perfected by issuance of a document in  
20 the name of the secured party or by the bailee's receipt of  
21 notification of the secured party's interest or by filing as to  
22 the goods.

23           (4) A security interest in instruments, certificated secu-  
24 rities or negotiable documents is perfected without filing  
25 or the taking of possession for a period of twenty-one  
26 days from the time it attaches to the extent that it arises for  
27 new value given under a written security agreement.

28           (5) A security interest remains perfected for a period  
29 of twenty-one days without filing where a secured party  
30 having a perfected security interest in an instrument, a  
31 certificated security, a negotiable document or goods in  
32 possession of a bailee other than one who has issued a  
33 negotiable document therefor:

34 (a) Makes available to the debtor the goods or docu-  
35 ments representing the goods for the purpose of ultimate  
36 sale or exchange or for the purpose of loading, unloading,  
37 storing, shipping, transshipping, manufacturing, process-  
38 ing or otherwise dealing with them in a manner prelimi-  
39 nary to their sale or exchange, but priority between con-  
40 flicting security interests in the goods is subject to subsec-  
41 tion (3) of section 9-312; or

42 (b) Delivers the instrument or certificated security to  
43 the debtor for the purpose of ultimate sale or exchange or  
44 of presentation, collection, renewal or registration of trans-  
45 fer.

46 (6) After the twenty-one-day period in subsections (4)  
47 and (5) of this section perfection depends upon compli-  
48 ance with applicable provisions of this article.

**§46-9-305. When possession by secured party perfects security  
interest without filing.**

1 A security interest in letters of credit and advices of  
2 credit (subsection (2) (a) of section 5-116), goods, instru-  
3 ments, (other than certificated securities), money, negotia-  
4 ble documents or chattel paper may be perfected by the  
5 secured party's taking possession of the collateral. A secu-  
6 rity interest in the right to proceeds of a written letter of  
7 credit may be perfected by the secured party's taking  
8 possession of the letter of credit. If such collateral other  
9 than goods covered by a negotiable document is held by a  
10 bailee, the secured party is deemed to have possession  
11 from the time the bailee receives notification of the se-  
12 cured party's interest. A security interest is perfected by  
13 possession from the time possession is taken without rela-  
14 tion back and continues only so long as possession is  
15 retained, unless otherwise specified in this article. The  
16 security interest may be otherwise perfected as provided in  
17 this article before or after the period of possession by the  
18 secured party.

## CHAPTER 255

(S. B. 157—By Senators Wooton, Bowman, Buckalew, Deem, Dittmar, Miller, Oliverio, Ross and Scott)

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[Passed March 7, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact section one hundred five, article nine, chapter forty-six of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to clarifying that a certificated certificate of deposit is an "instrument" for purposes of secured transactions governed by the uniform commercial code.

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

That section one hundred five, article nine, chapter forty-six of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 9. SECURED TRANSACTIONS; SALES OF ACCOUNTS AND CHATTEL PAPER.**

**\*§46-9-105. Definitions and index of definitions.**

1 (1) In this article, unless the context otherwise re-  
2 quires:

3 (a) "Account debtor" means the person who is obligat-  
4 ed on an account, chattel paper or general intangible;

5 (b) "Chattel paper" means a writing or writings which  
6 evidence both a monetary obligation and a security inter-  
7 est in or a lease of specific goods, but a charter or other  
8 contract involving the use or hire of a vessel is not chattel  
9 paper. When a transaction is evidenced both by such a  
10 security agreement or a lease and by an instrument or a  
11 series of instruments, the group of writings taken together  
12 constitutes chattel paper;

13 (c) "Collateral" means the property subject to a securi-  
14 ty interest, and includes accounts, and chattel paper which  
15 have been sold;

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\*Clerk's Note: This section was also amended by H. B. 4669 (Chapter 254), which passed subsequent to this act.

16 (d) "Debtor" means the person who owes payment or  
17 other performance of the obligation secured, whether or  
18 not he owns or has rights in the collateral, and includes the  
19 seller of accounts, or chattel paper. Where the debtor and  
20 the owner of the collateral are not the same person, the  
21 term "debtor" means the owner of the collateral in any  
22 provision of the article dealing with the collateral, the  
23 obligor in any provision dealing with the obligation, and  
24 may include both where the context so requires;

25 (e) "Deposit account" means a demand, time, savings,  
26 passbook or like account maintained with a bank, savings  
27 and loan association, credit union or like organization,  
28 other than an account evidenced by a certificate of depos-  
29 it;

30 (f) "Document" means document of title as defined in  
31 the general definitions of article 1 (section 1-201), and a  
32 receipt of the kind described in subsection (2) of section  
33 7-201;

34 (g) "Encumbrance" includes real estate mortgages and  
35 other liens on real estate and all other rights in real estate  
36 that are not ownership interests;

37 (h) "Goods" includes all things which are moveable at  
38 the time the security interest attaches or which are fixtures  
39 (section 9-313), but does not include money, documents,  
40 instruments, investment property, commodity contracts,  
41 accounts, chattel paper, general intangibles, or minerals or  
42 the like (including oil and gas) before extraction.  
43 "Goods" also includes standing timber which is to be cut  
44 and removed under a conveyance or contract for sale, the  
45 unborn young of animals, and growing crops;

46 (i) "Instrument" means a negotiable instrument (de-  
47 fined in section 3-104), or any other writing which evi-  
48 dences a right to the payment of money and is not itself a  
49 security agreement or lease and is of a type which is in  
50 ordinary course of business transferred by delivery with  
51 any necessary endorsement or assignment, including, but  
52 not limited to, all certificated certificates of deposit. The  
53 term does not include investment property;

54 (j) "Mortgage" means a consensual interest created by  
55 a real estate mortgage, a trust deed on real estate, or the  
56 like;

56 (k) An advance is made "pursuant to commitment" if  
57 the secured party has bound himself to make it, whether or  
58 not a subsequent event of default or other event not within  
59 his control has relieved or may relieve him from his obli-  
60 gation;

61 (l) "Security agreement" means an agreement which  
62 creates or provides for a security interest;

63 (m) "Secured party" means a lender, seller or other  
64 person in whose favor there is a security interest, including  
65 a person to whom accounts or chattel paper have been  
66 sold. When the holders of obligations issued under an  
67 indenture of trust, equipment trust agreement or the like  
68 are represented by a trustee or other person, the represen-  
69 tative is the secured party;

70 (n) "Transmitting utility" means any person primarily  
71 engaged in the railroad, street railway or trolley bus busi-  
72 ness, the electric or electronics communications transmis-  
73 sion business, the transmission of goods by pipeline, or the  
74 transmission or the production and transmission of elec-  
75 tricity, steam, gas or water, or the provision of sewer ser-  
76 vice.

77 (2) Other definitions applying to this article and the  
78 sections in which they appear are:

79	"Account".	Section 9-106.
80	"Attach".	Section 9-203.
81	"Commodity contract".	Section 9-115.
82	"Commodity customer".	Section 9-115.
83	"Commodity intermediary".	Section 9-115.
84	"Construction mortgage".	Section 9-313(1).
85	"Consumer goods".	Section 9-109(1).
86	"Control".	Section 9-115.
87	"Equipment".	Section 9-109(2).
88	"Farm products".	Section 9-109(3).
89	"Fixture".	Section 9-313(1).
90	"Fixture filing".	Section 9-313(1).



91	"General intangibles".	Section 9-106.
92	"Inventory".	Section 9-109(4).
93	"Investment property".	Section 9-115.
94	"Lien creditor".	Section 9-301(3).
95	"Proceeds".	Section 9-306(1).
96	"Purchase money security interest".	Section 9-107.
97	"United States".	Section 9-103.
98	(3) The following definitions in other articles apply to	
99	this article:	
100	"Broker".	Section 8-102.
101	"Certificated security".	Section 8-102.
102	"Check".	Section 3-104.
103	"Clearing corporation".	Section 8-102.
104	"Contract for sale".	Section 2-106.
105	"Control".	Section 8-106.
106	"Delivery".	Section 8-301.
107	"Entitlement holder".	Section 8-102.
108	"Financial asset".	Section 8-102.
109	"Holder in due course".	Section 3-302.
110	"Note".	Section 3-104.
111	"Sale".	Section 2-106.
112	"Securities intermediary".	Section 8-102.
113	"Security".	Section 8-102.
114	"Security certificate".	Section 8-102.
115	"Security entitlement".	Section 8-102.
116	"Uncertificated security".	Section 8-102.
117	(4) In addition, article 1 contains general definitions	
118	and principles of construction and interpretation applica-	
119	ble throughout this article.	

## CHAPTER 256

(Com. Sub. for S. B. 338—By Senators Ross, Anderson, Miller,  
Buckalew and Yoder)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to repeal article one-a, chapter thirty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said code by adding thereto a new chapter, designated chapter thirty-one-b; and to amend and reenact section ten, article six, chapter forty-seven of said code, all relating to adopting the uniform limited liability company act of 1996; general provisions; definitions; knowledge and notice of a fact; effect of operating agreement; nonwaivable provisions; applicability of supplemental principles of law and equity; requirements for name; reservation of name; registration of name; designation of office and agent for service of process; change thereof; resignation of agent for service of process; agent for service of process; nature of business and powers; organization; limited liability company as legal entity; articles of organization; amendment or restatement thereof; signing of records; requirement for filing in office of secretary of state; correction of filed record; certificate of existence or authorization; liability for false statement in filed record; filing compelled by court; annual report to be filed with secretary of state; relations of members and managers to persons dealing with limited liability company; agency of members and managers; limited liability company liable for member's or manager's actionable conduct; liability of members and managers; relations of members to each other and to limited liability company; form of contribution; member's liability for contributions; member's and manager's rights to payments and reimbursement; management of limited liability company; sharing of and right to distributions; limitations on distributions; liability for unlawful distributions; member's right to information; general standards of member's and manager's conduct; actions by members; continuation of limited liability company after expiration of specified term; transferees and creditors of member; member's distributional interest; transfer of

distributional interest; rights of transferee; rights of creditor; member's dissociation; events causing member's dissociation; member's power to dissociate; wrongful dissociation; effect of member's dissociation; member's dissociation when business not wound up; company purchase of distributional interest; court action to determine fair value of distributional interest; dissociated member's power to bind limited liability company; statement of dissociation; winding up company's business; events causing dissolution and winding up of company's business; limited liability company continues after dissolution; right to wind up limited liability company's business; member's or manager's power and liability as agent after dissolution; articles of termination; distribution of assets in winding up business; known claims against dissolved limited liability company; other claims against dissolved limited liability company; grounds for administrative dissolution by secretary of state; procedures for and effect thereof; reinstatement following administrative dissolution; appeal from denial of reinstatement; conversions and mergers; definitions; conversion of partnership or limited partnership to limited liability company; effect of conversion; entity unchanged; merger of entities; confirmation of title to real estate; articles of merger; effect of merger; article not exclusive over conversion or merger; foreign limited liability companies; law governing same; application for certificate of authority; activities not constituting transaction of business; issuance of certificate of authority; name of foreign limited liability company; revocation of certificate of authority; cancellation of authority; effect of failure to obtain certificate of authority; action by attorney general; derivative actions; right of action; proper plaintiff; requirements of pleading; award of expenses; miscellaneous provisions; uniformity of application and construction; short title; severability; effective date; transitional provisions; savings clause; professional limited liability companies; definitions; membership and authorization; name requirements; duty of professional licensing boards; professional relationship not affected; liability of company, its members, managers, agents and employees; professional liability insurance and requirements; applicability of other provisions of law; and prohibiting limited liability companies from asserting the defense of usury.

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

That article one-a, chapter thirty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that said code be further amended by adding thereto a new chapter, designated chapter thirty-one-b; and that section ten, article six, chapter forty-seven of said code be amended and reenacted, all to read as follows:.

## **Chapter**

### **31B. Uniform Limited Liability Company Act.**

#### **47. Regulation of Trade.**

## **CHAPTER 31B. UNIFORM LIMITED LIABILITY COMPANY ACT.**

### **Article**

- 1. General Provisions.**
- 2. Organization.**
- 3. Relations of Members and Managers to Persons Dealing with Limited Liability Company.**
- 4. Relations of Members to Each Other and to Limited Liability Company.**
- 5. Transferees and Creditors of Member.**
- 6. Member's Dissociation.**
- 7. Member's Dissociation When Business Not Wound Up.**
- 8. Winding Up Company's Business.**
- 9. Conversions and Merges.**
- 10. Foreign Limited Liability Companies.**
- 11. Derivative Actions.**
- 12. Miscellaneous Provisions.**
- 13. Professional Limited Liability Companies.**

### **ARTICLE 1. GENERAL PROVISIONS.**

- §31B-1-101. Definitions.
- §31B-1-102. Knowledge and notice.
- §31B-1-103. Effect of operating agreement; nonwaivable provisions.
- §31B-1-104. Supplemental principles of law.
- §31B-1-105. Name.
- §31B-1-106. Reserved name.
- §31B-1-107. Registered name.
- §31B-1-108. Designated office and agent for service of process.
- §31B-1-109. Change of designated office or agent for service of process.
- §31B-1-110. Resignation of agent for service of process.
- §31B-1-111. Service of process.

§31B-1-112. Nature of business and powers.

**§31B-1-101. Definitions.**

1 In this chapter:

2 (1) "Articles of organization" means initial, amended,  
3 and restated articles of organization and articles of merg-  
4 er. In the case of a foreign limited liability company, the  
5 term includes all records serving a similar function re-  
6 quired to be filed in the office of the secretary of state or  
7 other official having custody of company records in the  
8 state or country under whose law it is organized.

9 (2) "At-will company" means a limited liability com-  
10 pany other than a term company.

11 (3) "Business" includes every trade, occupation, pro-  
12 fession and other lawful purpose, whether or not carried  
13 on for profit.

14 (4) "Debtor in bankruptcy" means a person who is the  
15 subject of an order for relief under Title 11 of the United  
16 States Code or a comparable order under a successor stat-  
17 ute of general application or a comparable order under  
18 federal, state or foreign law governing insolvency.

19 (5) "Distribution" means a transfer of money, property  
20 or other benefit from a limited liability company to a  
21 member in the member's capacity as a member or to a  
22 transferee of the member's distributional interest.

23 (6) "Distributional interest" means all of a member's  
24 interest in distributions by the limited liability company.

25 (7) "Entity" means a person other than an individual.

26 (8) "Foreign limited liability company" means an  
27 unincorporated entity organized under laws other than the  
28 laws of this state which afford limited liability to its owners  
29 comparable to the liability under section 3-303 and is not  
30 required to obtain a certificate of authority to transact  
31 business under any law of this state other than this chapter.

32 (9) "Limited liability company" means a limited liabil-  
33 ity company organized under this chapter.

34 (10) "Manager" means a person, whether or not a  
35 member of a manager-managed company, who is vested  
36 with authority under section 3-301.

37 (11) "Manager-managed company" means a limited  
38 liability company which is so designated in its articles of  
39 organization.

40 (12) "Member-managed company" means a limited  
41 liability company other than a manager-managed compa-  
42 ny.

43 (13) "Operating agreement" means the agreement  
44 under section 1-103 concerning the relations among the  
45 members, managers and limited liability company. The  
46 term includes amendments to the agreement.

47 (14) "Person" means an individual, corporation, busi-  
48 ness trust, estate, trust, partnership, limited liability compa-  
49 ny, association, joint venture, government, governmental  
50 subdivision, agency, or instrumentality or any other legal  
51 or commercial entity.

52 (15) "Principal office" means the office, whether or  
53 not in this state, where the principal executive office of a  
54 domestic or foreign limited liability company is located.

55 (16) "Record" means information that is inscribed on a  
56 tangible medium or that is stored in an electronic or other  
57 medium and is retrievable in perceivable form.

58 (17) "Sign" means to identify a record by means of a  
59 signature, mark or other symbol, with intent to authenti-  
60 cate it.

61 (18) "State" means a state of the United States, the  
62 District of Columbia, the Commonwealth of Puerto Rico  
63 or any territory or insular possession subject to the juris-  
64 diction of the United States.

65 (19) "Term company" means a limited liability com-  
66 pany in which its members have agreed to remain mem-  
67 bers until the expiration of a term specified in the articles  
68 of organization.

69           (20) "Transfer" includes an assignment, conveyance,  
70 deed, bill of sale, lease, mortgage, security interest, encum-  
71 brance and gift.

**§31B-1-102. Knowledge and notice.**

1           (a) A person knows a fact if the person has actual  
2 knowledge of it.

3           (b) A person has notice of a fact if the person:

4           (1) Knows the fact;

5           (2) Has received a notification of the fact; or

6           (3) Has reason to know the fact exists from all of the  
7 facts known to the person at the time in question.

8           (c) A person notifies or gives a notification of a fact to  
9 another by taking steps reasonably required to inform the  
10 other person in ordinary course, whether or not the other  
11 person knows the fact.

12           (d) A person receives a notification when the notifica-  
13 tion:

14           (1) Comes to the person's attention; or

15           (2) Is duly delivered at the person's place of business  
16 or at any other place held out by the person as a place for  
17 receiving communications.

18           (e) An entity knows, has notice or receives a notifica-  
19 tion of a fact for purposes of a particular transaction when  
20 the individual conducting the transaction for the entity  
21 knows, has notice, or receives a notification of the fact, or  
22 in any event when the fact would have been brought to the  
23 individual's attention had the entity exercised reasonable  
24 diligence. An entity exercises reasonable diligence if it  
25 maintains reasonable routines for communicating signifi-  
26 cant information to the individual conducting the transac-  
27 tion for the entity and there is reasonable compliance with  
28 the routines. Reasonable diligence does not require an  
29 individual acting for the entity to communicate informa-  
30 tion unless the communication is part of the individual's  
31 regular duties or the individual has reason to know of the

32 transaction and that the transaction would be materially  
33 affected by the information.

**§31B-1-103. Effect of operating agreement; nonwaivable provisions.**

1 (a) Except as otherwise provided in subsection (b) of  
2 this section, all members of a limited liability company  
3 may enter into an operating agreement, which need not be  
4 in writing, to regulate the affairs of the company and the  
5 conduct of its business, and to govern relations among the  
6 members, managers and company. To the extent the  
7 operating agreement does not otherwise provide, this  
8 chapter governs relations among the members, managers  
9 and company.

10 (b) The operating agreement may not:

11 (1) Unreasonably restrict a right to information or  
12 access to records under section 4-408;

13 (2) Eliminate the duty of loyalty under section  
14 4-409(b) or 6-603(b)(3), but the agreement may:

15 (i) Identify specific types or categories of activities  
16 that do not violate the duty of loyalty, if not manifestly  
17 unreasonable; and

18 (ii) Specify the number or percentage of members or  
19 disinterested managers that may authorize or ratify, after  
20 full disclosure of all material facts, a specific act or trans-  
21 action that otherwise would violate the duty of loyalty;

22 (3) Unreasonably reduce the duty of care under sec-  
23 tion 4-409(c) or 6-603(b)(3);

24 (4) Eliminate the obligation of good faith and fair  
25 dealing under section 4-409(d), but the operating agree-  
26 ment may determine the standards by which the perfor-  
27 mance of the obligation is to be measured, if the standards  
28 are not manifestly unreasonable;

29 (5) Vary the right to expel a member in an event spec-  
30 ified in section 6-601(6);



31 (6) Vary the requirement to wind up the limited liability  
32 company's business in a case specified in section  
33 8-801(b)(4) or (b)(5); or

34 (7) Restrict rights of a person, other than a manager,  
35 member and transferee of a member's distributional interest,  
36 est, under this chapter.

#### **§31B-1-104. Supplemental principles of law.**

1 (a) Unless displaced by particular provisions of this  
2 chapter, the principles of law and equity supplement this  
3 chapter.

4 (b) If an obligation to pay interest arises under this  
5 chapter and the rate is not specified, the rate is that specified  
6 in section thirty-one, article six, chapter fifty-six of  
7 this code.

#### **§31B-1-105. Name.**

1 (a) The name of a limited liability company must  
2 contain "limited liability company" or "limited company"  
3 or the abbreviation "L.L.C.", "LLC", "L.C." or "LC". "Limited"  
4 may be abbreviated as "Ltd." and "company" may be  
5 abbreviated as "Co.".

6 (b) Except as authorized by subsections (c) and (d) of  
7 this section, the name of a limited liability company must  
8 be distinguishable upon the records of the secretary of  
9 state from:

10 (1) The name of any corporation, limited partnership  
11 or company incorporated, organized or authorized to  
12 transact business in this state;

13 (2) A name reserved or registered under section 1-106  
14 or 1-107;

15 (3) A fictitious name approved under section 10-1005  
16 for a foreign company authorized to transact business in  
17 this state because its real name is unavailable.

18 (c) A limited liability company may apply to the secretary  
19 of state for authorization to use a name that is not  
20 distinguishable upon the records of the secretary of state

21 from one or more of the names described in subsection  
22 (b) of this section. The secretary of state shall authorize  
23 use of the name applied for if:

24 (1) The present user, registrant or owner of a reserved  
25 name consents to the use in a record and submits an un-  
26 dertaking in form satisfactory to the secretary of state to  
27 change the name to a name that is distinguishable upon  
28 the records of the secretary of state from the name applied  
29 for; or

30 (2) The applicant delivers to the secretary of state a  
31 certified copy of the final judgment of a court of compe-  
32 tent jurisdiction establishing the applicant's right to use the  
33 name applied for in this state.

34 (d) A limited liability company may use the name,  
35 including a fictitious name, of another domestic or foreign  
36 company which is used in this state if the other company  
37 is organized or authorized to transact business in this state  
38 and the company proposing to use the name has:

39 (1) Merged with the other company;

40 (2) Been formed by reorganization with the other  
41 company; or

42 (3) Acquired substantially all of the assets, including  
43 the name, of the other company.

**§31B-1-106. Reserved name.**

1 (a) A person may reserve the exclusive use of the  
2 name of a limited liability company, including a fictitious  
3 name for a foreign company whose name is not available,  
4 by delivering an application to the secretary of state for  
5 filing. The application must set forth the name and ad-  
6 dress of the applicant and the name proposed to be re-  
7 served. If the secretary of state finds that the name ap-  
8 plied for is available, it must be reserved for the applicant's  
9 exclusive use for a nonrenewable one hundred twenty-day  
10 period.

11 (b) The owner of a name reserved for a limited liabili-  
12 ty company may transfer the reservation to another person  
13 by delivering to the secretary of state a signed notice of

14 the transfer which states the name and address of the trans-  
15 feree.

**§31B-1-107. Registered name.**

1 (a) A foreign limited liability company may register  
2 its name subject to the requirements of section 10-1005, if  
3 the name is distinguishable upon the records of the secre-  
4 tary of state from names that are not available under sec-  
5 tion 1-105(b).

6 (b) A foreign limited liability company registers its  
7 name, or its name with any addition required by section  
8 10-1005, by delivering to the secretary of state for filing  
9 an application:

10 (1) Setting forth its name, or its name with any addi-  
11 tion required by section 10-1005, the state or country and  
12 date of its organization and a brief description of the na-  
13 ture of the business in which it is engaged; and

14 (2) Accompanied by a certificate of existence, or a  
15 record of similar import, from the state or country of  
16 organization.

17 (c) A foreign limited liability company whose registra-  
18 tion is effective may renew it for successive years by deliv-  
19 ering for filing in the office of the secretary of state a  
20 renewal application complying with subsection (b) of this  
21 section between the first day of October and the thirty-first  
22 day of December of the preceding year. The renewal  
23 application renews the registration for the following calen-  
24 dar year.

25 (d) A foreign limited liability company whose regis-  
26 tration is effective may qualify as a foreign company  
27 under its name or consent in writing to the use of its name  
28 by a limited liability company later organized under this  
29 chapter or by another foreign company later authorized to  
30 transact business in this state. The registered name termi-  
31 nates when the limited liability company is organized or  
32 the foreign company qualifies or consents to the qualifica-  
33 tion of another foreign company under the registered  
34 name.

**§31B-1-108. Designated office and agent for service of process.**

1 (a) A limited liability company and a foreign limited  
2 liability company authorized to do business in this state  
3 shall designate and continuously maintain in this state:

4 (1) An office, which need not be a place of its business  
5 in this state; and

6 (2) An agent and street address of the agent for service  
7 of process on the company.

8 (b) An agent must be an individual resident of this  
9 state, a domestic corporation, another limited liability  
10 company or a foreign corporation or foreign company  
11 authorized to do business in this state.

12 (c) Every foreign limited liability company and every  
13 domestic limited liability company whose principal place  
14 of business is located outside the state shall pay an annual  
15 fee of ten dollars for the services of the secretary of state  
16 as attorney-in-fact for such limited liability company,  
17 which fee shall be due and payable at the same time that  
18 the annual report required under section two hundred  
19 eleven, article two of this chapter is due, and such fees  
20 shall be used to offset the costs of the secretary of state for  
21 his or her services as attorney-in-fact.

**§31B-1-109. Change of designated office or agent for service of process.**

1 A limited liability company may change its designated  
2 office or agent for service of process by delivering to the  
3 secretary of state for filing a statement of change which  
4 sets forth:

5 (1) The name of the company;

6 (2) The street address of its current designated office;

7 (3) If the current designated office is to be changed,  
8 the street address of the new designated office;

9 (4) The name and address of its current agent for  
10 service of process; and

11 (5) If the current agent for service of process or street  
12 address of that agent is to be changed, the new address or  
13 the name and street address of the new agent for service of  
14 process.

**§31B-1-110. Resignation of agent for service of process.**

1 (a) An agent for service of process of a limited liability  
2 ty company may resign by delivering to the secretary of  
3 state for filing a record of the statement of resignation.

4 (b) After filing a statement of resignation, the secre-  
5 tary of state shall mail a copy to the designated office and  
6 another copy to the limited liability company at its princi-  
7 pal office.

8 (c) An agency is terminated on the thirty-first day  
9 after the statement is filed in the office of the secretary of  
10 state.

**§31B-1-111. Service of process.**

1 (a) An agent for service of process appointed by a  
2 limited liability company or a foreign limited liability  
3 company is an agent of the company for service of any  
4 process, notice or demand required or permitted by law to  
5 be served upon the company.

6 (b) If a limited liability company or foreign limited  
7 liability company fails to appoint or maintain an agent for  
8 service of process in this state or the agent for service of  
9 process cannot with reasonable diligence be found at the  
10 agent's address, the secretary of state is an agent of the  
11 company upon whom process, notice or demand may be  
12 served.

13 (c) Service of any process, notice or demand on the  
14 secretary of state may be made by delivering to and leav-  
15 ing with the secretary of state, the assistant secretary of  
16 state or clerk having charge of the limited liability compa-  
17 ny department of the secretary of state, the original pro-  
18 cess, notice or demand and two copies thereof for each  
19 defendant, along with a fee of ten dollars. No process,  
20 notice or demand may be served on or accepted by the  
21 secretary of state less than ten days before the return day

22 thereof. If the process, notice or demand is served on the  
23 secretary of state, the secretary of state shall forward one  
24 of the copies by registered or certified mail, return receipt  
25 requested, to the company at its designated office and  
26 shall file in his or her office a copy of such process, notice  
27 or demand, with a note thereon endorsed of the time of  
28 service, or acceptance, as the case may be. Such service or  
29 acceptance of such process, notice or demand is sufficient  
30 if such return receipt is signed by an agent or employee of  
31 such company, or the registered or certified mail so sent  
32 by the secretary of state is refused by the addressee and  
33 the registered or certified mail is returned to the secretary  
34 of state, showing thereon the stamp of the United States  
35 postal service that delivery thereof has been refused, and  
36 such return receipt or registered or certified mail is ap-  
37 pended to the original process, notice or demand and filed  
38 therewith in the clerk's office of the court from which such  
39 process, notice or demand was issued.

40 (d) The secretary of state shall keep a record of all  
41 processes, notices and demands served pursuant to this  
42 section and record the time of and the action taken re-  
43 garding the service.

44 (e) This section does not affect the right to serve pro-  
45 cess, notice or demand in any manner otherwise provided  
46 by law.

#### **§31B-1-112. Nature of business and powers.**

1 (a) A limited liability company may be organized  
2 under this chapter for any lawful purpose, subject to any  
3 law of this state governing or regulating business.

4 (b) Unless its articles of organization provide other-  
5 wise, a limited liability company has the same powers as an  
6 individual to do all things necessary or convenient to carry  
7 on its business or affairs, including power to:

8 (1) Sue and be sued, and defend in its name;

9 (2) Purchase, receive, lease, or otherwise acquire, and  
10 own, hold, improve, use and otherwise deal with real or  
11 personal property, or any legal or equitable interest in  
12 property, wherever located;

13           (3) Sell, convey, mortgage, grant a security interest in,  
14 lease, exchange and otherwise encumber or dispose of all  
15 or any part of its property;

16           (4) Purchase, receive, subscribe for or otherwise ac-  
17 quire, own, hold, vote, use, sell, mortgage, lend, grant a  
18 security interest in or otherwise dispose of and deal in and  
19 with, shares or other interests in or obligations of any  
20 other entity;

21           (5) Make contracts and guarantees, incur liabilities,  
22 borrow money, issue its notes, bonds and other obliga-  
23 tions, which may be convertible into or include the option  
24 to purchase other securities of the limited liability compa-  
25 ny, and secure any of its obligations by a mortgage on or  
26 a security interest in any of its property, franchises or  
27 income;

28           (6) Lend money, invest and reinvest its funds and  
29 receive and hold real and personal property as security for  
30 repayment;

31           (7) Be a promoter, partner, member, associate or man-  
32 ager of any partnership, joint venture, trust or other entity;

33           (8) Conduct its business, locate offices and exercise  
34 the powers granted by this chapter within or without this  
35 state;

36           (9) Elect managers and appoint officers, employees  
37 and agents of the limited liability company, define their  
38 duties, fix their compensation and lend them money and  
39 credit;

40           (10) Pay pensions and establish pension plans, pension  
41 trusts, profit sharing plans, bonus plans, option plans and  
42 benefit or incentive plans for any or all of its current or  
43 former members, managers, officers, employees and  
44 agents;

45           (11) Make donations for the public welfare or for  
46 charitable, scientific or educational purposes; and

47           (12) Make payments or donations, or do any other act,  
48 not inconsistent with law, that furthers the business of the  
49 limited liability company.

**ARTICLE 2. ORGANIZATION.**

- §31B-2-201. Limited liability company as legal entity.
- §31B-2-202. Organization.
- §31B-2-203. Articles of organization.
- §31B-2-204. Amendment or restatement of articles of organization.
- §31B-2-205. Signing of records.
- §31B-2-206. Filing in office of secretary of state.
- §31B-2-207. Correcting filed record.
- §31B-2-208. Certificate of existence or authorization.
- §31B-2-209. Liability for false statement in filed record.
- §31B-2-210. Filing by judicial act.
- §31B-2-211. Annual report for secretary of state.

**§31B-2-201. Limited liability company as legal entity.**

- 1 A limited liability company is a legal entity distinct
- 2 from its members.

**§31B-2-202. Organization.**

- 1 (a) One or more persons may organize a limited liabil-
- 2 ity company, consisting of one or more members, by
- 3 delivering articles of organization to the office of the
- 4 secretary of state for filing, together with a fee in the
- 5 amount of one hundred dollars.
- 6 (b) Unless a delayed effective date is specified, the
- 7 existence of a limited liability company begins when the
- 8 articles of organization are filed.
- 9 (c) The filing of the articles of organization by the
- 10 secretary of state is conclusive proof that the organizers
- 11 satisfied all conditions precedent to the creation of a limit-
- 12 ed liability company.

**§31B-2-203. Articles of organization.**

- 1 (a) Articles of organization of a limited liability com-
- 2 pany must set forth:
  - 3 (1) The name of the company;
  - 4 (2) The address of the initial designated office;
  - 5 (3) The name and street address of the initial agent for
  - 6 service of process;



7 (4) The name and address of each organizer;

8 (5) Whether the company is to be a term company  
9 and, if so, the term specified;

10 (6) Whether the company is to be manager-managed,  
11 and, if so, the name and address of each initial manager;  
12 and

13 (7) Whether one or more of the members of the com-  
14 pany are to be liable for its debts and obligations under  
15 section 3-303(c).

16 (b) Articles of organization of a limited liability com-  
17 pany may set forth:

18 (1) Provisions permitted to be set forth in an operating  
19 agreement; or

20 (2) Other matters not inconsistent with law.

21 (c) Articles of organization of a limited liability com-  
22 pany may not vary the nonwaivable provisions of section  
23 1-103(b). As to all other matters, if any provision of an  
24 operating agreement is inconsistent with the articles of  
25 organization:

26 (1) The operating agreement controls as to managers,  
27 members and members' transferees; and

28 (2) The articles of organization control as to persons  
29 other than managers, members and their transferees who  
30 reasonably rely on the articles to their detriment.

**§31B-2-204. Amendment or restatement of articles of organi-  
zation.**

1 (a) Articles of organization of a limited liability com-  
2 pany may be amended at any time by delivering articles  
3 of amendment to the secretary of state for filing. The  
4 articles of amendment must set forth the:

5 (1) Name of the limited liability company;

6 (2) Date of filing of the articles of organization; and

7 (3) Amendment to the articles.

8 (b) A limited liability company may restate its articles  
9 of organization at any time. Restated articles of organiza-  
10 tion must be signed and filed in the same manner as arti-  
11 cles of amendment. Restated articles of organization must  
12 be designated as such in the heading and state in the head-  
13 ing or in an introductory paragraph the limited liability  
14 company's present name and, if it has been changed, all of  
15 its former names and the date of the filing of its initial  
16 articles of organization.

### §31B-2-205. Signing of records.

1 (a) Except as otherwise provided in this chapter, a  
2 record to be filed by or on behalf of a limited liability  
3 company in the office of the secretary of state must be  
4 signed in the name of the company by a:

5 (1) Manager of a manager-managed company;

6 (2) Member of a member-managed company;

7 (3) Person organizing the company, if the company  
8 has not been formed; or

9 (4) Fiduciary, if the company is in the hands of a  
10 receiver, trustee or other court-appointed fiduciary.

11 (b) A record signed under subsection (a) of this sec-  
12 tion must state adjacent to the signature the name and  
13 capacity of the signer.

14 (c) Any person may sign a record to be filed under  
15 subsection (a) of this section by an attorney-in-fact. Pow-  
16 ers of attorney relating to the signing of records to be  
17 filed under subsection (a) of this section by an  
18 attorney-in-fact need not be filed in the office of the sec-  
19 retary of state as evidence of authority by the person filing  
20 but must be retained by the company.

### §31B-2-206. Filing in office of secretary of state.

1 (a) Articles of organization or any other record autho-  
2 rized to be filed under this chapter must be in a medium  
3 permitted by the secretary of state and must be delivered  
4 to the office of the secretary of state. Unless the secretary  
5 of state determines that a record fails to comply as to form

6 with the filing requirements of this chapter, and if all filing  
7 fees have been paid, the secretary of state shall file the  
8 record and send a receipt for the record and the fees to the  
9 limited liability company or its representative.

10 (b) Upon request and payment of a fee, the secretary  
11 of state shall send to the requester a certified copy of the  
12 requested record.

13 (c) Except as otherwise provided in subsection (d) of  
14 this section and section 2-207(c), a record accepted for  
15 filing by the secretary of state is effective:

16 (1) At the time of filing on the date it is filed, as evi-  
17 denced by the secretary of state's date and time endorse-  
18 ment on the original record; or

19 (2) At the time specified in the record as its effective  
20 time on the date it is filed.

21 (d) A record may specify a delayed effective time and  
22 date, and if it does so the record becomes effective at the  
23 time and date specified. If a delayed effective date but no  
24 time is specified, the record is effective at the close of  
25 business on that date. If a delayed effective date is later  
26 than the ninetieth day after the record is filed, the record is  
27 effective on the ninetieth day.

### **§31B-2-207. Correcting filed record.**

1 (a) A limited liability company or foreign limited  
2 liability company may correct a record filed by the secre-  
3 tary of state if the record contains a false or erroneous  
4 statement or was defectively signed.

5 (b) A record is corrected:

6 (1) By preparing articles of correction that:

7 (i) Describe the record, including its filing date, or  
8 attach a copy of it to the articles of correction;

9 (ii) Specify the incorrect statement and the reason it is  
10 incorrect or the manner in which the signing was defec-  
11 tive; and

12 (iii) Correct the incorrect statement or defective sign-  
13 ing; and

14 (2) By delivering the corrected record to the secretary  
15 of state for filing.

16 (c) Articles of correction are effective retroactively on  
17 the effective date of the record they correct except as to  
18 persons relying on the uncorrected record and adversely  
19 affected by the correction. As to those persons, articles of  
20 correction are effective when filed.

**§31B-2-208. Certificate of existence or authorization.**

1 (a) A person may request the secretary of state to  
2 furnish a certificate of existence for a limited liability  
3 company or a certificate of authorization for a foreign  
4 limited liability company.

5 (b) A certificate of existence for a limited liability  
6 company must set forth:

7 (1) The company's name;

8 (2) That it is duly organized under the laws of this  
9 state, the date of organization, whether its duration is  
10 at-will or for a specified term, and, if the latter, the period  
11 specified;

12 (3) If payment is reflected in the records of the secre-  
13 tary of state and if nonpayment affects the existence of the  
14 company, that all fees, taxes and penalties owed to this  
15 state have been paid;

16 (4) Whether its most recent annual report required by  
17 section 2-211 has been filed with the secretary of state;

18 (5) That articles of termination have not been filed;  
19 and

20 (6) Other facts of record in the office of the secretary  
21 of state which may be requested by the applicant.

22 (c) A certificate of authorization for a foreign limited  
23 liability company must set forth:

24 (1) The company's name used in this state;

25       (2) That it is authorized to transact business in this  
26 state;

27       (3) If payment is reflected in the records of the secre-  
28 tary of state and nonpayment affects the authorization of  
29 the company, that all fees, taxes and penalties owed to this  
30 state have been paid;

31       (4) Whether its most recent annual report required by  
32 section 2-211 has been filed with the secretary of state;

33       (5) That a certificate of cancellation has not been  
34 filed; and

35       (6) Other facts of record in the office of the secretary  
36 of state which may be requested by the applicant.

37       (d) Subject to any qualification stated in the certificate,  
38 a certificate of existence or authorization issued by the  
39 secretary of state may be relied upon as conclusive evi-  
40 dence that the domestic or foreign limited liability compa-  
41 ny is in existence or is authorized to transact business in  
42 this state.

### **§31B-2-209. Liability for false statement in filed record.**

1       If a record authorized or required to be filed under  
2 this chapter contains a false statement, one who suffers loss  
3 by reliance on the statement may recover damages for the  
4 loss from a person who signed the record or caused another  
5 to sign it on the person's behalf and knew the statement  
6 to be false at the time the record was signed.

### **§31B-2-210. Filing by judicial act.**

1       If a person required by section 2-205 to sign any  
2 record fails or refuses to do so, any other person who is  
3 adversely affected by the failure or refusal may petition  
4 the circuit court to direct the signing of the record. If the  
5 court finds that it is proper for the record to be signed and  
6 that a person so designated has failed or refused to sign  
7 the record, it shall order the secretary of state to sign and  
8 file an appropriate record.

### **§31B-2-211. Annual report for secretary of state.**

1 (a) A limited liability company, and a foreign limited  
2 liability company authorized to transact business in this  
3 state, shall deliver to the secretary of state for filing an  
4 annual report that sets forth:

5 (1) The name of the company and the state or country  
6 under whose law it is organized;

7 (2) The address of its designated office and the name  
8 and address of its agent for service of process in this state;

9 (3) The address of its principal office; and

10 (4) The names and business addresses of any manag-  
11 ers.

12 (b) Information in an annual report must be current as  
13 of the date the annual report is signed on behalf of the  
14 limited liability company.

15 (c) The first annual report must be delivered to the  
16 secretary of state between the first day of January and the  
17 first day of April of the year following the calendar year  
18 in which a limited liability company was organized or a  
19 foreign company was authorized to transact business.  
20 Subsequent annual reports must be delivered to the secre-  
21 tary of state between the first day of January and the first  
22 day of April of the ensuing calendar years.

23 (d) If an annual report does not contain the informa-  
24 tion required in subsection (a) of this section, the secretary  
25 of state shall promptly notify the reporting limited liability  
26 company or foreign limited liability company and return  
27 the report to it for correction. If the report is corrected to  
28 contain the information required in subsection (a) of this  
29 section and delivered to the secretary of state within thirty  
30 days after the effective date of the notice, it is timely filed.

**ARTICLE 3. RELATIONS OF MEMBERS AND MANAGERS TO  
PERSONS DEALING WITH LIMITED LIABILITY  
COMPANY.**

§31B-3-301. Agency of members and managers.

§31B-3-302. Limited liability company liable for member's or manager's  
actionable conduct.

§31B-3-303. Liability of members and managers.

**§31B-3-301. Agency of members and managers.**

1 (a) Subject to subsections (b) and (c) of this section:

2 (1) Each member is an agent of the limited liability  
3 company for the purpose of its business and an act of a  
4 member, including the signing of an instrument in the  
5 company's name, for apparently carrying on in the ordi-  
6 nary course the company's business or business of the  
7 kind carried on by the company binds the company, un-  
8 less the member had no authority to act for the company  
9 in the particular matter and the person with whom the  
10 member was dealing knew or had notice that the member  
11 lacked authority.

12 (2) An act of a member which is not apparently for  
13 carrying on in the ordinary course the company's business  
14 or business of the kind carried on by the company binds  
15 the company only if the act was authorized by the other  
16 members.

17 (b) Subject to subsection (c) of this section, in a  
18 manager-managed company:

19 (1) A member is not an agent of the company for the  
20 purpose of its business solely by reason of being a mem-  
21 ber. Each manager is an agent of the company for the  
22 purpose of its business and an act of a manager, including  
23 the signing of an instrument in the company's name, for  
24 apparently carrying on in the ordinary course the compa-  
25 ny's business or business of the kind carried on by the  
26 company binds the company, unless the manager had no  
27 authority to act for the company in the particular matter  
28 and the person with whom the manager was dealing knew  
29 or had notice that the manager lacked authority.

30 (2) An act of a manager which is not apparently for  
31 carrying on in the ordinary course the company's business  
32 or business of the kind carried on by the company binds  
33 the company only if the act was authorized under section  
34 4-404.

35 (c) Unless the articles of organization limit their au-  
36 thority, any member of a member-managed company or  
37 manager of a manager-managed company may sign and

38 deliver any instrument transferring or affecting the com-  
39 pany's interest in real property. The instrument is conclu-  
40 sive in favor of a person who gives value without knowl-  
41 edge of the lack of the authority of the person signing and  
42 delivering the instrument.

**§31B-3-302. Limited liability company liable for member's or  
manager's actionable conduct.**

1 A limited liability company is liable for loss or injury  
2 caused to a person, or for a penalty incurred, as a result of  
3 a wrongful act or omission, or other actionable conduct, of  
4 a member or manager acting in the ordinary course of  
5 business of the company or with authority of the compa-  
6 ny.

**§31B-3-303. Liability of members and managers.**

1 (a) Except as otherwise provided in subsection (c) of  
2 this section, the debts, obligations and liabilities of a limit-  
3 ed liability company, whether arising in contract, tort or  
4 otherwise, are solely the debts, obligations and liabilities of  
5 the company. A member or manager is not personally  
6 liable for a debt, obligation or liability of the company  
7 solely by reason of being or acting as a member or man-  
8 ager.

9 (b) The failure of a limited liability company to ob-  
10 serve the usual company formalities or requirements relat-  
11 ing to the exercise of its company powers or management  
12 of its business is not a ground for imposing personal lia-  
13 bility on the members or managers for liabilities of the  
14 company.

15 (c) All or specified members of a limited liability  
16 company are liable in their capacity as members for all or  
17 specified debts, obligations or liabilities of the company if:

18 (1) A provision to that effect is contained in the arti-  
19 cles of organization; and

20 (2) A member so liable has consented in writing to the  
21 adoption of the provision or to be bound by the provision.

**ARTICLE 4. RELATIONS OF MEMBERS TO EACH OTHER AND  
TO LIMITED LIABILITY COMPANY.**



- §31B-4-401. Form of contribution.
- §31B-4-402. Member's liability for contributions.
- §31B-4-403. Member's and manager's rights to payments and reimbursement.
- §31B-4-404. Management of limited liability company.
- §31B-4-405. Sharing of and right to distributions.
- §31B-4-406. Limitations on distributions.
- §31B-4-407. Liability for unlawful distributions.
- §31B-4-408. Member's right to information.
- §31B-4-409. General standards of member's and manager's conduct.
- §31B-4-410. Actions by members.
- §31B-4-411. Continuation of term company after expiration of specified term.

**§31B-4-401. Form of contribution.**

- 1       A contribution of a member of a limited liability com-  
2       pany may consist of tangible or intangible property or  
3       other benefit to the company, including money, promisso-  
4       ry notes, services performed or other agreements to con-  
5       tribute cash or property, or contracts for services to be  
6       performed.

**§31B-4-402. Member's liability for contributions.**

- 1       (a) A member's obligation to contribute money, prop-  
2       erty or other benefit to, or to perform services for, a limit-  
3       ed liability company is not excused by the member's  
4       death, disability or other inability to perform personally.  
5       If a member does not make the required contribution of  
6       property or services, the member is obligated at the option  
7       of the company to contribute money equal to the value of  
8       that portion of the stated contribution which has not been  
9       made.
- 10       (b) A creditor of a limited liability company who  
11       extends credit or otherwise acts in reliance on an obliga-  
12       tion described in subsection (a) of this section, and without  
13       notice of any compromise under section 4-404(c)(5), may  
14       enforce the original obligation.

**§31B-4-403. Member's and manager's rights to payments and reimbursement.**

1 (a) A limited liability company shall reimburse a  
2 member or manager for payments made and indemnify a  
3 member or manager for liabilities incurred by the member  
4 or manager in the ordinary course of the business of the  
5 company or for the preservation of its business or proper-  
6 ty.

7 (b) A limited liability company shall reimburse a  
8 member for an advance to the company beyond the  
9 amount of contribution the member agreed to make.

10 (c) A payment or advance made by a member which  
11 gives rise to an obligation of a limited liability company  
12 under subsection (a) or (b) of this section constitutes a  
13 loan to the company upon which interest accrues from the  
14 date of the payment or advance.

15 (d) A member is not entitled to remuneration for ser-  
16 vices performed for a limited liability company, except for  
17 reasonable compensation for services rendered in winding  
18 up the business of the company.

**§31B-4-404. Management of limited liability company.**

1 (a) In a member-managed company:

2 (1) Each member has equal rights in the management  
3 and conduct of the company's business; and

4 (2) Except as otherwise provided in subsection (c) of  
5 this section or in section 8-801(b)(3)(i), any matter relat-  
6 ing to the business of the company may be decided by a  
7 majority of the members.

8 (b) In a manager-managed company:

9 (1) Each manager has equal rights in the management  
10 and conduct of the company's business;

11 (2) Except as otherwise provided in subsection (c) of  
12 this section or in section 8-801(b)(3)(i), any matter relat-  
13 ing to the business of the company may be exclusively  
14 decided by the manager or, if there is more than one man-  
15 ager, by a majority of the managers; and

16 (3) A manager:

- 17 (i) Must be designated, appointed, elected, removed or  
18 replaced by a vote, approval or consent of a majority of  
19 the members; and
- 20 (ii) Holds office until a successor has been elected and  
21 qualified, unless the manager sooner resigns or is re-  
22 moved.
- 23 (c) The only matters of a member or manager-man-  
24 aged company's business requiring the consent of all of  
25 the members are:
- 26 (1) The amendment of the operating agreement under  
27 section 1-103;
- 28 (2) The authorization or ratification of acts or transac-  
29 tions under section 1-103(b)(2)(ii) which would otherwise  
30 violate the duty of loyalty;
- 31 (3) An amendment to the articles of organization  
32 under section 2-204;
- 33 (4) The compromise of an obligation to make a con-  
34 tribution under section 4-402(b);
- 35 (5) The compromise, as among members, of an obli-  
36 gation of a member to make a contribution or return  
37 money or other property paid or distributed in violation  
38 of this chapter;
- 39 (6) The making of interim distributions under section  
40 4-405(a), including the redemption of an interest;
- 41 (7) The admission of a new member;
- 42 (8) The use of the company's property to redeem an  
43 interest subject to a charging order;
- 44 (9) The consent to dissolve the company under section  
45 8-801(b)(2);
- 46 (10) A waiver of the right to have the company's busi-  
47 ness wound up and the company terminated under section  
48 8-802(b);
- 49 (11) The consent of members to merge with another  
50 entity under section 9-904(c)(1); and

51 (12) The sale, lease, exchange or other disposal of all,  
52 or substantially all, of the company's property with or  
53 without goodwill.

54 (d) Action requiring the consent of members or man-  
55 agers under this chapter may be taken or without a meet-  
56 ing.

57 (e) A member or manager may appoint a proxy to  
58 vote or otherwise act for the member or manager by sign-  
59 ing an appointment instrument, either personally or by the  
60 member's or manager's attorney-in-fact.

**§31B-4-405. Sharing of and right to distributions.**

1 (a) Any distributions made by a limited liability com-  
2 pany before its dissolution and winding up must be in  
3 equal shares.

4 (b) A member has no right to receive, and may not be  
5 required to accept, a distribution in kind.

6 (c) If a member becomes entitled to receive a distribu-  
7 tion, the member has the status of, and is entitled to all  
8 remedies available to, a creditor of the limited liability  
9 company with respect to the distribution.

**§31B-4-406. Limitations on distributions.**

1 (a) A distribution may not be made if:

2 (1) The limited liability company would not be able to  
3 pay its debts as they become due in the ordinary course of  
4 business; or

5 (2) The company's total assets would be less than the  
6 sum of its total liabilities plus the amount that would be  
7 needed, if the company were to be dissolved, wound up  
8 and terminated at the time of the distribution, to satisfy the  
9 preferential rights upon dissolution, winding up and termi-  
10 nation of members whose preferential rights are superior  
11 to those receiving the distribution.

12 (b) A limited liability company may base a determina-  
13 tion that a distribution is not prohibited under subsection  
14 (a) of this section on financial statements prepared on the

15 basis of accounting practices and principles that are rea-  
16 sonable in the circumstances or on a fair valuation or  
17 other method that is reasonable in the circumstances.

18 (c) Except as otherwise provided in subsection (e) of  
19 this section, the effect of a distribution under subsection  
20 (a) of this section is measured:

21 (1) In the case of distribution by purchase, redemption  
22 or other acquisition of a distributional interest in a limited  
23 liability company, as of the date money or other property  
24 is transferred or debt incurred by the company; and

25 (2) In all other cases, as of the date the:

26 (i) Distribution is authorized if the payment occurs  
27 within one hundred twenty days after the date of authori-  
28 zation; or

29 (ii) Payment is made if it occurs more than one hun-  
30 dred twenty days after the date of authorization.

31 (d) A limited liability company's indebtedness to a  
32 member incurred by reason of a distribution made in  
33 accordance with this section is at parity with the company's  
34 indebtedness to its general, unsecured creditors.

35 (e) Indebtedness of a limited liability company, in-  
36 cluding indebtedness issued in connection with or as part  
37 of a distribution, is not considered a liability for purposes  
38 of determinations under subsection (a) of this section if its  
39 terms provide that payment of principal and interest are  
40 made only if and to the extent that payment of a distribu-  
41 tion to members could then be made under this section. If  
42 the indebtedness is issued as a distribution, each payment  
43 of principal or interest on the indebtedness is treated as a  
44 distribution, the effect of which is measured on the date  
45 the payment is made.

#### **§31B-4-407. Liability for unlawful distributions.**

1 (a) A member of a member-managed company or a  
2 member or manager of a manager-managed company  
3 who votes for or assents to a distribution made in violation  
4 of section 4-406, the articles of organization, or the oper-  
5 ating agreement is personally liable to the company for

6 the amount of the distribution which exceeds the amount  
7 that could have been distributed without violating section  
8 4-406, the articles of organization, or the operating agree-  
9 ment if it is established that the member or manager did  
10 not perform the member's or manager's duties in compli-  
11 ance with section 4-409.

12 (b) A member of a manager-managed limited liability  
13 company who knew a distribution was made in violation  
14 of section 4-406, the articles of organization, or the oper-  
15 ating agreement is personally liable to the company, but  
16 only to the extent that the distribution received by the  
17 member exceeded the amount that could properly have  
18 been paid under section 4-406.

19 (c) A member or manager against whom an action is  
20 brought under this section may implead in the action all:

21 (1) Other members or managers who voted for or  
22 assented to the distribution in violation of subsection (a)  
23 of this section and may compel contribution from them;  
24 and

25 (2) Members who received a distribution in violation  
26 of subsection (b) of this section and may compel contri-  
27 bution from the member in the amount received in viola-  
28 tion of subsection (b) of this section.

29 (d) A proceeding under this section is barred unless it  
30 is commenced within two years after the distribution.

**§31B-4-408. Member's right to information.**

1 (a) A limited liability company shall provide members  
2 and their agents and attorneys access to its records, if any,  
3 at the company's principal office or other reasonable loca-  
4 tions specified in the operating agreement. The company  
5 shall provide former members and their agents and attor-  
6 neys access for proper purposes to records pertaining to  
7 the period during which they were members. The right of  
8 access provides the opportunity to inspect and copy re-  
9 cords during ordinary business hours. The company may  
10 impose a reasonable charge, limited to the costs of labor  
11 and material, for copies of records furnished.

12 (b) A limited liability company shall furnish to a  
13 member, and to the legal representative of a deceased  
14 member or member under legal disability:

15 (1) Without demand, information concerning the com-  
16 pany's business or affairs reasonably required for the  
17 proper exercise of the member's rights and performance  
18 of the member's duties under the operating agreement or  
19 this chapter; and

20 (2) On demand, other information concerning the  
21 company's business or affairs, except to the extent the  
22 demand or the information demanded is unreasonable or  
23 otherwise improper under the circumstances.

24 (c) A member has the right upon written demand  
25 given to the limited liability company to obtain at the  
26 company's expense a copy of any written operating agree-  
27 ment.

**§31B-4-409. General standards of member's and manager's  
conduct.**

1 (a) The only fiduciary duties a member owes to a  
2 member-managed company and its other members are the  
3 duty of loyalty and the duty of care imposed by subsec-  
4 tions (b) and (c) of this section.

5 (b) A member's duty of loyalty to a member-managed  
6 company and its other members is limited to the follow-  
7 ing:

8 (1) To account to the company and to hold as trustee  
9 for it any property, profit or benefit derived by the mem-  
10 ber in the conduct or winding up of the company's busi-  
11 ness or derived from a use by the member of the compa-  
12 ny's property, including the appropriation of a company's  
13 opportunity;

14 (2) To refrain from dealing with the company in the  
15 conduct or winding up of the company's business as or on  
16 behalf of a party having an interest adverse to the compa-  
17 ny; and

18       (3) To refrain from competing with the company in  
19 the conduct of the company's business before the dissolu-  
20 tion of the company.

21       (c) A member's duty of care to a member-managed  
22 company and its other members in the conduct of and  
23 winding up of the company's business is limited to refrain-  
24 ing from engaging in grossly negligent or reckless con-  
25 duct, intentional misconduct or a knowing violation of  
26 law.

27       (d) A member shall discharge the duties to a  
28 member-managed company and its other members under  
29 this chapter or under the operating agreement and exer-  
30 cise any rights consistently with the obligation of good  
31 faith and fair dealing.

32       (e) A member of a member-managed company does  
33 not violate a duty or obligation under this chapter or un-  
34 der the operating agreement merely because the member's  
35 conduct furthers the member's own interest.

36       (f) A member of a member-managed company may  
37 lend money to and transact other business with the compa-  
38 ny. As to each loan or transaction, the rights and obliga-  
39 tions of the member are the same as those of a person who  
40 is not a member, subject to other applicable law.

41       (g) This section applies to a person winding up the  
42 limited liability company's business as the personal or  
43 legal representative of the last surviving member as if the  
44 person were a member.

45       (h) In a manager-managed company:

46       (1) A member who is not also a manager owes no  
47 duties to the company or to the other members solely by  
48 reason of being a member;

49       (2) A manager is held to the same standards of con-  
50 duct prescribed for members in subsections (b) through  
51 (f) of this section;

52       (3) A member who pursuant to the operating agree-  
53 ment exercises some or all of the rights of a manager in  
54 the management and conduct of the company's business is



55 held to the standards of conduct in subsections (b)  
56 through (f) of this section to the extent that the member  
57 exercises the managerial authority vested in a manager by  
58 this chapter; and

59 (4) A manager is relieved of liability imposed by law  
60 for violation of the standards prescribed by subsections  
61 (b) through (f) of this section to the extent of the manage-  
62 rial authority delegated to the members by the operating  
63 agreement.

**§31B-4-410. Actions by members.**

1 (a) A member may maintain an action against a limit-  
2 ed liability company or another member for legal or equi-  
3 table relief, with or without an accounting as to the compa-  
4 ny's business, to enforce:

5 (1) The member's rights under the operating agree-  
6 ment;

7 (2) The member's rights under this chapter; and

8 (3) The rights and otherwise protect the interests of the  
9 member, including rights and interests arising independ-  
10 ently of the member's relationship to the company.

11 (b) The accrual, and any time limited for the assertion,  
12 of a right of action for a remedy under this section is  
13 governed by other law. A right to an accounting upon a  
14 dissolution and winding up does not revive a claim barred  
15 by law.

**§31B-4-411. Continuation of term company after expiration of specified term.**

1 (a) If a term company is continued after the expiration  
2 of the specified term, the rights and duties of the members  
3 and managers remain the same as they were at the expira-  
4 tion of the term except to the extent inconsistent with  
5 rights and duties of members and managers of an at-will  
6 company.

7 (b) If the members in a member-managed company  
8 or the managers in a manager-managed company contin-

9 ue the business without any winding up of the business of  
10 the company, it continues as an at-will company.

#### **ARTICLE 5. TRANSFEREES AND CREDITORS OF MEMBER.**

§31B-5-501. Member's distributional interest.

§31B-5-502. Transfer of distributional interest.

§31B-5-503. Rights of transferee.

§31B-5-504. Rights of creditor.

#### **§31B-5-501. Member's distributional interest.**

1 (a) A member is not a coowner of, and has no trans-  
2 ferable interest in, property of a limited liability company.

3 (b) A distributional interest in a limited liability com-  
4 pany is personal property and, subject to sections 5-502  
5 and 5-503, may be transferred, in whole or in part.

6 (c) An operating agreement may provide that a  
7 distributional interest may be evidenced by a certificate of  
8 the interest issued by the limited liability company and,  
9 subject to section 5-503, may also provide for the transfer  
10 of any interest represented by the certificate.

#### **§31B-5-502. Transfer of distributional interest.**

1 A transfer of a distributional interest does not entitle  
2 the transferee to become or to exercise any rights of a  
3 member. A transfer entitles the transferee to receive, to  
4 the extent transferred, only the distributions to which the  
5 transferor would be entitled.

#### **§31B-5-503. Rights of transferee.**

1 (a) A transferee of a distributional interest may be-  
2 come a member of a limited liability company if and to  
3 the extent that the transferor gives the transferee the right  
4 in accordance with authority described in the operating  
5 agreement or all other members consent.

6 (b) A transferee who has become a member, to the  
7 extent transferred, has the rights and powers, and is subject  
8 to the restrictions and liabilities, of a member under the  
9 operating agreement of a limited liability company and  
10 this chapter. A transferee who becomes a member also is  
11 liable for the transferor member's obligations to make

12 contributions under section 4-402 and for obligations  
13 under section 4-407 to return unlawful distributions, but  
14 the transferee is not obligated for the transferor member's  
15 liabilities unknown to the transferee at the time the trans-  
16 feree becomes a member.

17 (c) Whether or not a transferee of a distributional  
18 interest becomes a member under subsection (a) of this  
19 section, the transferor is not released from liability to the  
20 limited liability company under the operating agreement  
21 or this chapter.

22 (d) A transferee who does not become a member is  
23 not entitled to participate in the management or conduct  
24 of the limited liability company's business, require access  
25 to information concerning the company's transactions or  
26 inspect or copy any of the company's records.

27 (e) A transferee who does not become a member is  
28 entitled to:

29 (1) Receive, in accordance with the transfer, distribu-  
30 tions to which the transferor would otherwise be entitled;

31 (2) Receive, upon dissolution and winding up of the  
32 limited liability company's business:

33 (i) In accordance with the transfer, the net amount  
34 otherwise distributable to the transferor;

35 (ii) A statement of account only from the date of the  
36 latest statement of account agreed to by all the members;

37 (3) Seek under section 8-801(b)(6) a judicial determi-  
38 nation that it is equitable to dissolve and wind up the com-  
39 pany's business.

40 (f) A limited liability company need not give effect to  
41 a transfer until it has notice of the transfer.

#### **§31B-5-504. Rights of creditor.**

1 (a) On application by a judgment creditor of a mem-  
2 ber of a limited liability company or of a member's trans-  
3 feree, a court having jurisdiction may charge the  
4 distributional interest of the judgment debtor to satisfy the

5 judgment. The court may appoint a receiver of the share  
6 of the distributions due or to become due to the judgment  
7 debtor and make all other orders, directions, accounts and  
8 inquiries the judgment debtor might have made or which  
9 the circumstances may require to give effect to the charg-  
10 ing order.

11 (b) A charging order constitutes a lien on the judg-  
12 ment debtor's distributional interest. The court may order  
13 a foreclosure of a lien on a distributional interest subject  
14 to the charging order at any time. A purchaser at the  
15 foreclosure sale has the rights of a transferee.

16 (c) At any time before foreclosure, a distributional  
17 interest in a limited liability company which is charged  
18 may be redeemed:

19 (1) By the judgment debtor;

20 (2) With property other than the company's property,  
21 by one or more of the other members; or

22 (3) With the company's property, but only if permitted  
23 by the operating agreement.

24 (d) This chapter does not affect a member's right un-  
25 der exemption laws with respect to the member's  
26 distributional interest in a limited liability company.

27 (e) This section provides the exclusive remedy by  
28 which a judgment creditor of a member or a transferee  
29 may satisfy a judgment out of the judgment debtor's  
30 distributional interest in a limited liability company.

#### **ARTICLE 6. MEMBER'S DISSOCIATION.**

§31B-6-601. Events causing member's dissociation.

§31B-6-602. Member's power to dissociate; wrongful dissociation.

§31B-6-603. Effect of member's dissociation.

#### **§31B-6-601. Events causing member's dissociation.**

1 A member is dissociated from a limited liability com-  
2 pany upon the occurrence of any of the following events:

- 3 (1) The company's having notice of the member's  
4 express will to withdraw upon the date of notice or on a  
5 later date specified by the member;
- 6 (2) An event agreed to in the operating agreement as  
7 causing the member's dissociation;
- 8 (3) Upon transfer of all of a member's distributional  
9 interest, other than a transfer for security purposes or a  
10 court order charging the member's distributional interest  
11 which has not been foreclosed;
- 12 (4) The member's expulsion pursuant to the operating  
13 agreement;
- 14 (5) The member's expulsion by unanimous vote of the  
15 other members if:
- 16 (i) It is unlawful to carry on the company's business  
17 with the member;
- 18 (ii) There has been a transfer of substantially all of the  
19 member's distributional interest, other than a transfer for  
20 security purposes, or a court order charging the member's  
21 distributional interest, which has not been foreclosed;
- 22 (iii) Within ninety days after the company notifies a  
23 corporate member that it will be expelled because it has  
24 filed a certificate of dissolution or the equivalent, its char-  
25 ter has been revoked, or its right to conduct business has  
26 been suspended by the jurisdiction of its incorporation,  
27 the member fails to obtain a revocation of the certificate  
28 of dissolution or a reinstatement of its charter or its right  
29 to conduct business; or
- 30 (iv) A partnership or a limited liability company that is  
31 a member has been dissolved and its business is being  
32 wound up;
- 33 (6) On application by the company or another mem-  
34 ber, the member's expulsion by judicial determination  
35 because the member:
- 36 (i) Engaged in wrongful conduct that adversely and  
37 materially affected the company's business;

38 (ii) Willfully or persistently committed a material  
39 breach of the operating agreement or of a duty owed to  
40 the company or the other members under section 4-409;  
41 or

42 (iii) Engaged in conduct relating to the company's  
43 business which makes it not reasonably practicable to  
44 carry on the business with the member;

45 (7) The member's:

46 (i) Becoming a debtor in bankruptcy;

47 (ii) Executing an assignment for the benefit of credi-  
48 tors;

49 (iii) Seeking, consenting to, or acquiescing in the ap-  
50 pointment of a trustee, receiver or liquidator of the mem-  
51 ber or of all or substantially all of the member's property;  
52 or

53 (iv) Failing, within ninety days after the appointment,  
54 to have vacated or stayed the appointment of a trustee,  
55 receiver or liquidator of the member or of all or substan-  
56 tially all of the member's property obtained without the  
57 member's consent or acquiescence, or failing within ninety  
58 days after the expiration of a stay to have the appointment  
59 vacated;

60 (8) In the case of a member who is an individual:

61 (i) The member's death;

62 (ii) The appointment of a guardian or general conser-  
63 vator for the member; or

64 (iii) A judicial determination that the member has  
65 otherwise become incapable of performing the member's  
66 duties under the operating agreement;

67 (9) In the case of a member that is a trust or is acting  
68 as a member by virtue of being a trustee of a trust, distri-  
69 bution of the trust's entire rights to receive distributions  
70 from the company, but not merely by reason of the substi-  
71 tution of a successor trustee;

72 (10) In the case of a member that is an estate or is  
73 acting as a member by virtue of being a personal repre-  
74 sentative of an estate, distribution of the estate's entire  
75 rights to receive distributions from the company, but not  
76 merely the substitution of a successor personal representa-  
77 tive; or

78 (11) Termination of the existence of a member if the  
79 member is not an individual, estate or trust other than a  
80 business trust.

**§31B-6-602. Member's power to dissociate; wrongful dissociation.**

1 (a) Unless otherwise provided in the operating agree-  
2 ment, a member has the power to dissociate from a limited  
3 liability company at any time, rightfully or wrongfully, by  
4 express will pursuant to section 6-601(1).

5 (b) If the operating agreement has not eliminated a  
6 member's power to dissociate, the member's dissociation  
7 from a limited liability company is wrongful only if:

8 (1) It is in breach of an express provision of the agree-  
9 ment; or

10 (2) Before the expiration of the specified term of a  
11 term company:

12 (i) The member withdraws by express will;

13 (ii) The member is expelled by judicial determination  
14 under section 6-601(6);

15 (iii) The member is dissociated by becoming a debtor  
16 in bankruptcy; or

17 (iv) In the case of a member who is not an individual,  
18 trust other than a business trust, or estate, the member is  
19 expelled or otherwise dissociated because it willfully dis-  
20 solved or terminated its existence.

21 (c) A member who wrongfully dissociates from a  
22 limited liability company is liable to the company and to  
23 the other members for damages caused by the dissocia-

24 tion. The liability is in addition to any other obligation of  
25 the member to the company or to the other members.

26 (d) If a limited liability company does not dissolve  
27 and wind up its business as a result of a member's wrong-  
28 ful dissociation under subsection (b) of this section, dam-  
29 ages sustained by the company for the wrongful dissocia-  
30 tion must be offset against distributions otherwise due the  
31 member after the dissociation.

**§31B-6-603. Effect of member's dissociation.**

1 (a) If under section 8-801 a member's dissociation  
2 from a limited liability company results in a dissolution  
3 and winding up of the company's business, article eight of  
4 this chapter applies. If a member's dissociation from the  
5 company does not result in a dissolution and winding up  
6 of the company's business under section 8-801:

7 (1) In an at-will company, the company must cause  
8 the dissociated member's distributional interest to be pur-  
9 chased under article seven of this chapter; and

10 (2) In a term company:

11 (i) If the company dissolves and winds up its business  
12 on or before the expiration of its specified term, article  
13 eight of this chapter applies to determine the dissociated  
14 member's rights to distributions; and

15 (ii) If the company does not dissolve and wind up its  
16 business on or before the expiration of its specified term,  
17 the company must cause the dissociated member's  
18 distributional interest to be purchased under article seven  
19 of this chapter on the date of the expiration of the term  
20 specified at the time of the member's dissociation.

21 (b) Upon a member's dissociation from a limited lia-  
22 bility company:

23 (1) The member's right to participate in the manage-  
24 ment and conduct of the company's business terminates,  
25 except as otherwise provided in section 8-803, and the  
26 member ceases to be a member and is treated the same as  
27 a transferee of a member;



28 (2) The member's duty of loyalty under section  
29 4-409(b)(3) terminates; and

30 (3) The member's duty of loyalty under section  
31 4-409(b)(1) and (2) and duty of care under section  
32 4-409(c) continue only with regard to matters arising and  
33 events occurring before the member's dissociation, unless  
34 the member participates in winding up the company's  
35 business pursuant to section 8-803.

#### ARTICLE 7. MEMBER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP.

§31B-7-701. Company purchase of distributional interest.

§31B-7-702. Court action to determine fair value of distributional interest.

§31B-7-703. Dissociated member's power to bind limited liability company.

§31B-7-704. Statement of dissociation.

#### §31B-7-701. Company purchase of distributional interest.

1 (a) A limited liability company shall purchase a  
2 distributional interest of a:

3 (1) Member of an at-will company for its fair value  
4 determined as of the date of the member's dissociation if  
5 the member's dissociation does not result in a dissolution  
6 and winding up of the company's business under section  
7 8-801; or

8 (2) Member of a term company for its fair value de-  
9 termined as of the date of the expiration of the specified  
10 term that existed on the date of the member's dissociation  
11 if the expiration of the specified term does not result in a  
12 dissolution and winding up of the company's business  
13 under section 8-801.

14 (b) A limited liability company must deliver a pur-  
15 chase offer to the dissociated member whose distributional  
16 interest is entitled to be purchased not later than thirty  
17 days after the date determined under subsection (a) of this  
18 section. The purchase offer must be accompanied by:

19 (1) A statement of the company's assets and liabilities  
20 as of the date determined under subsection (a) of this  
21 section;

22           (2) The latest available balance sheet and income state-  
23           ment, if any; and

24           (3) An explanation of how the estimated amount of  
25           the payment was calculated.

26           (c) If the price and other terms of a purchase of a  
27           distributional interest are fixed or are to be determined by  
28           the operating agreement, the price and terms so fixed or  
29           determined govern the purchase unless the purchaser  
30           defaults. If a default occurs, the dissociated member is  
31           entitled to commence a proceeding to have the company  
32           dissolved under section 8-801(b)(5)(iv).

33           (d) If an agreement to purchase the distributional  
34           interest is not made within one hundred twenty days after  
35           the date determined under subsection (a) of this section,  
36           the dissociated member, within another one hundred twen-  
37           ty days, may commence a proceeding against the limited  
38           liability company to enforce the purchase. The company  
39           at its expense shall notify in writing all of the remaining  
40           members, and any other person the court directs, of the  
41           commencement of the proceeding. The jurisdiction of the  
42           court in which the proceeding is commenced under this  
43           subsection is plenary and exclusive.

44           (e) The court shall determine the fair value of the  
45           distributional interest in accordance with the standards set  
46           forth in section 7-702 together with the terms for the pur-  
47           chase. Upon making these determinations, the court shall  
48           order the limited liability company to purchase or cause  
49           the purchase of the interest.

50           (f) Damages for wrongful dissociation under section  
51           6-602(b), and all other amounts owing, whether or not  
52           currently due, from the dissociated member to a limited  
53           liability company, must be offset against the purchase  
54           price.

**§31B-7-702. Court action to determine fair value of  
distributional interest.**

1           (a) In an action brought to determine the fair value of  
2           a distributional interest in a limited liability company, the  
3           court shall:

4 (1) Determine the fair value of the interest, consider-  
5 ing among other relevant evidence the going concern  
6 value of the company, any agreement among some or all  
7 of the members fixing the price or specifying a formula  
8 for determining value of distributional interests for any  
9 purpose, the recommendations of any appraiser appointed  
10 by the court, and any legal constraints on the company's  
11 ability to purchase the interest;

12 (2) Specify the terms of the purchase, including, if  
13 appropriate, terms for installment payments, subordination  
14 of the purchase obligation to the rights of the company's  
15 other creditors, security for a deferred purchase price and  
16 a covenant not to compete or other restriction on a disso-  
17 ciated member; and

18 (3) Require the dissociated member to deliver an as-  
19 signment of the interest to the purchaser upon receipt of  
20 the purchase price or the first installment of the purchase  
21 price.

22 (b) After the dissociated member delivers the assign-  
23 ment, the dissociated member has no further claim against  
24 the company, its members, officers or managers, if any,  
25 other than a claim to any unpaid balance of the purchase  
26 price and a claim under any agreement with the company  
27 or the remaining members that is not terminated by the  
28 court.

29 (c) If the purchase is not completed in accordance  
30 with the specified terms, the company is to be dissolved  
31 upon application under section 8-801(b)(5)(iv). If a lim-  
32 ited liability company is so dissolved, the dissociated  
33 member has the same rights and priorities in the compa-  
34 ny's assets as if the sale had not been ordered.

35 (d) If the court finds that a party to the proceeding  
36 acted arbitrarily, vexatiously or not in good faith, it may  
37 award one or more other parties their reasonable expenses,  
38 including attorney's fees and the expenses of appraisers or  
39 other experts, incurred in the proceeding. The finding  
40 may be based on the company's failure to make an offer  
41 to pay or to comply with section 7-701(b).

42 (e) Interest must be paid on the amount awarded from  
43 the fair market value determined under section 7-701(a)  
44 to the date of payment.

**§31B-7-703. Dissociated member's power to bind limited liability company.**

1 For two years after a member dissociates without the  
2 dissociation resulting in a dissolution and winding up of a  
3 limited liability company's business, the company, includ-  
4 ing a surviving company under article nine of this chapter,  
5 is bound by an act of the dissociated member which would  
6 have bound the company under section 3-301 before  
7 dissociation only if at the time of entering into the transac-  
8 tion the other party:

9 (1) Reasonably believed that the dissociated member  
10 was then a member;

11 (2) Did not have notice of the member's dissociation;  
12 and

13 (3) Is not deemed to have had notice under section  
14 7-704.

**§31B-7-704. Statement of dissociation.**

1 (a) A dissociated member or a limited liability compa-  
2 ny may file in the office of the secretary of state a state-  
3 ment of dissociation stating the name of the company and  
4 that the member is dissociated from the company.

5 (b) For the purposes of sections 3-301 and 7-703, a  
6 person not a member is deemed to have notice of the  
7 dissociation ninety days after the statement of dissociation  
8 is filed.

**ARTICLE 8. WINDING UP COMPANY'S BUSINESS.**

§31B-8-801. Events causing dissolution and winding up of company's business.

§31B-8-802. Limited liability company continues after dissolution.

§31B-8-803. Right to wind up limited liability company's business.

§31B-8-804. Member's or manager's power and liability as agent after dissolution.

§31B-8-805. Articles of termination.

- §31B-8-806. Distribution of assets in winding up limited liability company's business.
- §31B-8-807. Known claims against dissolved limited liability company.
- §31B-8-808. Other claims against dissolved limited liability company.
- §31B-8-809. Grounds for administrative dissolution.
- §31B-8-810. Procedure for and effect of administrative dissolution.
- §31B-8-811. Reinstatement following administrative dissolution.
- §31B-8-812. Appeal from denial of reinstatement.

**§31B-8-801. Events causing dissolution and winding up of company's business.**

1 (a) In this section, "future distributions" means the  
2 total distributions that, as of the date of dissociation, are  
3 reasonably estimated to be made to the remaining mem-  
4 bers if the company were continued until the projected  
5 date of its termination, reduced by the amount of distribu-  
6 tions that would have been made to the remaining mem-  
7 bers if the business of the company were dissolved and  
8 wound up on the date of dissociation.

9 (b) A limited liability company is dissolved, and its  
10 business must be wound up, upon the occurrence of any  
11 of the following events:

12 (1) An event specified in the operating agreement;

13 (2) Consent of the number or percentage of members  
14 specified in the operating agreement;

15 (3) Dissociation of a member who is also a manager  
16 or, if none, a member of an at-will company, and dissocia-  
17 tion of a member who is also a manager or, if none, a  
18 member of a term company but only if the dissociation  
19 was for a reason provided in section 6-601(7) through  
20 (11) and occurred before the expiration of the specified  
21 term, but the company is not dissolved and required to be  
22 wound up by reason of the dissociation if:

23 (i) Within ninety days after the dissociation, the busi-  
24 ness of the company is continued by the agreement of:

25 (A) The remaining members that would be entitled to  
26 receive a majority of any distributions that would be made

- 27 to them assuming the business of the company were dis-  
28 solved and wound up on the date of the dissociation; and
- 29 (B) The remaining members that would be entitled to  
30 receive a majority of any future distributions that would  
31 be made to them assuming the business of the company  
32 were continued after the date of the dissociation; or
- 33 (ii) The business of the company is continued under a  
34 right to continue stated in the operating agreement;
- 35 (4) An event that makes it unlawful for all or substan-  
36 tially all of the business of the company to be continued,  
37 but any cure of illegality within ninety days after notice to  
38 the company of the event is effective retroactively to the  
39 date of the event for purposes of this section;
- 40 (5) On application by a member or a dissociated  
41 member, upon entry of a judicial decree that:
- 42 (i) The economic purpose of the company is likely to  
43 be unreasonably frustrated;
- 44 (ii) Another member has engaged in conduct relating  
45 to the company's business that makes it not reasonably  
46 practicable to carry on the company's business with that  
47 member;
- 48 (iii) It is not otherwise reasonably practicable to carry  
49 on the company's business in conformity with the articles  
50 of organization and the operating agreement;
- 51 (iv) The company failed to purchase the petitioner's  
52 distributional interest as required by section 7-701; or
- 53 (v) The managers or members in control of the com-  
54 pany have acted, are acting or will act in a manner that is  
55 illegal, oppressive, fraudulent or unfairly prejudicial to the  
56 petitioner;
- 57 (6) On application by a transferee of a member's inter-  
58 est, a judicial determination that it is equitable to wind up  
59 the company's business:
- 60 (i) After the expiration of the specified term, if the  
61 company was for a specified term at the time the applicant

62 became a transferee by member dissociation, transfer or  
63 entry of a charging order that gave rise to the transfer; or

64 (ii) At any time, if the company was at will at the time  
65 the applicant became a transferee by member dissociation,  
66 transfer or entry of a charging order that gave rise to the  
67 transfer.

**§31B-8-802. Limited liability company continues after dissolution.**

1 (a) Subject to subsection (b) of this section, a limited  
2 liability company continues after dissolution only for the  
3 purpose of winding up its business.

4 (b) At any time after the dissolution of a limited liabil-  
5 ity company and before the winding up of its business is  
6 completed, the members, including a dissociated member  
7 whose dissociation caused the dissolution, may unani-  
8 mously waive the right to have the company's business  
9 wound up and the company terminated. In that case:

10 (1) The limited liability company resumes carrying on  
11 its business as if dissolution had never occurred and any  
12 liability incurred by the company or a member after the  
13 dissolution and before the waiver is determined as if the  
14 dissolution had never occurred; and

15 (2) The rights of a third party accruing under section  
16 8-804(a) or arising out of conduct in reliance on the dis-  
17 solution before the third party knew or received a notifica-  
18 tion of the waiver are not adversely affected.

**§31B-8-803. Right to wind up limited liability company's business.**

1 (a) After dissolution, a member who has not wrongful-  
2 ly dissociated may participate in winding up a limited  
3 liability company's business, but on application of any  
4 member, member's legal representative or transferee, the  
5 circuit court, for good cause shown, may order judicial  
6 supervision of the winding up.

7 (b) A legal representative of the last surviving member  
8 may wind up a limited liability company's business.

9 (c) A person winding up a limited liability company's  
10 business may preserve the company's business or property  
11 as a going concern for a reasonable time, prosecute and  
12 defend actions and proceedings, whether civil, criminal or  
13 administrative, settle and close the company's business,  
14 dispose of and transfer the company's property, discharge  
15 the company's liabilities, distribute the assets of the com-  
16 pany pursuant to section 8-806, settle disputes by media-  
17 tion or arbitration and perform other necessary acts.

**§31B-8-804. Member's or manager's power and liability as agent after dissolution.**

1 (a) A limited liability company is bound by a mem-  
2 ber's or manager's act after dissolution that:

3 (1) Is appropriate for winding up the company's busi-  
4 ness; or

5 (2) Would have bound the company under section  
6 3-301 before dissolution, if the other party to the transac-  
7 tion did not have notice of the dissolution.

8 (b) A member or manager who, with knowledge of the  
9 dissolution, subjects a limited liability company to liability  
10 by an act that is not appropriate for winding up the com-  
11 pany's business is liable to the company for any damage  
12 caused to the company arising from the liability.

**§31B-8-805. Articles of termination.**

1 (a) At any time after dissolution and winding up, a  
2 limited liability company may terminate its existence by  
3 filing with the secretary of state articles of termination  
4 stating:

5 (1) The name of the company;

6 (2) The date of the dissolution; and

7 (3) That the company's business has been wound up  
8 and the legal existence of the company has been terminat-  
9 ed.

10 (b) The existence of a limited liability company is  
11 terminated upon the filing of the articles of termination, or



12 upon a later effective date, if specified in the articles of  
13 termination.

**§31B-8-806. Distribution of assets in winding up limited liability company's business.**

1 (a) In winding up a limited liability company's busi-  
2 ness, the assets of the company must be applied to dis-  
3 charge its obligations to creditors, including members who  
4 are creditors. Any surplus must be applied to pay in mon-  
5 ey the net amount distributable to members in accordance  
6 with their right to distributions under subsection (b) of this  
7 section.

8 (b) Each member is entitled to a distribution upon the  
9 winding up of the limited liability company's business  
10 consisting of a return of all contributions which have not  
11 previously been returned and a distribution of any re-  
12 mainder in equal shares.

**§31B-8-807. Known claims against dissolved limited liability company.**

1 (a) A dissolved limited liability company may dispose  
2 of the known claims against it by following the procedure  
3 described in this section.

4 (b) A dissolved limited liability company shall notify  
5 its known claimants in writing of the dissolution. The  
6 notice must:

7 (1) Specify the information required to be included in  
8 a claim;

9 (2) Provide a mailing address where the claim is to be  
10 sent;

11 (3) State the deadline for receipt of the claim, which  
12 may not be less than one hundred twenty days after the  
13 date the written notice is received by the claimant; and

14 (4) State that the claim will be barred if not received  
15 by the deadline.

16 (c) A claim against a dissolved limited liability compa-  
17 ny is barred if the requirements of subsection (b) of this  
18 section are met, and:

19 (1) The claim is not received by the specified dead-  
20 line; or

21 (2) In the case of a claim that is timely received but  
22 rejected by the dissolved company, the claimant does not  
23 commence a proceeding to enforce the claim within nine-  
24 ty days after the receipt of the notice of the rejection.

25 (d) For purposes of this section, "claim" does not in-  
26 clude a contingent liability or a claim based on an event  
27 occurring after the effective date of dissolution.

**§31B-8-808. Other claims against dissolved limited liability company.**

1 (a) A dissolved limited liability company may publish  
2 notice of its dissolution and request persons having claims  
3 against the company to present them in accordance with  
4 the notice.

5 (b) The notice must:

6 (1) Be published at least once in a newspaper of gen-  
7 eral circulation in the county in which the dissolved limit-  
8 ed liability company's principal office is located or, if  
9 none in this state, in which its designated office is or was  
10 last located;

11 (2) Describe the information required to be contained  
12 in a claim and provide a mailing address where the claim  
13 is to be sent; and

14 (3) State that a claim against the limited liability com-  
15 pany is barred unless a proceeding to enforce the claim is  
16 commenced within five years after publication of the no-  
17 tice.

18 (c) If a dissolved limited liability company publishes a  
19 notice in accordance with subsection (b) of this section,  
20 the claim of each of the following claimants is barred  
21 unless the claimant commences a proceeding to enforce

22 the claim against the dissolved company within five years  
23 after the publication date of the notice:

24 (1) A claimant who did not receive written notice un-  
25 der section 8-807;

26 (2) A claimant whose claim was timely sent to the  
27 dissolved company but not acted on; and

28 (3) A claimant whose claim is contingent or based on  
29 an event occurring after the effective date of dissolution.

30 (d) A claim not barred under this section may be en-  
31 forced:

32 (1) Against the dissolved limited liability company, to  
33 the extent of its undistributed assets; or

34 (2) If the assets have been distributed in liquidation,  
35 against a member of the dissolved company to the extent  
36 of the member's proportionate share of the claim or the  
37 company's assets distributed to the member in liquidation,  
38 whichever is less, but a member's total liability for all  
39 claims under this section may not exceed the total amount  
40 of assets distributed to the member.

#### **§31B-8-809. Grounds for administrative dissolution.**

1 The secretary of state may commence a proceeding to  
2 dissolve a limited liability company administratively if the  
3 company does not:

4 (1) Pay any fees, taxes or penalties imposed by this  
5 chapter or other law within sixty days after they are due;

6 (2) Deliver its annual report to the secretary of state  
7 within sixty days after it is due.

#### **§31B-8-810. Procedure for and effect of administrative dissolution.**

1 (a) If the secretary of state determines that a ground  
2 exists for administratively dissolving a limited liability  
3 company, the secretary of state shall enter a record of the  
4 determination and serve the company with a copy of the  
5 record.

6 (b) If the company does not correct each ground for  
7 dissolution or demonstrate to the reasonable satisfaction of  
8 the secretary of state that each ground determined by the  
9 secretary of state does not exist within sixty days after  
10 service of the notice, the secretary of state shall administra-  
11 tively dissolve the company by signing a certification of  
12 the dissolution that recites the ground for dissolution and  
13 its effective date. The secretary of state shall file the origi-  
14 nal of the certificate and serve the company with a copy of  
15 the certificate.

16 (c) A company administratively dissolved continues its  
17 existence but may carry on only business necessary to  
18 wind up and liquidate its business and affairs under sec-  
19 tion 8-802 and to notify claimants under sections 8-807  
20 and 8-808.

21 (d) The administrative dissolution of a company does  
22 not terminate the authority of its agent for service of pro-  
23 cess.

**§31B-8-811. Reinstatement following administrative dissolution.**

1 (a) A limited liability company administratively dis-  
2 solved may apply to the secretary of state for reinstate-  
3 ment within two years after the effective date of dissolu-  
4 tion. The application must:

5 (1) Recite the name of the company and the effective  
6 date of its administrative dissolution;

7 (2) State that the ground for dissolution either did not  
8 exist or have been eliminated;

9 (3) State that the company's name satisfies the require-  
10 ments of section 1-105; and

11 (4) Contain a certificate from the tax commissioner  
12 reciting that all taxes owed by the company have been  
13 paid.

14 (b) If the secretary of state determines that the applica-  
15 tion contains the information required by subsection (a)  
16 of this section and that the information is correct, the sec-  
17 retary of state shall cancel the certificate of dissolution and

18 prepare a certificate of reinstatement that recites this deter-  
19 mination and the effective date of reinstatement, file the  
20 original of the certificate, and serve the company with a  
21 copy of the certificate.

22 (c) When reinstatement is effective, it relates back to  
23 and takes effect as of the effective date of the administra-  
24 tive dissolution and the company may resume its business  
25 as if the administrative dissolution had never occurred.

### **§31B-8-812. Appeal from denial of reinstatement.**

1 (a) If the secretary of state denies a limited liability  
2 company's application for reinstatement following admin-  
3 istrative dissolution, the secretary of state shall serve the  
4 company with a record that explains the reason or reasons  
5 for denial.

6 (b) The company may appeal the denial of reinstate-  
7 ment to the circuit court within thirty days after service of  
8 the notice of denial is perfected. The company appeals by  
9 petitioning the court to set aside the dissolution and at-  
10 taching to the petition copies of the secretary of state's  
11 certificate of dissolution, the company's application for  
12 reinstatement and the secretary of state's notice of denial.

13 (c) The court may summarily order the secretary of  
14 state to reinstate the dissolved company or may take other  
15 action the court considers appropriate.

16 (d) The court's final decision may be appealed as in  
17 other civil proceedings.

## **ARTICLE 9. CONVERSIONS AND MERGERS.**

§31B-9-901. Definitions.

§31B-9-902. Conversion of partnership or limited partnership to limited liability company.

§31B-9-903. Effect of conversion; entity unchanged.

§31B-9-904. Merger of entities; confirmation of title to real estate required.

§31B-9-905. Articles of merger.

§31B-9-906. Effect of merger.

§31B-9-907. Article not exclusive.

### **§31B-9-901. Definitions.**

1 In this article:

2 (1) "Corporation" means a corporation under chapter  
3 thirty-one of this code, a predecessor law, or comparable  
4 law of another jurisdiction.

5 (2) "General partner" means a partner in a partnership  
6 and a general partner in a limited partnership.

7 (3) "Limited partner" means a limited partner in a  
8 limited partnership.

9 (4) "Limited partnership" means a limited partnership  
10 created under article nine, chapter forty-seven of this code,  
11 a predecessor law, or comparable law of another jurisdic-  
12 tion.

13 (5) "Partner" includes a general partner and a limited  
14 partner.

15 (6) "Partnership" means a general partnership under  
16 chapter forty-seven-b of this code, a predecessor law, or  
17 comparable law of another jurisdiction.

18 (7) "Partnership agreement" means an agreement  
19 among the partners concerning the partnership or limited  
20 partnership.

21 (8) "Shareholder" means a shareholder in a corpora-  
22 tion.

**§31B-9-902. Conversion of partnership or limited partnership  
to limited liability company.**

1 (a) A partnership or limited partnership may be con-  
2 verted to a limited liability company pursuant to this sec-  
3 tion.

4 (b) The terms and conditions of a conversion of a  
5 partnership or limited partnership to a limited liability  
6 company must be approved by all of the partners or by a  
7 number or percentage of the partners required for conver-  
8 sion in the partnership agreement.

9 (c) An agreement of conversion must set forth the  
10 terms and conditions of the conversion of the interests of  
11 partners of a partnership or of a limited partnership, as the

12 case may be, into interests in the converted limited liability  
13 company or the cash or other consideration to be paid or  
14 delivered as a result of the conversion of the interests of  
15 the partners, or a combination thereof.

16 (d) After a conversion is approved under subsection  
17 (b) of this section, the partnership or limited partnership  
18 shall file articles of organization in the office of the secre-  
19 tary of state which satisfy the requirements of section  
20 2-203 and contain:

21 (1) A statement that the partnership or limited partner-  
22 ship was converted to a limited liability company from a  
23 partnership or limited partnership, as the case may be;

24 (2) Its former name;

25 (3) A statement of the number of votes cast by the  
26 partners entitled to vote for and against the conversion  
27 and, if the vote is less than unanimous, the number or  
28 percentage required to approve the conversion under  
29 subsection (b) of this section; and

30 (4) In the case of a limited partnership, a statement  
31 that the certificate of limited partnership is to be canceled  
32 as of the date the conversion took effect.

33 (e) In the case of a limited partnership, the filing of  
34 articles of organization under subsection (d) of this sec-  
35 tion cancels its certificate of limited partnership as of the  
36 date the conversion took effect.

37 (f) A conversion takes effect when the articles of orga-  
38 nization are filed in the office of the secretary of state or  
39 at any later date specified in the articles of organization.

40 (g) A general partner who becomes a member of a  
41 limited liability company as a result of a conversion re-  
42 mains liable as a partner for an obligation incurred by the  
43 partnership or limited partnership before the conversion  
44 takes effect.

45 (h) A general partner's liability for all obligations of  
46 the limited liability company incurred after the conversion  
47 takes effect is that of a member of the company. A limit-  
48 ed partner who becomes a member as a result of a conver-

49 sion remains liable only to the extent the limited partner  
50 was liable for an obligation incurred by the limited part-  
51 nership before the conversion takes effect.

**§31B-9-903. Effect of conversion; entity unchanged.**

1 (a) A partnership or limited partnership that has been  
2 converted pursuant to this article is for all purposes the  
3 same entity that existed before the conversion.

4 (b) When a conversion takes effect:

5 (1) All property owned by the converting partnership  
6 or limited partnership vests in the limited liability compa-  
7 ny;

8 (2) All debts, liabilities and other obligations of the  
9 converting partnership or limited partnership continue as  
10 obligations of the limited liability company;

11 (3) An action or proceeding pending by or against the  
12 converting partnership or limited partnership may be  
13 continued as if the conversion had not occurred;

14 (4) Except as prohibited by other law, all of the rights,  
15 privileges, immunities, powers and purposes of the con-  
16 verting partnership or limited partnership vest in the limit-  
17 ed liability company; and

18 (5) Except as otherwise provided in the agreement of  
19 conversion under section 9-902(c), all of the partners of  
20 the converting partnership continue as members of the  
21 limited liability company.

**§31B-9-904. Merger of entities; confirmation of title to real estate required.**

1 (a) Pursuant to a plan of merger approved under sub-  
2 section (c) of this section, a limited liability company may  
3 be merged with or into one or more limited liability com-  
4 panies, foreign limited liability companies, corporations,  
5 foreign corporations, partnerships, foreign partnerships,  
6 limited partnerships, foreign limited partnerships or other  
7 domestic or foreign entities.

8 (b) A plan of merger must set forth:



9           (1) The name of each entity that is a party to the  
10 merger;

11           (2) The name of the surviving entity into which the  
12 other entities will merge;

13           (3) The type of organization of the surviving entity;

14           (4) The terms and conditions of the merger;

15           (5) The manner and basis for converting the interests  
16 of each party to the merger into interests or obligations of  
17 the surviving entity, or into money or other property, in  
18 whole or in part; and

19           (6) The street address of the surviving entity's princi-  
20 pal place of business.

21           (c) A plan of merger must be approved:

22           (1) In the case of a limited liability company that is a  
23 party to the merger, by all of the members or by a number  
24 or percentage of members specified in the operating  
25 agreement;

26           (2) In the case of a foreign limited liability company  
27 that is a party to the merger, by the vote required for ap-  
28 proval of a merger by the law of the state or foreign juris-  
29 diction in which the foreign limited liability company is  
30 organized;

31           (3) In the case of a partnership or domestic limited  
32 partnership that is a party to the merger, by the vote re-  
33 quired for approval of a conversion under section 9-902  
34 (b); and

35           (4) In the case of any other entities that are parties to  
36 the merger, by the vote required for approval of a merger  
37 by the law of this state or of the state or foreign jurisdic-  
38 tion in which the entity is organized and, in the absence of  
39 such a requirement, by all the owners of interests in the  
40 entity.

41           (d) After a plan of merger is approved and before the  
42 merger takes effect, the plan may be amended or aban-  
43 doned as provided in the plan.

44 (e) The merger is effective upon the filing of the arti-  
45 cles of merger with the secretary of state, or at such later  
46 date as the articles may provide.

47 (f) Irrespective of whether the surviving limited liabili-  
48 ty company is to be governed by the laws of this state or  
49 by the laws of any other state, any constituent limited  
50 liability company thereof owning or holding real estate in  
51 this state shall further evidence title thereto in the surviving  
52 limited liability company by executing and acknowledg-  
53 ing for record a confirmatory deed or deeds to the respec-  
54 tive parcels of real estate, which deed or deeds shall be  
55 recorded in the office of the clerk of the county commis-  
56 sion of the respective counties in which such real estate is  
57 situate; and such deed or deeds shall recite as the consider-  
58 ation therefor the said merger and shall be deemed confir-  
59 matory of the title of such real estate in the surviving limit-  
60 ed liability company.

**§31B-9-905. Articles of merger.**

1 (a) After approval of the plan of merger under section  
2 9-904(c), unless the merger is abandoned under section  
3 9-904(d), articles of merger must be signed on behalf of  
4 each limited liability company and other entity that is a  
5 party to the merger and delivered to the secretary of state  
6 for filing. The articles must set forth:

7 (1) The name and jurisdiction of formation or organi-  
8 zation of each of the limited liability companies and other  
9 entities that are parties to the merger;

10 (2) For each limited liability company that is to merge,  
11 the date its articles of organization were filed with the  
12 secretary of state;

13 (3) That a plan of merger has been approved and  
14 signed by each limited liability company and other entity  
15 that is to merge;

16 (4) The name and address of the surviving limited  
17 liability company or other surviving entity;

18 (5) The effective date of the merger;

19 (6) If a limited liability company is the surviving enti-  
20 ty, such changes in its articles of organization as are neces-  
21 sary by reason of the merger;

22 (7) If a party to a merger is a foreign limited liability  
23 company, the jurisdiction and date of filing of its initial  
24 articles of organization and the date when its application  
25 for authority was filed by the secretary of state or, if an  
26 application has not been filed, a statement to that effect;  
27 and

28 (8) If the surviving entity is not a limited liability com-  
29 pany, an agreement that the surviving entity may be served  
30 with process in this state and is subject to liability in any  
31 action or proceeding for the enforcement of any liability  
32 or obligation of any limited liability company previously  
33 subject to suit in this state which is to merge, and for the  
34 enforcement, as provided in this chapter, of the right of  
35 members of any limited liability company to receive pay-  
36 ment for their interest against the surviving entity.

37 (b) If a foreign limited liability company is the surviv-  
38 ing entity of a merger, it may not do business in this state  
39 until an application for that authority is filed with the  
40 secretary of state.

41 (c) The surviving limited liability company or other  
42 entity shall furnish a copy of the plan of merger, on re-  
43 quest and without cost, to any member of any limited  
44 liability company or any person holding an interest in any  
45 other entity that is to merge.

46 (d) Articles of merger operate as an amendment to the  
47 limited liability company's articles of organization.

#### §31B-9-906. Effect of merger.

1 (a) When a merger takes effect:

2 (1) The separate existence of each limited liability  
3 company and other entity that is a party to the merger,  
4 other than the surviving entity, terminates;

5 (2) All property owned by each of the limited liability  
6 companies and other entities that are party to the merger  
7 vests in the surviving entity;

8           (3) All debts, liabilities and other obligations of each  
9 limited liability company and other entity that is party to  
10 the merger become the obligations of the surviving entity;

11           (4) An action or proceeding pending by or against a  
12 limited liability company or other party to a merger may  
13 be continued as if the merger had not occurred or the  
14 surviving entity may be substituted as a party to the action  
15 or proceeding; and

16           (5) Except as prohibited by other law, all the rights,  
17 privileges, immunities, powers and purposes of every limited  
18 liability company and other entity that is a party to a  
19 merger become vested in the surviving entity.

20           (b) The secretary of state is an agent for service of  
21 process in an action or proceeding against the surviving  
22 foreign entity to enforce an obligation of any party to a  
23 merger if the surviving foreign entity fails to appoint or  
24 maintain an agent designated for service of process in this  
25 state or the agent for service of process cannot with rea-  
26 sonable diligence be found at the designated office. Upon  
27 receipt of process, the secretary of state shall send a copy  
28 of the process by registered or certified mail, return re-  
29 ceipt requested, to the surviving entity at the address set  
30 forth in the articles of merger. Service is effected under  
31 this subsection at the earliest of:

32           (1) The date the company receives the process, notice  
33 or demand;

34           (2) The date shown on the return receipt, if signed on  
35 behalf of the company; or

36           (3) Five days after its deposit in the mail, if mailed  
37 postpaid and correctly addressed.

38           (c) A member of the surviving limited liability compa-  
39 ny is liable for all obligations of a party to the merger for  
40 which the member was personally liable before the merg-  
41 er.

42           (d) Unless otherwise agreed, a merger of a limited  
43 liability company that is not the surviving entity in the  
44 merger does not require the limited liability company to

45 wind up its business under this chapter or pay its liabilities  
46 and distribute its assets pursuant to this chapter.

47 (e) Articles of merger serve as articles of dissolution  
48 for a limited liability company that is not the surviving  
49 entity in the merger.

**§31B-9-907. Article not exclusive.**

1 This article does not preclude an entity from being  
2 converted or merged under other law.

**ARTICLE 10. FOREIGN LIMITED LIABILITY COMPANIES.**

§31B-10-1001. Law governing foreign limited liability companies.

§31B-10-1002. Application for certificate of authority.

§31B-10-1003. Activities not constituting transacting business.

§31B-10-1004. Issuance of certificate of authority.

§31B-10-1005. Name of foreign limited liability company.

§31B-10-1006. Revocation of certificate of authority.

§31B-10-1007. Cancellation of authority.

§31B-10-1008. Effect of failure to obtain certificate of authority.

§31B-10-1009. Action by attorney general.

**§31B-10-1001. Law governing foreign limited liability companies.**

1 (a) The laws of the state or other jurisdiction under  
2 which a foreign limited liability company is organized  
3 govern its organization and internal affairs and the liability  
4 of its managers, members and their transferees.

5 (b) A foreign limited liability company may not be  
6 denied a certificate of authority by reason of any difference  
7 between the laws of another jurisdiction under which  
8 the foreign company is organized and the laws of this  
9 state.

10 (c) A certificate of authority does not authorize a  
11 foreign limited liability company to engage in any business  
12 or exercise any power that a limited liability company  
13 may not engage in or exercise in this state.

**§31B-10-1002. Application for certificate of authority.**

1 (a) A foreign limited liability company may apply for  
2 a certificate of authority to transact business in this state  
3 by delivering an application to the secretary of state for  
4 filing, together with a fee in the amount of one hundred  
5 fifty dollars. The application must set forth:

6 (1) The name of the foreign company or, if its name is  
7 unavailable for use in this state, a name that satisfies the  
8 requirements of section 10-1005;

9 (2) The name of the state or country under whose law  
10 it is organized;

11 (3) The street address of its principal office;

12 (4) The address of its initial designated office in this  
13 state;

14 (5) The name and street address of its initial agent for  
15 service of process in this state;

16 (6) Whether the duration of the company is for a spec-  
17 ified term and, if so, the period specified;

18 (7) Whether the company is manager-managed, and, if  
19 so, the name and address of each initial manager; and

20 (8) Whether the members of the company are to be  
21 liable for its debts and obligations under a provision simi-  
22 lar to section 3-303(c).

23 (b) A foreign limited liability company shall deliver  
24 with the completed application a certificate of existence or  
25 a record of similar import authenticated by the secretary  
26 of state or other official having custody of company re-  
27 cords in the state or country under whose law it is orga-  
28 nized.

**§31B-10-1003. Activities not constituting transacting business.**

1 (a) Activities of a foreign limited liability company  
2 that do not constitute transacting business in this state  
3 within the meaning of this article include:

- 4 (1) Maintaining, defending or settling an action or  
5 proceeding;
- 6 (2) Holding meetings of its members or managers or  
7 carrying on any other activity concerning its internal af-  
8 fairs;
- 9 (3) Maintaining bank accounts;
- 10 (4) Maintaining offices or agencies for the transfer,  
11 exchange and registration of the foreign company's own  
12 securities or maintaining trustees or depositories with re-  
13 spect to those securities;
- 14 (5) Selling through independent contractors;
- 15 (6) Soliciting or obtaining orders, whether by mail or  
16 through employees or agents or otherwise, if the orders  
17 require acceptance outside this state before they become  
18 contracts;
- 19 (7) Creating or acquiring indebtedness, mortgages or  
20 security interests in real or personal property;
- 21 (8) Securing or collecting debts or enforcing mort-  
22 gages or other security interests in property securing the  
23 debts, and holding, protecting and maintaining property  
24 so acquired;
- 25 (9) Conducting an isolated transaction that is complet-  
26 ed within thirty days and is not one in the course of simi-  
27 lar transactions of a like manner; and
- 28 (10) Transacting business in interstate commerce.
- 29 (b) For purposes of this article, the ownership in this  
30 state of income-producing real property or tangible per-  
31 sonal property, other than property excluded under sub-  
32 section (a) of this section, constitutes transacting business  
33 in this state.
- 34 (c) This section does not apply in determining the  
35 contacts or activities that may subject a foreign limited  
36 liability company to service of process, taxation or regula-  
37 tion under any other law of this state.

**§31B-10-1004. Issuance of certificate of authority.**

1 Unless the secretary of state determines that an appli-  
2 cation for a certificate of authority fails to comply as to  
3 form with the filing requirements of this chapter, the sec-  
4 retary of state, upon payment of all filing fees, shall file  
5 the application and send a receipt for it and the fees to the  
6 limited liability company or its representative.

**§31B-10-1005. Name of foreign limited liability company.**

1 (a) If the name of a foreign limited liability company  
2 does not satisfy the requirements of section 1-105, the  
3 company, to obtain or maintain a certificate of authority  
4 to transact business in this state, must use a fictitious name  
5 to transact business in this state if its real name is unavail-  
6 able and it delivers to the secretary of state for filing a  
7 copy of the resolution of its managers, in the case of a  
8 manager-managed company, or of its members, in the  
9 case of a member-managed company, adopting the ficti-  
10 tious name.

11 (b) Except as authorized by subsections (c) and (d) of  
12 this section, the name, including a fictitious name to be  
13 used to transact business in this state, of a foreign limited  
14 liability company must be distinguishable upon the re-  
15 cords of the secretary of state from:

16 (1) The name of any corporation, limited partnership,  
17 or company incorporated, organized or authorized to  
18 transact business in this state;

19 (2) A name reserved or registered under section 1-106  
20 or 1-107; and

21 (3) The fictitious name of another foreign limited  
22 liability company authorized to transact business in this  
23 state.

24 (c) A foreign limited liability company may apply to  
25 the secretary of state for authority to use in this state a  
26 name that is not distinguishable upon the records of the  
27 secretary of state from a name described in subsection (b)  
28 of this section. The secretary of state shall authorize use  
29 of the name applied for if:



30 (1) The present user, registrant or owner of a reserved  
31 name consents to the use in a record and submits an un-  
32 dertaking in form satisfactory to the secretary of state to  
33 change its name to a name that is distinguishable upon the  
34 records of the secretary of state from the name of the  
35 foreign applying limited liability company; or

36 (2) The applicant delivers to the secretary of state a  
37 certified copy of a final judgment of a court establishing  
38 the applicant's right to use the name applied for in this  
39 state.

40 (d) A foreign limited liability company may use in  
41 this state the name, including the fictitious name, of anoth-  
42 er domestic or foreign entity that is used in this state if the  
43 other entity is incorporated, organized or authorized to  
44 transact business in this state and the foreign limited liabil-  
45 ity company:

46 (1) Has merged with the other entity;

47 (2) Has been formed by reorganization of the other  
48 entity; or

49 (3) Has acquired all or substantially all of the assets,  
50 including the name, of the other entity.

51 (e) If a foreign limited liability company authorized to  
52 transact business in this state changes its name to one that  
53 does not satisfy the requirements of section 1-105, it may  
54 not transact business in this state under the name as  
55 changed until it adopts a name satisfying the requirements  
56 of section 1-105 and obtains an amended certificate of  
57 authority.

#### **§31B-10-1006. Revocation of certificate of authority.**

1 (a) A certificate of authority of a foreign limited lia-  
2 bility company to transact business in this state may be  
3 revoked by the secretary of state in the manner provided  
4 in subsection (b) of this section if:

5 (1) The company fails to:

6 (i) Pay any fees, taxes and penalties owed to this state;

7 (ii) Deliver its annual report required under section  
8 2-211 to the secretary of state within sixty days after it is  
9 due;

10 (iii) Appoint and maintain an agent for service of  
11 process as required by this article; or

12 (iv) File a statement of a change in the name or busi-  
13 ness address of the agent as required by this article; or

14 (2) A misrepresentation has been made of any materi-  
15 al matter in any application, report, affidavit or other re-  
16 cord submitted by the company pursuant to this article.

17 (b) The secretary of state may not revoke a certificate  
18 of authority of a foreign limited liability company unless  
19 the secretary of state sends the company notice of the  
20 revocation, at least sixty days before its effective date, by a  
21 record addressed to its agent for service of process in this  
22 state, or if the company fails to appoint and maintain a  
23 proper agent in this state, addressed to the office required  
24 to be maintained by section 1-108. The notice must spec-  
25 ify the cause for the revocation of the certificate of au-  
26 thority. The authority of the company to transact business  
27 in this state ceases on the effective date of the revocation  
28 unless the foreign limited liability company cures the  
29 failure before that date.

#### **§31B-10-1007. Cancellation of authority.**

1 A foreign limited liability company may cancel its  
2 authority to transact business in this state by filing in the  
3 office of the secretary of state a certificate of cancellation.  
4 Cancellation does not terminate the authority of the secre-  
5 tary of state to accept service of process on the company  
6 for claims for relief arising out of the transactions of busi-  
7 ness in this state.

#### **§31B-10-1008. Effect of failure to obtain certificate of authority.**

1 (a) A foreign limited liability company transacting  
2 business in this state may not maintain an action or pro-  
3 ceeding in this state unless it has a certificate of authority  
4 to transact business in this state.

5 (b) The failure of a foreign limited liability company  
6 to have a certificate of authority to transact business in this  
7 state does not impair the validity of a contract or act of the  
8 company or prevent the foreign limited liability company  
9 from defending an action or proceeding in this state.

10 (c) Limitations on personal liability of managers,  
11 members and their transferees are not waived solely by  
12 transacting business in this state without a certificate of  
13 authority.

14 (d) If a foreign limited liability company transacts  
15 business in this state without a certificate of authority, it  
16 appoints the secretary of state as its agent for service of  
17 process for claims for relief arising out of the transaction  
18 of business in this state.

#### **§31B-10-1009. Action by attorney general.**

1 The attorney general may maintain an action to re-  
2 strain a foreign limited liability company from transacting  
3 business in this state in violation of this article.

#### **ARTICLE 11. DERIVATIVE ACTIONS.**

§31B-11-1101. Right of action.

§31B-11-1102. Proper plaintiff.

§31B-11-1103. Pleading.

§31B-11-1104. Expenses.

#### **§31B-11-1101. Right of action.**

1 A member of a limited liability company may main-  
2 tain an action in the right of the company if the members  
3 or managers having authority to do so have refused to  
4 commence the action or an effort to cause those members  
5 or managers to commence the action is not likely to suc-  
6 ceed.

#### **§31B-11-1102. Proper plaintiff.**

1 In a derivative action for a limited liability company,  
2 the plaintiff must be a member of the company when the  
3 action is commenced; and:

4 (1) Must have been a member at the time of the trans-  
5 action of which the plaintiff complains; or

6 (2) The plaintiff's status as a member must have de-  
7 volved upon the plaintiff by operation of law or pursuant  
8 to the terms of the operating agreement from a person  
9 who was a member at the time of the transaction.

**§31B-11-1103. Pleading.**

1 In a derivative action for a limited liability company,  
2 the complaint must set forth with particularity the effort of  
3 the plaintiff to secure initiation of the action by a member  
4 or manager or the reasons for not making the effort.

**§31B-11-1104. Expenses.**

1 If a derivative action for a limited liability company is  
2 successful, in whole or in part, or if anything is received  
3 by the plaintiff as a result of a judgment, compromise or  
4 settlement of an action or claim, the court may award the  
5 plaintiff reasonable expenses, including reasonable attor-  
6 ney's fees, and shall direct the plaintiff to remit to the  
7 limited liability company the remainder of the proceeds  
8 received.

**ARTICLE 12. MISCELLANEOUS PROVISIONS.**

§31B-12-1201. Uniformity of application and construction.

§31B-12-1202. Short title.

§31B-12-1203. Severability clause.

§31B-12-1204. Effective date.

§31B-12-1205. Transitional provisions.

§31B-12-1206. Savings clause.

**§31B-12-1201. Uniformity of application and construction.**

1 This chapter shall be applied and construed to effectu-  
2 ate its general purpose to make uniform the law with re-  
3 spect to the subject of this chapter among states enacting  
4 it.

**§31B-12-1202. Short title.**

1 This chapter may be cited as the Uniform Limited  
2 Liability Company Act.

**§31B-12-1203. Severability clause.**

1 If any provision of this chapter or its application to  
2 any person or circumstance is held invalid, the invalidity  
3 does not affect other provisions or applications of this  
4 chapter which can be given effect without the invalid pro-  
5 vision or application, and to this end, the provisions of this  
6 chapter are severable.

**§31B-12-1204. Effective date.**

1 This chapter takes effect on the first day of July, one  
2 thousand nine hundred ninety-six.

**§31B-12-1205. Transitional provisions.**

1 (a) Before the first day of July, one thousand nine  
2 hundred ninety-six, this chapter governs only a limited  
3 liability company organized:

4 (1) After the effective date of this chapter, unless the  
5 company is continuing the business of a dissolved limited  
6 liability company under the provisions of the former West  
7 Virginia limited liability company act; and

8 (2) Before the effective date of this chapter, which  
9 elects, as provided by subsection (c) of this section, to be  
10 governed by this chapter.

11 (b) On and after the first day of July, one thousand  
12 nine hundred ninety-six, this chapter governs all limited  
13 liability companies.

14 (c) Before the first day of July, one thousand nine  
15 hundred ninety-six, a limited liability company voluntarily  
16 may elect, in the manner provided in its operating agree-  
17 ment or by law for amending the operating agreement, to  
18 be governed by this chapter.

**§31B-12-1206. Savings clause.**

1 This chapter does not affect an action or proceeding  
2 commenced or right accrued before the effective date of  
3 this chapter.

**ARTICLE 13. PROFESSIONAL LIMITED LIABILITY COMPANIES.**

**§31B-13-1301. Definitions.**

§31B-13-1302. Who may become a member; professional limited liability companies authorized.

§31B-13-1303. Name.

§31B-13-1304. Duty of licensing board.

§31B-13-1305. Professional relationships not affected; liability for debts, etc., of limited liability company, its members, managers, employees and agents; individual liability.

§31B-13-1306. Application of article.

**§31b-13-1301. Definitions.**

1 As used in this article:

2 (1) "Licensing board" means the governing body or  
3 agency established under chapter thirty of this code which  
4 is responsible for the licensing and regulation of the prac-  
5 tice of the profession which the professional limited liabil-  
6 ity company is organized to provide;

7 (2) "Professional limited liability company" means a  
8 limited liability company organized under this chapter for  
9 the purpose of rendering a professional service; and

10 (3) "Professional service" means the services rendered  
11 by the following professions: Attorneys-at-law under  
12 article two, physicians and podiatrists under article three,  
13 dentists under article four, optometrists under article eight,  
14 accountants under article nine, veterinarians under article  
15 ten, architects under article twelve, engineers under article  
16 thirteen, osteopathic physicians and surgeons under article  
17 fourteen and chiropractors under article sixteen, all of  
18 chapter thirty of this code.

**§31B-13-1302. Who may become a member; professional limited liability companies authorized.**

1 (a) Two or more persons duly licensed or otherwise  
2 legally authorized to render the same professional services  
3 or to practice together within this state may become mem-  
4 bers of a professional limited liability company under the  
5 provisions of this chapter for the purpose of rendering the  
6 same professional services. Notwithstanding any provision  
7 of this code to the contrary, including any limitation or  
8 restriction set forth in any licensing provision of chapter  
9 thirty of this code, a professional limited liability company

10 may be formed to provide any of the professional services  
11 as defined in section 13-1301(3) of this article.

12 (b) No professional limited liability company orga-  
13 nized under this article shall have as a member anyone  
14 other than a person who is duly licensed or otherwise  
15 legally authorized to render the professional services for  
16 which the professional limited liability company was orga-  
17 nized.

**§31B-13-1303. Name.**

1 The name of a professional limited liability company  
2 shall contain the words "professional limited liability com-  
3 pany" or the abbreviation "P.L.L.C." or "Professional L.  
4 L.C.".

**§31B-13-1304. Duty of licensing board.**

1 The licensing board for each of the professions autho-  
2 rized to form professional limited liability companies  
3 under this article shall propose legislative rules for pro-  
4 mulgation, in accordance with the provisions of article  
5 three, chapter twenty-nine-a of this code, providing for the  
6 implementation of this article and the procedures for the  
7 formation and approval of professional limited liability  
8 companies for the particular profession under the jurisdic-  
9 tion of such licensing board.

**§31B-13-1305. Professional relationships not affected; liability  
for debts, etc., of limited liability company,  
its members, managers, employees and  
agents; individual liability.**

1 (a) The provisions of this article shall not be construed  
2 to alter or affect the professional relationship between an  
3 individual furnishing professional services and a person  
4 receiving that service either with respect to liability arising  
5 out of that professional service or any confidential rela-  
6 tionship between the individual rendering and the individ-  
7 ual receiving the professional services, and all confidential  
8 relationships enjoyed under the laws of this state, whether  
9 now in existence, or hereafter enacted, shall remain invio-  
10 late.

11 (b) A member, manager, agent or employee of a pro-  
12 fessional limited liability company shall not, by reason of  
13 being a member, manager, agent or employee of a profes-  
14 sional limited liability company, be personally liable for  
15 any debts or claims against, or the acts or omissions of the  
16 professional limited liability company or of another mem-  
17 ber, manager, agent or employee of the professional limit-  
18 ed liability company.

19 (c) The professional limited liability company shall be  
20 liable for the acts or omissions of its members, managers,  
21 agents and employees to the same extent to which any  
22 other limited liability company would be liable for the acts  
23 or omissions of its members, managers, agents and em-  
24 ployees while they are engaged in carrying on the profes-  
25 sional limited liability company business.

26 (d) Notwithstanding any provision of this article to the  
27 contrary, any individual who renders a professional service  
28 as a member, manager, agent or employee of a profession-  
29 al limited liability company is liable for a negligent or  
30 wrongful act or omission in which the individual personal-  
31 ly participated to the same extent as if the individual ren-  
32 dered the professional service as a sole practitioner.

33 (e) A professional limited liability company organized  
34 under this article shall carry at all times at least one million  
35 dollars of professional liability insurance which shall in-  
36 sure the limited liability company and its members against  
37 liability imposed upon the company or any of its mem-  
38 bers arising out of the performance of professional servic-  
39 es to patients or clients of the company by any of the  
40 members or professional or nonprofessional managers or  
41 employees of the limited liability company.

42 (f) If, in any proceeding, compliance by a professional  
43 limited liability company with the requirements of subsec-  
44 tion (e) of this section is disputed, that issue shall be deter-  
45 mined by the court, and the burden of proof of compli-  
46 ance shall be on the person who claims the limitation of  
47 liability set forth in subsection (b) of this section.



48 (g) If a professional limited liability company is in  
49 compliance with the requirements of subsection (e) of this  
50 section, the requirements of this section shall not be ad-  
51 missible or in any way be made known to a jury in deter-  
52 mining an issue of liability for or extent of the obligation  
53 or damages in question.

54 (h) A professional limited liability company is consid-  
55 ered to be in compliance with subsection (e) of this section  
56 if it provides one million dollars of funds specifically  
57 designated and segregated for the satisfaction of judg-  
58 ments against the limited liability company, its members  
59 or any of its professional or nonprofessional managers or  
60 employees resulting from any of the types of claims cov-  
61 ered by subsection (e) of this section, by:

62 (1) Deposit in trust or in bank escrow of cash, bank  
63 certificates of deposit or United States treasury obligation;  
64 or

65 (2) A bank letter of credit or insurance company  
66 bond.

### §31B-13-1306. Application of article.

1 Except as otherwise specifically provided in this arti-  
2 cle, all provisions of this chapter governing limited liabili-  
3 ty companies shall be applicable to professional limited  
4 liability companies.

## CHAPTER 47. REGULATION OF TRADE.

### ARTICLE 6. MONEY AND INTEREST.

#### §47-6-10. Corporations, partnerships, and limited partner- ships not entitled to defense of usury.

1 No corporation, partnership, limited partnership or  
2 limited liability company may interpose the defense of  
3 usury in any civil action, nor may any bond, note, debt or  
4 contract of a corporation, partnership, limited partnership  
5 or limited liability company be set aside, impaired or ad-  
6 judged invalid by reason of anything contained in the laws  
7 prohibiting usury.

## CHAPTER 257

(H. B. 4860—By Delegates Kiss, Burke, Kelley,  
Mezzatesta, Border and Facemyer)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections one, three, five and seven, article two, chapter twenty-two-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to definitions in the water pollution control revolving fund act; changing the term "local government" to "local entity"; adding banking institutions to the definition of "local entity"; establishing a revolving fund; promulgation of rules; disbursement from the fund; collection of money due the fund; and review of funded projects.

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

That sections one, three, five and seven, article two, chapter twenty-two-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

### ARTICLE 2. WATER POLLUTION CONTROL REVOLVING FUND ACT.

§22C-2-1. Definitions.

§22C-2-3. West Virginia water pollution control revolving fund; disbursement of fund moneys; administration of the fund.

§22C-2-5. Collection of money due to the fund.

§22C-2-7. Environmental review of funded projects.

#### §22C-2-1. Definitions.

1 Unless the context in which used clearly requires a  
2 different meaning, as used in this article:

3 (a) "Authority" means the water development authority  
4 provided for in section four, article one of this chapter.

5 (b) "Cost" as applied to any project financed under the  
6 provisions of this article means the total of all costs in-  
7 curred by a local entity that are reasonable and necessary  
8 for carrying out all works and undertakings necessary or  
9 incident to the accomplishment of any project including:

10 (1) Developmental, planning and feasibility studies,  
11 surveys, plans and specifications;

12 (2) Architectural, engineering, financial, legal or other  
13 special services;

14 (3) Acquisition of land and any buildings and im-  
15 provements on the land or buildings, including the dis-  
16 charge of any obligations of the sellers of the land, build-  
17 ings or improvements;

18 (4) Site preparation and development, including de-  
19 molition or removal of existing structures, construction  
20 and reconstruction, labor, materials, machinery and equip-  
21 ment;

22 (5) The reasonable costs of financing incurred by the  
23 local entity in the course of the development of the pro-  
24 ject, carrying charges incurred before placing the project  
25 in service, interest on funds borrowed to finance the pro-  
26 ject to a date subsequent to the estimated date the project  
27 is to be placed in service, necessary expenses incurred in  
28 connection with placing the project in service, and the  
29 funding of accounts and reserves which the authority may  
30 require; and

31 (6) Other items that the division of environmental  
32 protection determines to be reasonable and necessary.

33 (c) "Fund" means the state water pollution control  
34 revolving fund provided for in this article as it may be  
35 expanded or modified from time to time pursuant to the  
36 clean water act, as amended, the federal safe drinking  
37 water act, as amended or by the executive order of the  
38 governor issued to comply with federal laws relating to the  
39 acts.

40 (d) "Instrumentality" means the division of environ-  
41 mental protection or the agency designated by an order of  
42 the governor as having the primary responsibility for  
43 administering the fund pursuant to the federal clean water  
44 act, as amended, and the federal safe drinking water act, as  
45 amended, or other federal laws.

46 (e) "Local entity" means any county, city, town, mu-  
47 nicipal corporation, authority, district, public service dis-  
48 trict, commission, banking institution or political subdivi-  
49 sion in West Virginia.

50 (f) "Project" means any public water or wastewater  
51 treatment facility located or to be located in or outside this  
52 state by a local entity and includes:

53 (1) Sewage and wastewater collection, treatment and  
54 disposal facilities;

55 (2) Public water transportation, treatment and distribu-  
56 tion facilities;

57 (3) Drainage facilities and projects;

58 (4) Administrative, maintenance, storage and laborato-  
59 ry facilities related to the facilities delineated in subdivi-  
60 sions (1), (2) and (3) of this subsection;

61 (5) Interests in land related to the facilities delineated  
62 in subdivisions (1), (2), (3) and (4) of this subsection; and

63 (6) Other projects allowable under federal law.

**§22C-2-3. West Virginia water pollution control revolving  
fund; disbursement of fund moneys; adminis-  
tration of the fund.**

1 (a) Under the direction of the division of environmen-  
2 tal protection, the water development authority shall estab-  
3 lish, administer and manage a permanent and perpetual  
4 fund, to be known as the "West Virginia Water Pollution  
5 Control Revolving Fund." The fund shall be comprised of  
6 moneys appropriated to the fund by the Legislature, mon-  
7 eys allocated to the state by the federal government ex-

8 pressly for the purposes of establishing and maintaining a  
9 state water pollution control revolving fund, all receipts  
10 from loans made from the fund to local entities, all in-  
11 come from the investment of moneys held in the fund,  
12 and all other sums designated for deposits to the fund  
13 from any source, public or private. Moneys in the fund  
14 shall be used solely to make loans to local entities to fi-  
15 nance or refinance the costs of a project: *Provided*, That  
16 moneys in the fund shall be utilized to defray the costs  
17 incurred by the authority and the division of environmen-  
18 tal protection in administering the provisions of this arti-  
19 cle: *Provided, however*, That moneys in the fund shall be  
20 used to make grants for projects to the extent allowed or  
21 authorized by federal law.

22 (b) The director of the division of environmental pro-  
23 tection, in consultation with the authority, shall promulgate  
24 legislative rules in accordance with the provisions of article  
25 three, chapter twenty-nine-a of this code, to:

26 (1) Govern the disbursement of moneys from the  
27 fund; and

28 (2) Establish a state water pollution control revolving  
29 fund program to direct the distribution of grants or loans  
30 from the fund to particular local entities and establish the  
31 interest rates and repayment terms of the loans.

32 (c) In order to carry out the administration and man-  
33 agement of the fund, the authority is authorized to employ  
34 officers, employees, agents, advisers and consultants, in-  
35 cluding attorneys, financial advisers, engineers, other tech-  
36 nical advisers and public accountants and, notwithstanding  
37 any provisions of this code to the contrary, to determine  
38 their duties and compensation without the approval of any  
39 other agency or instrumentality.

40 (d) The authority shall promulgate legislative rules in  
41 accordance with the provisions of article three, chapter  
42 twenty-nine-a of this code to govern the pledge of loans to  
43 secure bonds of the authority.

44 (e) All moneys belonging to the fund shall be kept in  
45 appropriate depositories and secured in conformance with  
46 this code. Disbursements from the fund shall be autho-  
47 rized for payment by the director of the authority or the  
48 director's designee. Any depository or officer of the de-  
49 pository to which moneys of the fund are paid shall act as  
50 trustee of the moneys and shall hold and apply them sole-  
51 ly for the purposes for which the moneys are provided  
52 under this article. Moneys in the fund shall not be com-  
53 mingled with other money of the authority. If not needed  
54 for immediate use or disbursement, moneys in the fund  
55 may be invested or reinvested by the authority in obliga-  
56 tions or securities which are considered lawful investments  
57 for public funds under this code.

**§22C-2-5. Collection of money due to the fund.**

1 In order to ensure the timely payment of all sums due  
2 and owing to the fund under a revolving fund loan agree-  
3 ment between the state and a local entity, and notwith-  
4 standing any provisions of this code to the contrary, the  
5 authority has and may, at its option, exercise the following  
6 rights and remedies in the event of any default by a local  
7 entity under a loan agreement:

8 (a) The authority may directly impose, in its own  
9 name and for its own benefit, service charges upon all  
10 users of a project funded by a loan distributed to a local  
11 entity pursuant to this article, and may proceed directly to  
12 enforce and collect the service charges, together with all  
13 necessary costs of the enforcement and collection.

14 (b) The authority may exercise, in its own name or in  
15 the name of and as the agent for a particular local entity,  
16 all of the rights, powers and remedies of the local entity  
17 with respect to the project or which may be conferred  
18 upon the local entity by statute, rule, regulation or judicial  
19 decision, including all rights and remedies with respect to  
20 users of the project funded by the loan distributed to that  
21 local entity pursuant to this article.

22 (c) The authority may, by civil action, mandamus or  
23 other judicial or administrative proceeding, compel per-

24 formance by a local entity of all of the terms and condi-  
25 tions of the loan agreement between the state and that  
26 local entity including:

27 (1) The adjustment of service charges as required to  
28 repay the loan or otherwise satisfy the terms of the loan  
29 agreement;

30 (2) The enforcement and collection of service charges;  
31 and

32 (3) The enforcement by the local entity of all rights  
33 and remedies conferred by statute, rule, regulation or  
34 judicial decision.

35 The rights and remedies enumerated in this section are  
36 in addition to rights and remedies conferred upon the  
37 authority by law or pursuant to the loan agreement.

#### **§22C-2-7. Environmental review of funded projects.**

1 (a) The division of environmental protection shall  
2 conduct an environmental review on each project funded  
3 under this article. The director of the division of environ-  
4 mental protection shall promulgate legislative rules in  
5 accordance with the provisions of article three, chapter  
6 twenty-nine-a of this code to implement the environmental  
7 review of funded projects: *Provided*, That the rules shall  
8 be consistent with the regulations promulgated by the  
9 United States environmental protection agency pursuant to  
10 the federal clean water act, as amended.

11 (b) The director of the division of environmental pro-  
12 tection is authorized to direct a local entity, or its agent, to  
13 implement all measures that, in the judgment of the direc-  
14 tor, are necessary in order to mitigate or prevent adverse  
15 impacts to the public health, safety or welfare or to the  
16 environment that may result from a project funded under  
17 this article. The director is further authorized to require  
18 all projects to comply with all other appropriate federal  
19 laws and regulations that are required of the projects un-  
20 der the federal clean water act, as amended.

## CHAPTER 258

(Com. Sub. for H. B. 4132—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)

[By Request of the Executive]

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[Passed March 4, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to repeal sections six, nine, nine-a, nine-b, nine-d, nine-f and eleven, article six, chapter twelve of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section one, article ten-d, chapter five of said code; to amend and reenact section thirteen, article one, chapter twelve of said code; to amend and reenact sections two, three, five, eight, ten, twelve, thirteen and fifteen, article six of said chapter; to further amend said article by adding thereto a new section, designated section nine-g; and to amend chapter forty-four of said code by adding thereto a new article, designated article six-b, all relating to transferring from the board of investments to the newly created West Virginia trust fund for the purpose of investment the funds formerly known as the consolidated pension fund and hereafter known as the consolidated pension plan and being within the West Virginia public employees retirement system established in article ten, chapter five of this code, and within the state teachers retirement system established in article seven-a, chapter eighteen of this code, and within the West Virginia state police retirement system established in article two-a, chapter fifteen of this code, and within the death, disability and retirement fund for the division of public safety established in article two, chapter fifteen of this code, and within the judges' retirement system established in article nine, chapter fifty-one of this code, and within the workers' compensation fund established in article three, chapter twenty-three of this code, and within the coal-workers' pneumoconiosis fund established in article four-b, chapter twenty-three of this code; consolidated public retirement board transferring public retirement plans' employee and employer contributions except defined contribution and voluntary



deferred compensation funds; payment for services relating to the pursuit of claims against third party investment losses; board of investments; definitions; board composition; removal of authority to invest public retirement funds; management of consolidated fund; purchase of loans from the workers' compensation loan pool, from the public employees retirement system loan pool, and from the teachers retirement system loan pool; restrictions on investments; investment policy; standard of care; exceptions to the board of investments; audits; West Virginia trust fund; how article cited; legislative findings and purpose; public employee and employer contributions declared to be an irrevocable trust; disclaimer of state ownership; workers' compensation and pneumoconiosis funds declared to be trust funds; definitions; West Virginia trust fund created; body corporate; board created; trustees; nomination and appointment of trustees, qualifications and terms of appointment, advice and consent; operational, annual, and other meetings; designation of representatives and committees; board meetings with committees regarding investment policy statement required; open meetings, qualifications; management and control of fund; officers; staff; fiduciary or surety bonds for trustees; liability of trustees; corporate powers; annual audits; reports and information to constitutional and legislative officers, council of finance and administration, consolidated public retirement board, workers' compensation fund, and coal-workers' pneumoconiosis fund; statements and reports open for inspection; fees for service; transfers to the trust; trust indenture; standard of care; and limitations on investments.

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

That sections six, nine, nine-a, nine-b, nine-d, nine-f and eleven, article six, chapter twelve of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that section one, article ten-d, chapter five of said code be amended and reenacted; that section thirteen, article one, chapter twelve of said code be amended and reenacted; that sections two, three, five, eight, ten, twelve, thirteen and fifteen, article six of said chapter be amended and reenacted; that said article be further amended by adding thereto a new section, designated section nine-g; and that chapter forty-four of said code be

amended by adding thereto a new article, designated article six-b, all to read as follows:

**Chapter**

- 5. **General Powers and Authority of the Governor, Secretary of State and Attorney General; Board of Public Works; Miscellaneous Agencies, Commissions, Offices, Programs , Etc.**
- 12. **Public Moneys and Securities.**
- 44. **Administration of Estates and Trusts.**

**CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE GOVERNOR, SECRETARY OF STATE AND ATTORNEY GENERAL; BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES, COMMISSIONS, OFFICES, PROGRAMS, ETC.**

**ARTICLE 10D. CONSOLIDATED PUBLIC RETIREMENT BOARD.**

**§5-10D-1. Consolidated public retirement board created; transition; members; vacancies.**

1 (a) There is hereby created a consolidated public  
 2 retirement board to administer all public retirement plans  
 3 in this state. It shall administer the public employees  
 4 retirement system established in article ten of this chapter;  
 5 the teachers retirement system established in article  
 6 seven-a, chapter eighteen of this code; the teachers'  
 7 defined contribution retirement system created by article  
 8 seven-b, chapter eighteen of this code; the death, disability  
 9 and retirement fund of the department of public safety  
 10 created by article two, chapter fifteen of this code; and the  
 11 judges' retirement system created under article nine,  
 12 chapter fifty-one of this code.

13 (b) The consolidated public retirement board shall  
 14 begin administration of the systems listed in subsection (a)  
 15 of this section on the first day of July, one thousand nine  
 16 hundred ninety-one: *Provided*, That the board shall begin  
 17 administration of the teachers' defined contribution  
 18 retirement system established in article seven-b, chapter  
 19 eighteen of this code on the first day of January, one  
 20 thousand nine hundred ninety-one. Prior to that date the

21 existing entities which administer the system shall  
22 cooperate with the board in the orderly transition of all  
23 duties, responsibilities, records and other materials in their  
24 possession.

25 (c) The membership of the consolidated public  
26 retirement board consists of:

27 (1) The governor or his or her designee;

28 (2) The state treasurer or his or her designee;

29 (3) The state auditor or his or her designee;

30 (4) The secretary of the department of administration  
31 or his or her designee;

32 (5) Four residents of the state, who are not members,  
33 retirants or beneficiaries of any of the public retirement  
34 systems, to be appointed by the governor, with the advice  
35 and consent of the Senate; and

36 (6) A member, annuitant or retirant of the public  
37 employees retirement system who is or was a state  
38 employee; a member, annuitant or retirant of the public  
39 employees retirement system who is not or was not a state  
40 employee; a member, annuitant or retirant of the teachers  
41 retirement system; a member, annuitant or retirant of the  
42 department of public safety death, disability and  
43 retirement fund; and a member, annuitant or retirant of  
44 the teachers' defined contribution retirement system, all to  
45 be appointed by the governor, with the advice and consent  
46 of the Senate.

47 (d) The appointed members of the board shall serve  
48 five-year terms. A member appointed pursuant to  
49 subdivision (5), subsection (c) of this section ceases to be a  
50 member of the board if he or she ceases to be a member  
51 of the represented system. If a vacancy occurs in the  
52 appointed membership, the governor, within sixty days,  
53 shall fill the vacancy by appointment for the unexpired  
54 term. No more than five appointees shall be of the same  
55 political party.

56 (e) The consolidated public retirement board shall  
57 have all the powers, duties, responsibilities and liabilities of

58 the public employees retirement system established  
59 pursuant to article ten of this chapter; the teachers  
60 retirement system established pursuant to article seven-a,  
61 chapter eighteen of this code; the teachers' defined  
62 contribution system established pursuant to article seven-b,  
63 chapter eighteen of this code; the death, disability and  
64 retirement fund of the department of public safety created  
65 pursuant to article two, chapter fifteen of this code; and  
66 the judges' retirement system created pursuant to article  
67 nine, chapter fifty-one of this code and their appropriate  
68 governing boards. The consolidated public retirement  
69 board may propose for promulgation all rules necessary  
70 to effectuate its powers, duties and responsibilities  
71 pursuant to article three, chapter twenty-nine-a of this  
72 code: *Provided*, That the board may adopt any or all of  
73 the rules, previously promulgated, of a retirement system  
74 which it administers.

75 (f) Effective on the first day of July, one thousand  
76 nine hundred ninety-six, the consolidated public  
77 retirement board shall, within two business days of receipt,  
78 transfer all funds received by the consolidated public  
79 retirement board for the benefit of the retirement systems  
80 within the consolidated pension plan as defined in section  
81 three-c, article six-b, chapter forty-four of this code,  
82 including, but not limited to, all employer and employee  
83 contributions, to the West Virginia trust fund: *Provided*,  
84 That the employer and employee contributions of the  
85 teachers' defined contribution system, established in  
86 section three, article seven-b, chapter eighteen of this code,  
87 and voluntary deferred compensation funds invested by  
88 the West Virginia consolidated public retirement board  
89 pursuant to section five, article ten-b of this chapter, shall  
90 not be transferred to the West Virginia trust fund.

91 (g) The consolidated public retirement board shall be  
92 a trustee for all public retirement plans, except with regard  
93 to the investment of funds: *Provided*, That the  
94 consolidated public retirement board shall be a trustee  
95 with regard to the investments of the teachers' defined  
96 contribution system, and voluntary deferred compensation  
97 funds invested pursuant to section five, article ten-b of this  
98 chapter.

**CHAPTER 12. PUBLIC MONEYS AND SECURITIES.****Article**

1. State Depositories.
6. West Virginia State Board of Investments.

**ARTICLE 1. STATE DEPOSITORIES.****§12-1-13. Payment of banking services and litigation costs for prior investment losses.**

1 (a) The board of investments is authorized to pay for  
2 banking services, and services ancillary thereto, by either a  
3 compensating balance in a noninterest-bearing account  
4 maintained at the financial institution providing the  
5 services or with a state warrant as described in section one,  
6 article five of this chapter.

7 (b) The board of investments is authorized to pay for  
8 the investigation and pursuit of claims against third parties  
9 for the investment losses incurred during the period  
10 beginning on the first day of August, one thousand nine  
11 hundred eighty-four, and ending on the thirty-first day of  
12 August, one thousand nine hundred eighty-nine. The  
13 payment may be in the form of a state warrant.

14 (c) If payment is made by a state warrant, the board of  
15 investments is authorized to establish within the  
16 consolidated fund an investment pool which will generate  
17 sufficient income to pay for all banking services provided  
18 to the state and to pay for the investigation and pursuit of  
19 the prior investment loss claims. All income earned by the  
20 investment pool shall be paid into a special account of the  
21 state board of investments to be known as the banking  
22 services account and shall be used solely for the purpose  
23 of paying for all banking services and services ancillary to  
24 the banking services provided to the state and for the  
25 investigation and pursuit of the prior investment loss  
26 claims.

**ARTICLE 6. WEST VIRGINIA STATE BOARD OF INVESTMENTS.**

§12-6-2. Definitions.

- §12-6-3. State board of investments continued; body corporate; members; appointment of certain members; qualifications and term of office.
- §12-6-5. Powers of the board.
- §12-6-8. Investment funds established; management thereof.
- §12-6-9g. Transfer of loans to consolidated fund.
- §12-6-10. Restrictions on investments.
- §12-6-12. Investment policy; standard of care.
- §12-6-13. Board as sole agency for investments; exceptions.
- §12-6-15. Audits.

**§12-6-2. Definitions.**

1 As used in this article, unless a different meaning  
2 clearly appears from the context:

3 (1) "Board" means the West Virginia state board of  
4 investments;

5 (2) "Consolidated fund" means the investment fund  
6 managed by the board and established pursuant to  
7 subsection (a), section eight of this article;

8 (3) "Local government funds" means the moneys of a  
9 political subdivision, including policemen's pension and  
10 relief funds, firemen's pension and relief funds and  
11 volunteer fire departments, transferred to the board for  
12 deposit;

13 (4) "Political subdivision" means and includes a  
14 county, municipality or any agency, authority, board,  
15 county board of education, commission or instrumentality  
16 of a county or municipality and regional councils created  
17 pursuant to the provisions of section five, article  
18 twenty-five, chapter eight of this code;

19 (5) "Securities" means all bonds, notes, debentures or  
20 other evidences of indebtedness;

21 (6) "State funds" means all moneys of the state which  
22 may be lawfully invested except the "school fund"  
23 established by section four, article XII of the state  
24 constitution; and

25       (7) "West Virginia trust fund" means the entity created  
26 by the provisions of article six-b, chapter forty-four of this  
27 code.

**§12-6-3. State board of investments continued; body corporate; members; appointment of certain members; qualifications and term of office.**

1       (a) The state board of investments is hereby continued  
2 as a body corporate of the state authorized to exercise all  
3 of the powers and functions granted to it pursuant to this  
4 article. There shall be seven members of the state board  
5 of investments. The governor, or his or her designee, state  
6 treasurer and state auditor shall be members of the board.  
7 There shall be four members appointed by the governor:  
8 *Provided*, That no more than three such appointed  
9 members may belong to the same political party.

10       (b) The members appointed by the governor shall be  
11 appointed from a list of twelve persons submitted jointly  
12 by the governor, the state treasurer and the state auditor.  
13 No more than two names submitted by the governor may  
14 be appointed as members to the board. Of the members  
15 appointed by the governor, two shall be members of the  
16 financial community, one shall be a certified public  
17 accountant and one shall be an attorney with experience in  
18 finance and investment matters. Appointments shall be  
19 made by the governor with the advice and consent of the  
20 Senate.

21       (c) Appointed members shall serve for a term of six  
22 years and may be reappointed at the expiration of their  
23 terms. In the event of a vacancy among appointed  
24 members, an appointment shall be made to fill the  
25 unexpired term. Upon the expiration of terms on the  
26 thirtieth day of April, two thousand one, the governor shall  
27 appoint or reappoint one member to a three-year term;  
28 one to a four-year term; one to a five-year term; and one  
29 to a six-year term. Thereafter, all terms shall be six years.

30       (d) Appointed members of the board shall serve  
31 without compensation, but are entitled to their reasonable  
32 and necessary expenses actually incurred in discharging  
33 their duties under this article.

**§12-6-5. Powers of the board.**

1       The board may exercise all powers necessary or  
2 appropriate to carry out and effectuate its corporate  
3 purposes. The board may:

4       (1) Adopt and use a common seal and alter the same  
5 at pleasure;

6       (2) Sue and be sued;

7       (3) Enter into contracts and execute and deliver  
8 instruments;

9       (4) Acquire (by purchase, gift or otherwise), hold, use  
10 and dispose of real and personal property, deeds,  
11 mortgages and other instruments;

12       (5) Promulgate and enforce bylaws and rules for the  
13 management and conduct of its affairs;

14       (6) Retain and employ legal, accounting, financial and  
15 investment advisors and consultants;

16       (7) Acquire (by purchase, gift or otherwise), hold,  
17 exchange, pledge, lend and sell or otherwise dispose of  
18 securities and invest funds in interest earning deposits;

19       (8) Maintain accounts with banks, securities dealers  
20 and financial institutions both within and outside this state;

21       (9) Engage in financial transactions whereby securities  
22 are purchased by the board under an agreement providing  
23 for the resale of the securities to the original seller at a  
24 stated price;

25       (10) Engage in financial transactions whereby  
26 securities held by the board are sold under an agreement  
27 providing for the repurchase of the securities by the board  
28 at a stated price;

29       (11) Consolidate and manage moneys, securities and  
30 other assets of the other funds and accounts of the state  
31 and the moneys of political subdivisions which may be  
32 made available to it under the provisions of this article;



33 (12) Enter into agreements with political subdivisions  
34 of the state whereby moneys of the political subdivisions  
35 are invested on their behalf by the board;

36 (13) Charge and collect administrative fees from  
37 political subdivisions for its services;

38 (14) Exercise all powers generally granted to and  
39 exercised by the holders of investment securities with  
40 respect to management of the investment securities;

41 (15) Contract with one or more banking institutions in  
42 or outside the state for the custody, safekeeping and  
43 management of securities held by the board; and

44 (16) Develop and implement a centralized receipts  
45 processing center.

**§12-6-8. Investment funds established; management thereof.**

1 (a) There is hereby established a special investment  
2 fund to be managed by the board and designated as the  
3 "consolidated fund".

4 (b) Each board, commission, department, official or  
5 agency charged with the administration of state funds is  
6 hereby authorized to make moneys available to the board  
7 for investment.

8 (c) Each political subdivision of this state through its  
9 treasurer or equivalent financial officer is hereby  
10 authorized to enter into agreements with the board for the  
11 investment of moneys of the political subdivision. Any  
12 political subdivision may enter into an agreement with any  
13 state agency from which it receives funds to allow the  
14 funds to be transferred to their investment account with  
15 the state board of investments.

16 (d) Moneys held in the various funds and accounts  
17 administered by the board shall be invested as permitted in  
18 section twelve of this article and subject to the restrictions  
19 contained in section ten of this article. The board shall  
20 maintain records of the deposits and withdrawals of each  
21 participant and the performance of the various funds and  
22 accounts. The board shall also establish such rules and  
23 regulations for the administration of the various funds and  
24 accounts established by this section as it considers

25 necessary for the administration of the funds and  
26 accounts, including, but not limited to: (1) The  
27 specification of minimum amounts which may be  
28 deposited in any fund or account and minimum periods  
29 of time for which deposits will be retained; and (2)  
30 creation of reserves for losses: *Provided*, That in the event  
31 any moneys made available to the board may not lawfully  
32 be combined for investment or deposited in the  
33 consolidated funds established by this section, the board  
34 may create special accounts and may administer and invest  
35 those moneys in accordance with the restrictions specially  
36 applicable to those moneys.

**§12-6-9g. Transfer of loans to consolidated fund.**

1 The Legislature hereby finds and declares that with the  
2 establishment of the West Virginia trust fund as provided  
3 in article six-b, chapter forty-four of this code, and the  
4 transfer of the retirement systems' and workers'  
5 compensation and pneumoconiosis funds' investments to  
6 the West Virginia trust fund, those mortgage and  
7 economic development loans which the board determines  
8 cannot be actively traded and which are currently held by  
9 the retirement systems and workers' compensation and  
10 pneumoconiosis funds should remain as investments of  
11 the state.

12 Effective on the thirtieth day of June, one thousand  
13 nine hundred ninety-six, the board of investments is  
14 hereby directed to purchase the workers' compensation  
15 loan pool, public employees retirement system loan pool  
16 and teachers retirement loan pool. The amount to be paid  
17 shall be the loan's current amortized cost value plus any  
18 accrued interest as of the purchase date. The purchased  
19 loans shall then be recorded in the consolidated fund's  
20 state loan pool.

**§12-6-10. Restrictions on investments.**

1 Notwithstanding any other provision in this code,  
2 moneys on deposit in the consolidated fund shall be  
3 invested as permitted by section twelve of this article  
4 subject to the restrictions and conditions contained in this  
5 section:

6 (1) At no time shall more than seventy-five percent of  
7 the consolidated fund be invested in any bond, note,  
8 debenture, commercial paper or other evidence of  
9 indebtedness of any private corporation or association.  
10 Any such security, at the time of its acquisition, shall be  
11 investment grade paper;

12 (2) At no time shall more than five percent of the  
13 consolidated fund be invested in securities issued by a  
14 single private corporation or association; and

15 (3) At no time shall less than fifteen percent of the  
16 consolidated fund be invested in any direct obligation of  
17 or obligation guaranteed as to the payment of both  
18 principal and interest by the United States of America.

**§12-6-12. Investment policy; standard of care.**

1 The board shall establish policy guidelines for the  
2 investment of moneys on deposit in each of the funds  
3 managed by the board based on the needs of the  
4 participants in the various funds. The board shall review  
5 the investments at least every three months and may  
6 require the purchase or sale of any investments. In order  
7 to effectuate its investment policies, the board shall require  
8 from each participant a schedule, on an annual or more  
9 frequent basis, of anticipated deposits and withdrawals.

10 Any investments made under this article shall be made  
11 with the care, skill, prudence and diligence under the  
12 circumstances then prevailing that a prudent person acting  
13 in a like capacity and familiar with such matters would use  
14 in the conduct of an enterprise of a like character and with  
15 like aims. Fiduciaries shall diversify plan investments so  
16 as to minimize the risk of large losses, unless under the  
17 circumstances it is clearly prudent not to do so.

**§12-6-13. Board as sole agency for investments; exceptions.**

1 All duties vested by law in any agency, commission,  
2 official or other board of the state relating to the  
3 investment of moneys, and the acquisition, sale, exchange  
4 or disposal of securities or any other investment are  
5 hereby transferred to the board: *Provided*, That the West  
6 Virginia trust fund, is the sole entity for the investment of

7 the consolidated pension plan funds in accordance with  
 8 article six-b, chapter forty-four of this code: *Provided*,  
 9 *however*, That neither this section nor any other section of  
 10 this article applies to the "board of the school fund" and  
 11 the "school fund" established by section 4, article XII of  
 12 the state constitution: *Provided further*, That funds under  
 13 the control of the municipal bond commission may, in the  
 14 discretion of the commission, be made available to the  
 15 board for investment to be invested by the commission as  
 16 provided in article three, chapter thirteen of this code.

#### **§12-6-15. Audits.**

1 The board shall cause to be conducted an annual  
 2 external audit, by a nationally recognized accounting firm  
 3 in conjunction with the annual federal audit, of all  
 4 investment transactions of the board: *Provided*, That the  
 5 board shall on a monthly basis provide to each state  
 6 agency and any other entity investing moneys in the  
 7 consolidated fund an itemized statement of the agency's or  
 8 the entity's account in the consolidated fund. The  
 9 statement shall include the beginning balance,  
 10 contributions, withdrawals, income distributed, change in  
 11 value and ending balance.

### **CHAPTER 44. ADMINISTRATION OF ESTATES AND TRUSTS.**

#### **ARTICLE 6B. WEST VIRGINIA TRUST FUND.**

- §44-6B-1. How article cited.
- §44-6B-2. Legislative findings and purpose.
- §44-6B-3. Definitions.
- §44-6B-4. West Virginia trust fund created; body corporate; board created; trustees; nomination and appointment of trustees, qualifications and terms of appointment, advice and consent; annual and other meetings; designation of representatives and committees; board meetings with committees regarding investment policy statement required; open meetings, qualifications.
- §44-6B-5. Management and control of fund; officers; staff; fiduciary or surety bonds for trustees; liability of trustees.
- §44-6B-6. Corporate powers.
- §44-6B-7. Annual audits; reports and information to constitutional and legislative officers, council of finance and administration, consolidated public retirement board, workers' compensation

fund and coal-workers' pneumoconiosis fund; statements and reports open for inspection.

- §44-6B-8. Fees for service.
- §44-6B-9. Transfers to the trust.
- §44-6B-10. Trust indenture.
- §44-6B-11. Standard of care.
- §44-6B-12. Limitations on investments.

**§44-6B-1. How article cited.**

- 1 This article shall be known and may be cited as the
- 2 "West Virginia Trust Fund Act".

**§44-6B-2. Legislative findings and purpose.**

1 (a) The Legislature hereby finds and declares that all  
2 the public employees covered by the public employees  
3 retirement system, the teachers retirement system, the West  
4 Virginia state police retirement system, the death, disability  
5 and retirement fund of the division of public safety and  
6 the judges' retirement system should benefit from a  
7 prudent and conscientious staff of financial professionals  
8 dedicated to the administration, investment and  
9 management of those employees' and employer's financial  
10 contributions and that an independent trust fund board  
11 and staff should be immune to changing political climates  
12 and should provide a stable and continuous source of  
13 professional financial investment and management.

14 (b) The Legislature hereby finds and declares further  
15 that experience has demonstrated that prudent investment  
16 provides diversification and beneficial return not only for  
17 public employees but for all citizens of the state and that  
18 in order to have access to this sound fiscal policy, public  
19 employee and employer contributions are declared to be  
20 an irrevocable trust, available for no use or purpose other  
21 than for the benefit of those public employees.

22 (c) The Legislature hereby finds and declares further  
23 that the state and other public employers that made or  
24 make contributions to the West Virginia irrevocable trust  
25 fund have no proprietary interest in the fund or in the  
26 contributions made to the fund by them and that the state  
27 and other public employers disclaim any right to reclaim  
28 those contributions and waive any right of reclamation

29 they may have in the fund: *Provided*, That the provisions  
30 of this subsection do not prohibit alterations or refunds of  
31 employer contributions in the event of erroneous  
32 payment.

33 (d) The Legislature hereby finds and declares further  
34 that the workers' compensation funds and coal-workers'  
35 pneumoconiosis fund are trust funds to be used  
36 exclusively for those workers, miners and their  
37 beneficiaries who have sacrificed their health in the  
38 performance of their jobs, and further finds that the assets  
39 available to pay awarded benefits should be prudently  
40 invested so that awards may be paid.

41 (e) The Legislature hereby finds and declares further  
42 that a not-for-profit, nonstock corporate structure with  
43 appropriate governance shall be the best means of  
44 assuring prudent financial management of this nonstate  
45 trust fund under rapidly changing market conditions and  
46 regulations.

47 (f) The Legislature hereby finds and declares further  
48 that in accomplishing this purpose, the West Virginia trust  
49 fund, created and established by section four of this  
50 article, is acting in all respects for the benefit of the state's  
51 public employees and ultimately the citizens of the state,  
52 and the West Virginia trust fund is empowered by this  
53 article to act as trustee for the irrevocable trust created by  
54 this article, and the interests of citizens of the state shall be  
55 best met by carrying out the provisions of this trust.

56 (g) The Legislature hereby finds and declares further  
57 that the standard of care and prudence applied to trustees  
58 and the conduct of the affairs of the irrevocable trust  
59 created by this article is intended to be that applied to the  
60 administration of private pension plans as described in  
61 federal statutory law and by the common law of the  
62 United States.

### §44-6B-3. Definitions.

1 As used in this article unless a different meaning  
2 clearly appears from the context:

3 (a) "Beneficiaries" means those individuals entitled to  
4 benefits from the consolidated pension plan;

5 (b) "Board" means the governing body for the West  
6 Virginia trust fund;

7 (c) "Consolidated pension plan" means the public  
8 employees retirement system established in article ten,  
9 chapter five of this code, the teachers retirement system  
10 established in article seven-a, chapter eighteen of this code,  
11 the West Virginia state police retirement system established  
12 in article two-a, chapter fifteen of this code, the death,  
13 disability and retirement fund of the department of public  
14 safety established in article two, chapter fifteen of this  
15 code, the judges' retirement system established in article  
16 nine, chapter fifty-one of this code, the workers'  
17 compensation fund established in article three, chapter  
18 twenty-three of this code, and the coal-workers'  
19 pneumoconiosis plan established in article four-b, chapter  
20 twenty-three of this code;

21 (d) "Participant plan" means any component system,  
22 plan or fund of the consolidated pension plan within the  
23 definition set forth in subdivision (c) of this section;

24 (e) "Political subdivision" means and includes a  
25 county, municipality or any agency, authority, board,  
26 county board of education, commission or instrumentality  
27 of a county or municipality and regional councils created  
28 pursuant to the provisions of section five, article  
29 twenty-five, chapter eight of this code;

30 (f) "State" means the state of West Virginia;

31 (g) "Trust fund" means the West Virginia trust fund;  
32 and

33 (h) "Trustee" means any member serving on the West  
34 Virginia trust fund board: *Provided*, That in section ten of  
35 this article wherein the terms of the trust indenture are set  
36 forth, "trustee" means the West Virginia trust fund.

**§44-6B-4. West Virginia trust fund created; body corporate;  
board created; trustees; nomination and ap-  
pointment of trustees, qualifications and terms of  
appointment, advice and consent; annual and  
other meetings; designation of representatives**

**and committees; board meetings with committees regarding investment policy statement required; open meetings, qualifications.**

1 (a) There is hereby created the West Virginia trust  
2 fund. The fund is created as a public body corporate and  
3 established to provide prudent fiscal administration,  
4 investment and management for the pension funds and  
5 workers' compensation and pneumoconiosis funds  
6 formerly invested by this state. The corporation shall be  
7 organized as a nonprofit, nonstock corporation under the  
8 general corporation laws of the state.

9 (b) The trust fund shall be governed by a board of  
10 trustees, consisting of seven members:

11 (1) Four members shall be appointed by the governor  
12 from a list of twelve persons having experience in pension  
13 management, institutional management or financial  
14 markets. The list of twelve shall consist of four groups of  
15 three nominations, and no more than two of the three  
16 nominations in each group may be from the same political  
17 party. The president of the Senate, speaker of the House  
18 of Delegates, state auditor and state treasurer each shall  
19 submit one group of three nominations to the governor,  
20 who shall appoint one member from each group of three,  
21 which appointments shall be subject to the advice and  
22 consent of the Senate.

23 (2) The remaining three members shall be appointed  
24 from the general public by the governor, which  
25 appointments shall be subject to the advice and consent of  
26 the Senate. Of the members of the general public  
27 appointed by the governor, one shall be an attorney  
28 experienced in finance and investment matters, one shall  
29 be a certified public accountant and one shall be  
30 experienced in pension management, institutional  
31 management or financial markets.

32 (3) The governor shall make appointments to the trust  
33 fund board within sixty days of the effective date of this  
34 act. Nominations for the appointments shall be submitted  
35 to the governor within thirty days of the effective date of  
36 this act.



37       (4) Any appointment made by the governor subject  
38 to the advice and consent of the Senate is effective  
39 immediately upon appointment by the governor with  
40 respect to voting, constituting a quorum, receiving  
41 compensation and expenses, and all other rights and  
42 privileges of the trustee position.

43       (c) Two members shall serve for a term of three years,  
44 two members for a term of four years and three members  
45 for a term of five years, respectively, as the governor shall  
46 designate. Thereafter, at the end of each term, the  
47 governor may reappoint or appoint a successor following  
48 the same procedure as specified in subsection (b) of this  
49 section, who shall serve for five-year terms. No more than  
50 four of the trustees may belong to the same political party.

51       (d) In the event of a vacancy among the trustees, an  
52 appointment shall be made by the governor to fill the  
53 unexpired term. The governor shall fill the vacancy, by  
54 appointment from a new list of nominees, following the  
55 same procedure established in subsection (b) of this  
56 section.

57       (e) The governor may remove any trustee in case of  
58 gross negligence or misfeasance and may declare that  
59 position vacant and may appoint a person for the vacancy  
60 as provided in subsection (d) of this section.

61       (f) Each trustee shall be entitled to receive, and, at the  
62 trustee's option, the board shall pay to the trustee,  
63 compensation in the amount of five thousand dollars per  
64 year and additional compensation in the amount of five  
65 hundred dollars per meeting attended by the trustee in  
66 excess of the four quarterly meetings required by this  
67 section. In addition, trustees shall receive reasonable and  
68 necessary expenses actually incurred in discharging  
69 trustee duties pursuant to this article.

70       (g) The board shall meet quarterly and may include in  
71 its bylaws procedures for the calling and holding of  
72 additional meetings. For any quarterly or additional  
73 meeting in which the board shall review or modify its  
74 securities list or its investment objectives pursuant to  
75 subsection (f), section twelve of this article, the board shall

76 give ten days' notice in writing to the designated  
77 representative of each participant plan selected pursuant to  
78 subdivision (1), subsection (j) of this section, and the  
79 meeting shall be open to the members and beneficiaries of  
80 the participant plans for that portion of the meeting in  
81 which the board undertakes the review or modification.

82 (h) The West Virginia trust fund board shall meet  
83 prior to the first day of July, one thousand nine hundred  
84 ninety-six, to organize and structure its operations.

85 (i) The board shall hold an annual meeting within  
86 forty-five days after the issuance of the year-end financial  
87 report. The annual meeting may also serve as a quarterly  
88 meeting. The annual meeting shall be open to the public,  
89 and the board shall receive oral and written comments  
90 from representatives, members and beneficiaries of the  
91 participant plans and from other citizens of the state. At  
92 the annual meeting, the board shall adopt a fee schedule  
93 and a budget reflecting fee structures for the year.

94 (j) Pursuant to subsection (k) of this section, the  
95 board shall meet with committees representing the  
96 participant plans to discuss the board's drafting, reviewing  
97 or modifying the written investment policy of the trust  
98 with respect to that committee's participant plan pursuant  
99 to section twelve of this article. Representatives and  
100 committees shall be designated as follows:

101 (1) On or before the first day of May, one thousand  
102 nine hundred ninety-six, the West Virginia consolidated  
103 public retirement board shall promulgate procedural rules  
104 by which each pension system named in paragraphs one  
105 through five, subdivision (c), section ten of this article,  
106 shall designate an individual representative of each said  
107 pension system, and the West Virginia workers'  
108 compensation commission shall promulgate procedural  
109 rules by which the pneumoconiosis fund and the workers'  
110 compensation fund named in paragraphs six and seven,  
111 subdivision (c), section ten of this article, shall designate  
112 an individual representative of each said fund.

113 (2) On or before the first day of June, one thousand  
114 nine hundred ninety-six, and on or before the same date

115 each year thereafter, the consolidated public retirement  
116 board shall submit in writing to the West Virginia trust  
117 fund board the names of the five designated repre-  
118 sentatives, and the workers' compensation commission  
119 shall so submit the names of the two representatives.

120 (3) Each designated representative shall provide to the  
121 West Virginia trust fund board his or her current address,  
122 updated each year on or before the first day of July, to  
123 which address the board shall provide notice of meetings  
124 of the board pursuant to subsection (g) of this section.

125 (4) Each designated representative shall submit in  
126 writing to the board on or before the first day of July, one  
127 thousand nine hundred ninety-six, and on or before the  
128 same date each year thereafter, the names of no more than  
129 three persons comprising a committee representing the  
130 beneficiaries of that representative's participant plan.

131 (k) At its initial meeting, and thereafter at its annual  
132 meeting, the board shall meet with each of the seven  
133 committees, formed pursuant to subsection (j) of this  
134 section, for the purpose of receiving input from the  
135 committees regarding the board's drafting, reviewing or  
136 modifying its written investment policy statement for the  
137 trust. In developing the trust investment policy statement,  
138 the trustees shall receive each committee's stated objectives  
139 and policies regarding the risk tolerances and return  
140 expectations of each participant plan, with attention to the  
141 factors enumerated in subsection (g), section twelve of this  
142 article, in order to provide for the continuing financial  
143 security of the trust and its participant plans. The board  
144 may meet with the said committees or any of them at its  
145 quarterly and additional meetings for the same purpose.

146 (l) All meetings of the board shall be open to the  
147 representatives of the participant plans as appointed  
148 pursuant to subsection (j) of this section. The  
149 representatives shall be subject to any rules, bylaws,  
150 guidelines, requirements, and standards promulgated by  
151 the board. The representatives shall observe standards of  
152 decorum established by the board. The representatives  
153 shall be subject to the same code of conduct applicable to  
154 the trustees and shall be subject to all trust fund rules and

155 bylaws. The representatives shall also be subject to any  
156 requirements of confidentiality applicable to the trustees.  
157 Each representative shall be liable for any act which he or  
158 she undertakes which violates any rule, bylaw, or statute  
159 governing ethical standards, confidentiality, or other  
160 standard of conduct imposed upon the trustees or the  
161 representatives. Any meeting of the board may be closed,  
162 upon adoption of a motion by any trustee, when necessary  
163 to preserve the attorney-client privilege, to protect the  
164 privacy interests of individuals, to review personnel  
165 matters, or to maintain confidentiality when confidentiality  
166 is in the best interest of the beneficiaries of the trust.

**§44-6B-5. Management and control of fund; officers; staff;  
fiduciary or surety bonds for trustees; liability of  
trustees.**

1 (a) The management and control of the fund shall be  
2 vested solely in the board of trustees in accordance with  
3 the provisions of this article.

4 (b) The board of trustees shall elect a chairman to  
5 serve for a term of two years. The election shall be held at  
6 the board's first meeting after the effective date of this  
7 article. Effective with any vacancy in the chairmanship,  
8 the board shall elect a chairman to a new two-year term.  
9 Annually, beginning with the first meeting, the trustees  
10 shall elect a secretary, who need not be a member of the  
11 board, to keep a record of the proceedings of the board.

12 (c) The trustees shall appoint a chief executive officer  
13 of the trust fund and shall fix his or her duties and  
14 compensation. The chief executive officer shall have five  
15 years' experience in investment management with public  
16 or private funds within the ten years next preceding the  
17 date of appointment. The chief executive officer  
18 additionally shall have academic degrees, professional  
19 designations and other investment management or  
20 investment oversight or institutional investment experience  
21 in such combination as the trustees consider necessary to  
22 carry out the responsibilities of the chief executive officer  
23 position as defined by the trustees.

24 (d) The trustees shall retain an internal auditor to  
25 report directly to the trustees and shall fix his or her  
26 compensation. The internal auditor shall be a certified  
27 public accountant with at least three years' experience as  
28 an auditor. The internal auditor shall develop an internal  
29 audit plan, with board approval, for the testing of  
30 procedures and the security of transactions.

31 (e) Each trustee shall give a separate fiduciary or  
32 surety bond from a surety company qualified to do  
33 business within this state in a penalty amount of one  
34 million dollars for the faithful performance of his or her  
35 duties as a trustee of the fund. The board shall purchase a  
36 blanket bond for the faithful performance of its duties, in  
37 the amount of fifty million dollars or in an amount  
38 equivalent to one percent of the assets under management,  
39 whichever is greater. The amount of the blanket bond  
40 shall be in addition to the one million dollar individual  
41 bond required of each trustee by the provisions of this  
42 section. The board may require a fiduciary or surety  
43 bond from a surety company qualified to do business in  
44 this state for any person who has charge of, or access to,  
45 any securities, funds or other moneys held by the board,  
46 and the amount of the fiduciary or surety bond shall be  
47 fixed by the board. The premiums payable on all  
48 fiduciary or surety bonds shall be an expense of the  
49 board.

50 (f) The trustees and employees of the West Virginia  
51 trust fund are not liable personally, either jointly or  
52 severally, for any debt or obligation created by the West  
53 Virginia trust fund: *Provided*, That the trustees and  
54 employees of the West Virginia trust fund are liable for  
55 acts of misfeasance or gross negligence.

#### §44-6B-6. Corporate powers.

1 The fund may exercise all powers necessary or  
2 appropriate to carry out and effectuate its corporate  
3 purposes. The fund may:

4 (1) Adopt and use a common seal and alter the same  
5 at pleasure;

6 (2) Sue;

7 (3) Enter into contracts and execute and deliver  
8 instruments;

9 (4) Acquire (by purchase, gift or otherwise), hold, use  
10 and dispose of real and personal property, deeds,  
11 mortgages and other instruments;

12 (5) Promulgate and enforce bylaws and rules for the  
13 management and conduct of its affairs;

14 (6) Retain and employ legal, accounting, financial and  
15 investment advisors, managers and consultants;

16 (7) Acquire (by purchase, gift or otherwise), hold,  
17 exchange, pledge, lend and sell or otherwise dispose of  
18 securities and invest funds;

19 (8) Maintain accounts with banks, securities dealers  
20 and financial institutions both within and outside this state;

21 (9) Consolidate and manage moneys, securities and  
22 other assets of the pension plans and other funds and  
23 accounts of the state and the moneys of political  
24 subdivisions which may be made available to it under the  
25 provisions of this article;

26 (10) Enter into agreements with political subdivisions  
27 of the state whereby moneys of the political subdivisions  
28 are invested on their behalf by the fund;

29 (11) Charge and collect administrative investment and  
30 management fees for its services;

31 (12) Exercise all powers generally granted to and  
32 exercised by the holders of investment securities with  
33 respect to management of the securities;

34 (13) Make, and from time to time, amend and repeal  
35 bylaws, regulations and procedures not inconsistent with  
36 the provisions of this article;

37 (14) Hire its own employees, consultants, managers  
38 and advisors as it considers necessary, and fix their  
39 compensation and prescribe their duties;

40 (15) Develop, implement and maintain its own  
41 banking accounts, investments and employee benefit  
42 plans;

43 (16) Borrow or open lines of credit; and

44 (17) Do all things necessary to implement and operate  
45 the trust fund and carry out the intent of this article.

**§44-6B-7. Annual audits; reports and information to constitu-  
tional and legislative officers, council of finance  
and administration, consolidated public retire-  
ment board, workers' compensation fund and  
coal-workers' pneumoconiosis fund; statements  
and reports open for inspection.**

1 (a) The trust fund shall cause an annual financial and  
2 compliance audit to be made by a certified public  
3 accounting firm having a minimum staff of ten certified  
4 public accountants and being a member of the American  
5 institute of certified public accountants, and, if doing  
6 business in West Virginia, being a member of the West  
7 Virginia society of certified public accountants. The  
8 financial and compliance audit shall be made of the trust  
9 fund's books, accounts and records, with respect to its  
10 receipts, disbursements, investments, contracts and all other  
11 matters relating to its financial operations. Copies of the  
12 audit report shall be furnished to the governor, state  
13 treasurer, state auditor, president of the Senate, speaker of  
14 the House of Delegates, council of finance and  
15 administration and consolidated public retirement board.

16 (b) The trust fund shall produce monthly financial  
17 statements and deliver them to each member of the board  
18 and the executive secretary of the consolidated public  
19 retirement board as established in sections one and two,  
20 article ten-d, chapter five of this code and to the  
21 commissioner of the bureau of employment programs as  
22 administrator of the workers' compensation fund and  
23 coal-workers' pneumoconiosis fund, as established in  
24 section one, article one, and section one, article three, and  
25 section seven, article four-b, chapter twenty-three of this  
26 code.

27 (c) The trust fund shall deliver in each quarter to the  
28 council of finance and administration and the con-  
29 solidated public retirement board a report detailing the  
30 investment performance of the retirement plans.

31 (d) The trust fund shall cause an annual performance  
32 audit to be made by a nationally recognized fiduciary  
33 service. The trust fund shall furnish copies of the audit  
34 report to the governor, state treasurer, state auditor,  
35 president of the Senate, speaker of the House of Delegates,  
36 council of finance and administration and consolidated  
37 public retirement board.

38 (e) The trust fund shall provide any other information  
39 requested in writing by the council of finance and  
40 administration.

41 (f) All statements and reports required in this section  
42 shall be available for inspection by the members and  
43 beneficiaries and designated representatives of the  
44 participant plans.

#### **§44-6B-8. Fees for service.**

1 The trust fund shall charge fees, as adopted at the  
2 annual meeting, for the reasonable and necessary expenses  
3 incurred by the trust fund in rendering services to the  
4 participant plans. The fees shall be subtracted from the  
5 total return of the trust fund, and the net return shall be  
6 credited to the participant plans. All fees which are  
7 dedicated or identified or readily identifiable to an  
8 individual participant plan shall be charged against that  
9 plan, and all other fees shall be charged as a percentage of  
10 assets under management. At its annual meeting, the  
11 board shall adopt a fee schedule and a budget reflecting  
12 fee structures.

#### **§44-6B-9. Transfers to the trust.**

1 (a) The West Virginia state board of investments shall  
2 transfer to the West Virginia trust fund the computers, and  
3 other necessary items of equipment associated with each  
4 position at the board of investments whose responsibilities  
5 and obligations shall as of the effective date of this section  
6 be performed by the West Virginia trust fund.



7 (b) Any state employee who terminates his or her state  
8 employment and becomes employed by the West Virginia  
9 trust fund may at his or her option defer retirement within  
10 the public employees retirement system pursuant to  
11 section twenty-one, article ten, chapter five of this code, or,  
12 may elect to transfer to the West Virginia trust fund his or  
13 her employee contributions, with accrued interest, and, if  
14 vested, his or her employer contributions, with accrued  
15 interest. The West Virginia consolidated public retirement  
16 board shall transfer to the West Virginia trust fund the said  
17 contributions and accrued interest of terminating  
18 employees who so elect. The trust fund shall establish a  
19 private, nonstate retirement plan for the West Virginia trust  
20 fund employees, and the said transferred employee and  
21 employer contributions and interest shall be deposited to  
22 the private retirement plan.

23 (c) Upon the effective date of this article, no more  
24 than seven hundred thousand dollars of those funds  
25 remaining in the special revenue accounts known as the  
26 "loss legal expense fund" and the "security lending fund"  
27 and further known as WVFIMS accounts 8563 and 8565  
28 shall be transferred to the West Virginia trust fund board  
29 for its use in the beginning operations of the trust fund.

**§44-6B-10. Trust indenture.**

1 The governor, on behalf of the state, shall enter into a  
2 trust indenture with the West Virginia trust fund as trustee,  
3 effective on the first day of July, one thousand nine  
4 hundred ninety-six. The trust indenture shall contain the  
5 following provisions:

6 (a) Simultaneously with the execution of the trust  
7 indenture, the state shall have delivered to the trustee all  
8 the assets of the consolidated pension fund with any other  
9 property that may be transferred hereafter to the trustee  
10 by the state, or by any other person or entity, which shall  
11 be used as provided in the trust indenture and which  
12 constitutes the trust estate. The trustee shall acknowledge  
13 receipt of the assets and agree to hold the assets, and any  
14 other property that later may be added to the trust, and to  
15 perform the duties of trustee, according to the terms and

16 conditions set forth in this trust indenture and in the  
17 provisions of the "West Virginia Trust Fund Act".

18 (b) The Legislature hereby reserves the following  
19 rights and powers:

20 (1) The right by supplemental agreement to amend,  
21 modify or alter the terms of this trust without consent of  
22 the trustee, or any beneficiary; and

23 (2) The right to request and receive additional  
24 information from the trustee at any time.

25 (c) The state directs the trustee to establish a trust for  
26 the participant plans specified by the state with the  
27 earnings and losses accounted for and charged  
28 individually to each participant plan, including, but not  
29 limited to, the following:

30 (1) The public employees retirement system;

31 (2) The teachers retirement system;

32 (3) The West Virginia state police retirement system;

33 (4) The death, disability and retirement fund of the  
34 department of public safety;

35 (5) The judges' retirement system;

36 (6) The pneumoconiosis fund; and

37 (7) The workers' compensation fund.

38 (d) In the administration of the trust created by the  
39 trust indenture, the trustee has the following powers:

40 (1) To purchase, retain, hold, transfer and exchange,  
41 and to sell, at public or private sale, the whole or any part  
42 of the trust estate upon such terms and conditions as it  
43 considers advisable;

44 (2) To invest and reinvest the trust estate or any part  
45 thereof, in any kind of property, real or personal,  
46 including, but not limited to, mortgage or mortgage  
47 participations, common stocks, preferred stocks, common

48 trust funds, bonds, notes or other securities, not-  
49 withstanding the provisions of articles five and six, chapter  
50 forty-four of the code of West Virginia, one thousand nine  
51 hundred thirty-one, as amended;

52 (3) To carry the securities and other property held  
53 under the trust indenture either in the name of the trustee  
54 or in the name of its nominee;

55 (4) To vote, in person or by proxy, all securities held  
56 under the trust indenture, to join in or to dissent from and  
57 oppose the reorganization, recapitalization, consolidation,  
58 merger, liquidation or sale of corporations or property; to  
59 exchange securities for other securities issued in  
60 connection with or resulting from any transaction; to pay  
61 any assessment or expense which the trustee considers  
62 advisable for the protection of its interest as holder of any  
63 such securities; to deposit securities in any voting trust or  
64 with any protective or like committee, or with a trustee  
65 depository; to exercise any option appurtenant to any  
66 securities for the conversion of any securities into other  
67 securities; and to exercise or sell any rights issued upon or  
68 with respect to the securities of any corporation, all upon  
69 terms the trustee considers advisable;

70 (5) To prosecute, defend, compromise, arbitrate or  
71 otherwise adjust or settle claims in favor of or against the  
72 trustee or other trust estate;

73 (6) To employ and pay from the trust estate legal and  
74 investment counsel, brokers and such other assistants and  
75 agents as the trustee considers advisable; and

76 (7) To develop, implement and modify an asset  
77 allocation plan for each participant plan. The asset  
78 allocation plans shall be implemented within the  
79 management and investment of the trust fund.

80 (e) All trust income shall be free from anticipation,  
81 alienation, assignment or pledge by, and free from  
82 attachment, execution, appropriation or control by or on  
83 behalf of, any and all creditors of any beneficiary by any  
84 proceeding at law, in equity, in bankruptcy or insolvency.

85 (f) The trustee may receive any other property, real or  
86 personal, tangible or intangible, of any kind whatsoever,  
87 that may be granted, conveyed, assigned, transferred,  
88 devised, bequeathed or made payable to it by the state, or  
89 by any other person or entity, for the purposes of the trust  
90 created by the trust indenture, and all such properties shall  
91 be held, managed, invested and administered by the trustee  
92 as provided in the trust indenture and in the "West Virginia  
93 Trust Fund Act".

94 (g) The trustee shall promptly cause to be paid to the  
95 state the amounts certified by the governor as necessary  
96 for the monthly payment of benefits to the beneficiaries  
97 of the trust.

98 (h) The trustees shall render an annual accounting to  
99 the state not more than one hundred twenty days  
100 following the close of the fiscal year of the trust.

101 (i) The trust created by this indenture is not invalid by  
102 reason of any existing law or rule against perpetuities or  
103 against accumulations or against restraints upon the power  
104 of alienation, but the trust may continue for such time as  
105 necessary to accomplish the purposes for which it is  
106 established.

107 (j) If any provision of the trust indenture is void,  
108 invalid or unenforceable, the remaining provisions are  
109 nevertheless valid and shall be carried into effect.

#### **§44-6B-11. Standard of care.**

1 Any investments made under this article shall be made  
2 with the care, skill, prudence and diligence under the  
3 circumstances then prevailing that a prudent person acting  
4 in a like capacity and familiar with such matters would use  
5 in the conduct of an enterprise of a like character and with  
6 like aims.

7 (a) Trustees shall discharge their duties for the  
8 exclusive purpose of providing benefits to participants and  
9 their beneficiaries;

10 (b) Trustees shall diversify fund investments so as to  
11 minimize the risk of large losses unless, under the  
12 circumstances, it is clearly prudent not to do so;

13 (c) Trustees shall defray reasonable expenses of  
14 investing and operating the fund; and

15 (d) Trustees shall discharge their duties in accordance  
16 with the documents and instruments governing the plan  
17 insofar as such documents and instruments are consistent  
18 with the provisions of this article.

**§44-6B-12. Limitations on investments.**

1 The trust fund shall limit its asset allocation and types  
2 of securities to the following:

3 (a) Through the first day of July, one thousand nine  
4 hundred ninety-seven, the trust fund shall hold in equity  
5 investments no more than twenty percent of its total  
6 portfolio and no more than twenty percent of the assets of  
7 any individual participant plan; after the first day of July,  
8 one thousand nine hundred ninety-seven, and through the  
9 first day of July, two thousand, the trust fund shall hold in  
10 equity investments no more than forty percent of its total  
11 portfolio and no more than forty percent of the assets of  
12 any individual participant plan; after the first day of July,  
13 two thousand, the trust fund shall hold in equity  
14 investments no more than sixty percent of its total  
15 portfolio and no more than sixty percent of the assets of  
16 any individual participant plan.

17 (b) The trust fund shall hold in international securities  
18 no more than twenty percent of its portfolio and no more  
19 than twenty percent of the assets of any individual  
20 participant plan.

21 (c) The trust fund may not at the time of purchase  
22 hold more than five percent of its equity portfolio in the  
23 equity securities of any single company or association:  
24 *Provided*, That if a company or association has a market  
25 weighting of greater than five percent in the Standard &

26 Poor's 500 index of companies, the trust fund may hold  
27 securities of that equity equal to its market weighting.

28 (d) The trust fund may not hold more than twenty  
29 percent of its portfolio in commercial paper. Any  
30 commercial paper at the time of its acquisition shall be in  
31 one of the two highest rating categories by an agency  
32 nationally known for rating commercial paper.

33 (e) At no time shall the trust fund hold more than  
34 seventy-five percent of its portfolio in corporate debt.  
35 Any corporate debt security at the time of its acquisition  
36 shall be rated in one of the four highest rating categories  
37 by a nationally recognized rating agency.

38 (f) No security may be purchased by the trust fund  
39 unless the type of security is on a list approved by the trust  
40 fund board. The board may modify the securities list at  
41 any time, and must give notice of that action pursuant to  
42 subsection (g), section four of this article, and must review  
43 the said list at its annual meeting.

44 (g) The board, at the annual meeting provided for in  
45 subsection (i), section four of this article, shall review,  
46 establish and modify, if necessary, the investment  
47 objectives of the individual participant plans, as  
48 incorporated in the investment policy statement of the  
49 trust, so as to provide for the financial security of the trust  
50 fund, giving consideration to the following:

- 51 (1) Preservation of capital;
- 52 (2) Diversification;
- 53 (3) Risk tolerance;
- 54 (4) Rate of return;
- 55 (5) Stability;
- 56 (6) Turnover;
- 57 (7) Liquidity; and
- 58 (8) Reasonable cost of fees.

## CHAPTER 259

(Com. Sub. for S. B. 140—By Senators Tomblin, Mr. President, and Boley)  
[By Request of the Executive]

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[Passed March 9, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to amend chapter nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article nine, relating to the West Virginia works program for welfare assistance to at-risk families; food stamp recipients and emergency assistance recipients; short title; legislative findings; program goals; definitions; authorization for program, permitting establishment as pilot projects, authorizing the request for federal waivers, making the program implementation subject to appropriation of funds; creating the "West Virginia works program fund"; defining program participation requirements; establishing eligibility for program participation; requiring participants to work, attend school or a training program; exemptions from work requirements; requiring all participants to sign a personal responsibility contract and defining required provisions; time limits for program participation; sanctions; establishing due process procedures; emergency assistance loans in lieu of monthly cash assistance; employer subsidy for employment; transitional assistance; requiring interagency coordination; requiring intergovernmental coordination and the use of existing state facilities and county transportation systems for program implementation; authorizing community organizations to develop support services; coordinating relationship with other law; and requiring review and evaluation by the legislative oversight commission on health and human resources accountability.

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

That chapter nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article nine, to read as follows:

**ARTICLE 9. WEST VIRGINIA WORKS PROGRAM.**

- §9-9-1. Short title.
- §9-9-2. Legislative findings; purpose.
- §9-9-3. Definitions.
- §9-9-4. Authorization for program.
- §9-9-5. West Virginia works program fund.
- §9-9-6. Program participation.
- §9-9-7. Work requirements.
- §9-9-8. Exemptions.
- §9-9-9. Personal responsibility contract.
- §9-9-10. Participation limitation; exceptions.
- §9-9-11. Breach of contract; notice; sanctions.
- §9-9-12. Emergency assistance allowance in lieu of monthly cash assistance.
- §9-9-13. Subsidized employment.
- §9-9-14. Transitional assistance.
- §9-9-15. Interagency coordination.
- §9-9-16. Intergovernmental coordination.
- §9-9-17. Public-private partnerships.
- §9-9-18. Relationship with other law.
- §9-9-19. Legislative oversight.

**§9-9-1. Short title.**

- 1           This article may be cited as the "WV WORKS Act".

**§9-9-2. Legislative findings; purpose.**

- 1           (a) The Legislature hereby finds that:

2           (1) At-risk families are capable of becoming self-sup-  
3           porting;

4           (2) A reformed assistance program should both expect  
5           and assist a parent and caretaker-relatives in at-risk fami-  
6           lies to support their dependent children and children for  
7           which they are caretakers;

8           (3) Every parent or caretaker-relative can exhibit re-  
9           sponsible patterns of behavior so as to be a positive role  
10          model;

11          (4) Every parent or caretaker-relative who receives  
12          welfare assistance has a responsibility to participate in an  
13          activity to help them prepare for, obtain and maintain  
14          gainful employment;



15 (5) For a parent or caretaker-relative who receives  
16 welfare assistance and for whom full-time work is not  
17 feasible, participation in some activity is expected to fur-  
18 ther themselves, their family or their community;

19 (6) The state should promote the value of work and  
20 the capabilities of individuals;

21 (7) Job development efforts should enhance the em-  
22 ployment opportunities of participants;

23 (8) An effective public education system is the key to  
24 long-term self-support; and

25 (9) A reformed assistance program should be struc-  
26 tured to achieve a clear set of outcomes; deliver services in  
27 an expedient, effective and efficient manner; maximize  
28 community support for participants; and demonstrate  
29 budget neutrality over five years. After five years, there is  
30 expected to be a decrease in the following: (i) The num-  
31 ber of persons receiving public assistance; (ii) the amount  
32 of time an individual remains on public assistance; and  
33 (iii) the amount of money spent in the West Virginia  
34 works program.

35 (b) The goals of the program are to achieve more  
36 efficient and effective use of public assistance funds; re-  
37 duce dependency on public programs by promoting  
38 self-sufficiency; and structure the assistance programs to  
39 emphasize employment and personal responsibility. The  
40 program is to be evaluated on the increase in employment  
41 rates in the program areas; the completion of educational  
42 and training programs; the increased compliance in pre-  
43 ventive health activities, including immunizations; and a  
44 decrease in the case-load of division personnel.

### §9-9-3. Definitions.

1 In addition to the rules for the construction of statutes  
2 in section ten, article two, chapter two of this code and the  
3 words and terms defined in section two, article one of this  
4 chapter, unless a different meaning appears from the con-  
5 text:

6 (a) "At-risk family" means a group of West Virginians  
7 living in the same household, living below the federally  
8 designated poverty level, lacking the resources to become  
9 self-supporting, and consisting of a dependent minor child  
10 or children living with a parent, stepparent or  
11 caretaker-relative; an "at-risk family" may include an un-  
12 married minor parent and his or her dependent child or  
13 children who live in an adult supervised setting;

14 (b) "Barrier" means any fact, circumstance or situation  
15 that prevents a person from becoming self-sufficient or  
16 from seeking, obtaining or maintaining employment of  
17 any kind, including physical or mental disabilities, lack of  
18 education, testing, training, counseling, child care arrange-  
19 ments, transportation, medical treatment or substance  
20 abuse treatment;

21 (c) "Beneficiary" or "participant" means any person in  
22 an at-risk family who receives welfare assistance for him-  
23 self or herself, for family members or for persons for  
24 whom he or she cares;

25 (d) "Community or personal development" means  
26 activities designed or intended to eliminate barriers to  
27 participation in self-sufficiency activities. These activities  
28 are to provide community benefit and enhance personal  
29 responsibility, including, but not limited to, classes or  
30 counseling for learning life skills or parenting, dependent  
31 care, job readiness, volunteer work, participation in shel-  
32 tered workshops or substance abuse treatment;

33 (e) "Department" means the state department of health  
34 and human resources;

35 (f) "Division" means the division of human services;

36 (g) "Income" means money received by any member  
37 of an at-risk family which can be used at the discretion of  
38 the household to meet its basic needs: *Provided*, That  
39 income shall not include earnings of minor children in  
40 school, payments received from earned income tax credit  
41 or tax refunds;

42 (h) "Personal responsibility contract" means a written  
43 agreement entered into by the division and a beneficiary  
44 which establishes the responsibilities and obligations of the  
45 beneficiary;

46 (i) "Secretary" means the secretary of the state depart-  
47 ment of health and human resources;

48 (j) "Subsidized employment" means employment with  
49 earnings provided by an employer who receives a subsidy  
50 from the division for the creation and maintenance of the  
51 employment position;

52 (k) "Support services" means, but is not limited to, the  
53 following services: Child care; medicaid; transportation  
54 assistance; information and referral; resource development  
55 services which is assisting families to receive child support  
56 enforcement and supplemental social security income;  
57 family support services which is parenting, budgeting and  
58 family planning; relocation assistance; and mentoring  
59 services;

60 (l) "Supported employment" means employment with  
61 earnings, after mandatory deductions, that provides a level  
62 of income that does not allow an at-risk family to exist  
63 independent of government support such that supplement-  
64 al cash assistance, child care subsidies, food stamps, subsi-  
65 dized housing or other assistance may be provided as  
66 necessary for a period of time;

67 (m) "Unsubsidized employment" means employment  
68 with earnings, after mandatory deductions, that provides a  
69 level of income that allows a family to become completely  
70 independent of government support;

71 (n) "Welfare assistance" means aid to families with  
72 dependent children, food stamps or emergency assistance;

73 (o) "Work" means unsubsidized employment, subsi-  
74 dized employment, employment with support, work expe-  
75 rience or community or personal development; and

76 (p) "Work experience" means unpaid structured work  
77 activities that are provided in an environment where per-  
78 formance expectations are similar to those existing in

79 unsubsidized employment and which provide training in  
80 occupational areas that can realistically be expected to  
81 lead to unsubsidized employment.

**§9-9-4. Authorization for program.**

1 (a) The secretary shall conduct the West Virginia  
2 works program in accordance with this article and any  
3 applicable waivers from the secretary of the federal de-  
4 partment of health and human services and the secretary  
5 of the federal department of agriculture or in accordance  
6 with federal block-grant funding or similar federal fund-  
7 ing stream. This program shall be implemented to replace  
8 welfare assistance programs for at-risk families in accor-  
9 dance with this article and within federal requirements; to  
10 coordinate the transfer of all applicable state programs  
11 into the West Virginia works program; to expend only the  
12 funds appropriated by the Legislature to establish and  
13 operate the program; to establish administrative due pro-  
14 cess procedures for revocation or termination proceed-  
15 ings; and implement such other procedures as may be  
16 necessary to accomplish the purpose of this article.

17 (b) Notwithstanding any provision of the law to the  
18 contrary, the secretary shall implement the West Virginia  
19 works program as soon as possible, but no later than three  
20 months after receiving federal waiver approval and suffi-  
21 cient funds.

22 (c) The secretary shall submit federal waiver proposals  
23 to permit this state to limit the duration of assistance to  
24 adults, increase the asset test to five thousand dollars, to  
25 disregard the restriction that limits the primary wage earn-  
26 er to working less than one hundred hours per month and  
27 to eliminate the requirement of recent attachment to the  
28 work force.

29 (d) The secretary may establish the program as one or  
30 more pilot projects to test the policy being evaluated. Any  
31 pilot project so established is to be consistent with the  
32 principles and goals set forth in this act. The secretary  
33 shall determine the counties in which to implement the  
34 provisions of this program, considering a fair representa-

35 tion of both rural and urban areas, and may vary the pro-  
36 gram components to test the effectiveness, efficiency and  
37 fiscal impact of each prior to statewide implementation.  
38 The secretary shall structure the initial pilot program, or  
39 programs to include a minimum of fifteen percent of the  
40 state population that qualifies for aid to families with de-  
41 pendent children, or any successor program. The pilot  
42 program shall eventually include a minimum of fifteen  
43 percent of the participants eligible in other categories, as  
44 funds are available.

45 (e) The West Virginia works program authorized pur-  
46 suant to this act does not create an entitlement to that pro-  
47 gram or any services offered within that program, unless  
48 entitlement is created pursuant to a federal law or regula-  
49 tion. The West Virginia works program, and each compo-  
50 nent of that program established by this act or the expan-  
51 sion of any component established pursuant to federal law  
52 or regulation, is subject to the annual appropriation of  
53 funds by the Legislature and the corresponding federal  
54 financial participation moneys.

55 (f) On or before the first day of October, one thou-  
56 sand nine hundred ninety-six, the secretary shall propose  
57 emergency rules in accordance with the provisions of  
58 section fifteen, article three, chapter twenty-nine-a of this  
59 code regarding the implementation of the pilot program,  
60 including, but not limited to, rules establishing require-  
61 ments for participation in the program, and rules regard-  
62 ing the development, fulfillment and cancellation of per-  
63 sonal responsibility contracts.

64 (g) The secretary shall propose rules in accordance  
65 with the provisions of chapter twenty-nine-a of this code  
66 necessary to accomplish all other purposes of this article,  
67 including, but not limited to, rules for the regulation of the  
68 West Virginia works program when expanded; rules estab-  
69 lishing requirements for participation in the program; and  
70 rules regarding the development, fulfillment and cancella-  
71 tion of personal responsibility contracts: *Provided, That*  
72 such rules shall not be filed as emergency rules pursuant  
73 to section fifteen, article three of said chapter.

74 (h) Copies of all rules proposed by the secretary shall  
75 also be filed with the legislative oversight commission on  
76 health and human resources accountability established  
77 pursuant to article twenty-nine-e, chapter sixteen of this  
78 code.

**§9-9-5. West Virginia works program fund.**

1 There is hereby created a special account within the  
2 state treasury to be known as the "West Virginia Works  
3 Program Fund". Expenditures from the fund shall be used  
4 exclusively to meet the necessary expenditures of the  
5 program, including wage reimbursements to participating  
6 employers, aid to dependent children cash grants,  
7 employment-related day care payments, transportation  
8 expenses and administrative costs directly associated with  
9 the operation of the program. Moneys paid into the ac-  
10 count shall be from specific appropriations by the Legisla-  
11 ture and the corresponding federal financial participation  
12 moneys.

**§9-9-6. Program participation.**

1 (a) Unless otherwise noted in this article, all adult re-  
2 cipients of welfare assistance shall be required to partici-  
3 pate in the West Virginia works program, or pilot program,  
4 in accordance with the provisions of this article. The level  
5 of participation, services to be delivered and work require-  
6 ments shall be defined within the terms of the personal  
7 responsibility contract and through rules established by  
8 the secretary.

9 (b) To the extent funding permits, any individual  
10 exempt under the provisions of section eight of this article  
11 may participate in the activities and programs offered  
12 through the West Virginia works program.

13 (c) Support services other than cash assistance through  
14 the works program may be provided to at-risk families to  
15 eliminate the need for cash assistance.

16 (d) Cash assistance through the works program may  
17 be provided to an at-risk family if the combined family  
18 income is below the income and asset test levels estab-

19 lished by the division: *Provided*, That an at-risk family  
20 that includes a married man and woman and dependent  
21 children of either one or both may receive an additional  
22 cash assistance benefit in an amount ten percent greater  
23 than the cash assistance benefit provided to the same size  
24 household in which there are no married adults.

25 (e) The secretary shall promulgate legislative rules in  
26 accordance with article three, chapter twenty-nine-a of this  
27 code and administer the West Virginia works program to  
28 insure that no duplication of benefits occurs to the partici-  
29 pants in the program. Participants may not receive bene-  
30 fits under the works program and at the same time and for  
31 the same time period also receive aid to families with de-  
32 pendent children or other forms of governmental assis-  
33 tance that are the same or similar to those granted in this  
34 article.

#### §9-9-7. Work requirements.

1 Unless otherwise exempted by the provisions of sec-  
2 tion eight of this article, the West Virginia works program  
3 shall require that anyone who possesses a high school  
4 diploma, or its equivalent, or anyone who is of the age of  
5 twenty years or more, to work or attend an educational or  
6 training program for a minimum of twenty hours per  
7 week to receive any form of welfare assistance. In accor-  
8 dance with federal law or regulation, the work, education  
9 and training requirements of this section are waived for  
10 any qualifying participant if day care services are not  
11 available. In order for any participant to receive welfare  
12 assistance, he or she shall enter into personal responsibility  
13 contracts pursuant to the provisions of section nine of this  
14 article.

#### §9-9-8. Exemptions.

1 Participants exempt from the work requirements of the  
2 works program pursuant to the provisions of this section  
3 shall be required to develop a personal responsibility con-  
4 tract. The secretary shall establish by rule categories of  
5 persons exempt only from the work requirements of the

6 program, which categories shall include, but not be limited  
7 to, the following:

8 (a) A parent caring for a dependent child with a  
9 life-threatening illness;

10 (b) Individuals over the age of sixty years;

11 (c) Persons working in unsubsidized employment;

12 (d) Full-time students that are less than twenty years of  
13 age and are pursuing a high school diploma or equivalent;

14 (e) Persons with a physical or mental incapacity as  
15 defined pursuant to the provisions of title forty-two of the  
16 Social Security Act and the regulations promulgated  
17 thereunder, 45 C.F.R. §233.90;

18 (f) Individuals suffering from a temporary debilitating  
19 injury for the duration of that injury. For purposes of this  
20 section, the injury must cause the temporary disability for  
21 more than thirty days;

22 (g) Relatives providing in-home care for an individual  
23 that would otherwise be institutionalized; and

24 (h) Any woman during the last trimester of pregnancy  
25 and the first six months after the birth of the child but in  
26 no case shall the woman be exempt from the work re-  
27 quirements for more than a total of six months: *Provided,*  
28 That, in the case of the birth of the first child to said wom-  
29 an after said woman first becomes a public assistance re-  
30 cipient, the woman shall be exempt for the first two years  
31 after the birth of said child.

#### **§9-9-9. Personal responsibility contract.**

1 (a) Every eligible adult beneficiary shall participate in  
2 a program orientation and the development, and subse-  
3 quent revisions, of a personal responsibility contract. The  
4 contract shall be defined based on the assessed needs of  
5 the participant.

6 (1) If the participant has a recent attachment to the  
7 work force, the contract shall include provisions regarding



8 required job search activities, identified support services,  
9 level of benefits requested and time limitation.

10 (2) If the participant does not have a recent attachment  
11 to the work force, the contract shall identify the evaluation  
12 or testing activities, and/or job training activities necessary  
13 prior to job search activities, identified support services,  
14 benefits requested and time limitation.

15 (3) If it is determined that the participant is not able to  
16 obtain or maintain gainful employment, the contract shall  
17 contain appropriate provisions defining the activities that  
18 benefit the participant, their family or their community.

19 (4) If the participant is a parent or caretaker-relative,  
20 the contract shall include the requirement that the partici-  
21 pant develop and maintain, with the appropriate health  
22 care provider, a schedule of preventive care for their de-  
23 pendent child, including routine examinations and immu-  
24 nizations; nutrition counseling; assurance of school atten-  
25 dance for school age children under their care; assurance  
26 of properly supervised child care, including after-school  
27 care; and establish paternity or actively pursue child sup-  
28 port, or both, if applicable and if deemed necessary, coun-  
29 seling, parenting or family planning classes.

30 (5) If the participant is a parent or caretaker-relative  
31 who must remove barriers prior to employment, the con-  
32 tract shall include a list of the identified barriers and an  
33 individual plan for removing the same.

34 (6) If the participant is a teenage parent, the partici-  
35 pant may work and the contract shall include the require-  
36 ments that the participant:

37 (A) Remain in an educational activity to complete  
38 high school, obtain a general equivalent diploma or obtain  
39 vocational training and make satisfactory scholastic prog-  
40 ress without incurring any disciplinary actions;

41 (B) Attend parenting classes or participate in a  
42 mentorship program, or both; and

43 (C) Live at home or in other adult supervised arrange-  
44 ments if they are unemancipated minor parents.

45 (7) If the participant is under the age of twenty years  
46 and does not have a high school education or its equiva-  
47 lent, the contract shall include requirements to participate  
48 in mandatory education or training, which may include a  
49 return to high school if the participant is unemployed and  
50 to make satisfactory scholastic progress and without incur-  
51 ring any disciplinary actions.

52 (b) The participant shall have up to thirty days from  
53 approval of application to develop the personal responsi-  
54 bility contract. If the participant refuses to sign the per-  
55 sonal responsibility contract, the department shall stop all  
56 benefits and services until the participant complies with  
57 this section.

58 (c) Personal responsibility contracts shall be drafted  
59 by the division on a case-by-case basis; take into consider-  
60 ation the individual circumstances of each beneficiary;  
61 reviewed and re-evaluated not less often than every two  
62 years; and, in the discretion of the division, amended or  
63 extended on a periodic basis.

#### **§9-9-10. Participation limitation; exceptions.**

1 The length of time a participant may receive West  
2 Virginia works program benefits shall be defined in the  
3 personal responsibility contract: *Provided*, That no partic-  
4 ipant may receive benefits for a period longer than sixty  
5 months, except in circumstances as defined by legislative  
6 rule pursuant to the provisions of article three, chapter  
7 twenty-nine-a of this code.

#### **§9-9-11. Breach of contract; notice; sanctions.**

1 (a) The division may refuse to extend or renew a per-  
2 sonal responsibility contract and the benefits received by  
3 the beneficiary, or may terminate an existing contract and  
4 benefits, if the division finds any of the following:

5 (1) The employment of fraud or deception by the  
6 beneficiary in applying for or receiving program benefits;

7 (2) A substantial breach of the requirements and obli-  
8 gations set forth in the personal contract of responsibility;

9           (3) A violation of any provision of the personal con-  
10 tract of responsibility, this article, or any rule promulgated  
11 by the secretary pursuant to this article.

12           (b) In the event the division determines that a personal  
13 responsibility contract or the benefits received by the  
14 beneficiary are subject to revocation or termination, writ-  
15 ten notice of the violation, revocation or termination shall  
16 be deposited in the United States mail, postage pre-paid  
17 and addressed to the beneficiary at his or her last known  
18 address fourteen days prior to such termination or revoca-  
19 tion. Such notice shall state the action of the division, its  
20 reason or reasons for such termination and grant to the  
21 beneficiary a reasonable opportunity to be heard at a fair  
22 and impartial hearing before the division in accordance  
23 with administrative procedures established by the division  
24 and due process of law.

25           (c) In any hearing granted pursuant to the provisions  
26 of this section, the beneficiary shall maintain the burden  
27 of proving that his or her benefits were improperly termi-  
28 nated and shall bear his or her own costs, including attor-  
29 neys fees.

30           (d) The secretary shall determine by rule de minimis  
31 violations and those violations subject to sanctions and  
32 maximum penalties. In the event the division finds that a  
33 beneficiary has violated any provision of this article, of his  
34 or her personal responsibility contract or any applicable  
35 division rule, the division shall impose sanctions against  
36 the beneficiary as follows:

37           (1) For the first noncompliance, a one-third reduction  
38 of benefits for three months;

39           (2) For the second noncompliance, a two-thirds reduc-  
40 tion in benefits for three months; and

41           (3) For the third noncompliance, a termination of  
42 benefits.

43           (e) For any sanction imposed pursuant to subsection  
44 (d) of this section, if compliance occurs within ten days of  
45 notice of the sanction, the reduction in benefits shall not

46 be imposed, but the noncompliance shall count in deter-  
47 mining the level of sanction to be imposed for any future  
48 noncompliance. Once a reduction in benefits is in effect,  
49 it shall remain in effect for the entire three months. A  
50 reduction of benefits applies to both cash assistance and  
51 support services. If benefits are terminated, benefits may  
52 not be provided until the noncompliance that caused the  
53 termination has been rectified or excused.

**§9-9-12. Emergency assistance allowance in lieu of monthly cash assistance.**

1 (a) In order to encourage at-risk families not to apply  
2 for ongoing monthly cash assistance from the state, the  
3 secretary may issue one-time emergency assistance allow-  
4 ances to families in an amount not to exceed three months  
5 of cash assistance in order to enable such families to be-  
6 come immediately self-supporting.

7 (b) Except as otherwise provided by this section, all  
8 emergency assistance allowances shall be issued with a  
9 repayment schedule determined on a case-by-case basis  
10 by the division.

11 (c) If within one year of receiving such assistance an  
12 at-risk family subsequently applies for monthly cash assis-  
13 tance, the division shall recoup the amount remaining  
14 unpaid on the allowance from future monthly cash assis-  
15 tance payments at the monthly rate of ten percent of the  
16 monthly cash assistance payment for a period not to ex-  
17 ceed twenty-four months.

18 (d) One half of the amount of any emergency assis-  
19 tance allowance may be forgiven after a recipient has been  
20 employed in unsubsidized employment for one year after  
21 the date of receipt of the allowance. The full amount of  
22 the allowance may be forgiven after the recipient has been  
23 employed in unsubsidized employment for two years after  
24 the date of the receipt of the allowance.

25 (e) The secretary shall establish by rule the standards  
26 to be considered in making emergency assistance allow-  
27 ances, developing repayment schedules and qualifications  
28 for allowance forgiveness.

29 (f) Nothing in this section shall be construed to re-  
30 quire that the division or any assistance issued pursuant to  
31 this section be subject to any of the provisions of chapter  
32 thirty-one or chapter forty-six-a of this code.

**§9-9-13. Subsidized employment.**

1 (a) To the extent resources are available, an employer  
2 may be paid a subsidy by the department for the employ-  
3 ment of a parent or caretaker-relative of an at-risk family  
4 if the employer agrees to hire the works program partici-  
5 pant at the end of the subsidized period. If the employer  
6 does not hire the participant at the end of the subsidized  
7 period, the program shall not use that employer for subsi-  
8 dized employment for the next twelve months.

9 (b) If the division determines that any employer estab-  
10 lishes a pattern of discharging employees hired pursuant  
11 to the provisions of this article subsequent to the expira-  
12 tion of the subsidized period without good cause, the em-  
13 ployer shall no longer be eligible for participation in the  
14 subsidy program for a period to be determined by the  
15 division.

**§9-9-14. Transitional assistance.**

1 The West Virginia works program may provide transi-  
2 tional assistance in the form of supportive services and  
3 allow at-risk families to retain a portion of their cash assis-  
4 tance when they have earnings below fifty percent of the  
5 federally designated poverty level. For those at-risk fami-  
6 lies with earnings between fifty and one hundred percent  
7 of the federally designated poverty level, supportive ser-  
8 vices may be continued.

**§9-9-15. Interagency coordination.**

1 The Legislature encourages the development of a  
2 system of coordinated services, shared information and  
3 stream-lined application procedures between the program  
4 and the other agencies within the department to implement  
5 the provisions of this article. The secretary shall require

6 the coordination of activities between the program and the  
7 following agencies:

8 (a) The child support enforcement division for the  
9 purpose of establishing paternity, promoting cooperation  
10 in the pursuit of child support, encouraging noncustodial  
11 parents to get job search assistance and determining eligi-  
12 bility for cash assistance and support services;

13 (b) The bureau of public health for the purpose of  
14 determining appropriate immunization schedules, delivery  
15 systems and verification procedures; and

16 (c) The bureau of medical services for the purpose of  
17 reporting eligibility for medical assistance and transitional  
18 benefits.

19 The secretary may require the coordination of proce-  
20 dures and services with any other agency he or she deems  
21 necessary to implement this program.

22 The secretary shall propose any rules, including emer-  
23 gency rules, necessary for the coordination of various  
24 agency activities in the implementation of this section.

#### **§9-9-16. Intergovernmental coordination.**

1 The commissioner of the bureau of employment pro-  
2 grams and the superintendent of the department of educa-  
3 tion shall assist the secretary in the establishment of the  
4 West Virginia works program. Prior to implementation of  
5 this program, each department shall address in their re-  
6 spective plans the method in which their respective re-  
7 sources will be devoted to facilitate the identification of or  
8 delivery of services for participants and shall coordinate  
9 their respective programs with the division in the provision  
10 of services to participants and their families. Each county  
11 board of education shall designate a person to coordinate  
12 with the local department of health and human resources  
13 office the board's services to participant families and that  
14 person shall work to achieve coordination at the local  
15 level.

16 The secretary and the superintendent shall develop a  
17 plan for program implementation to occur with the use of

18 existing state facilities and county transportation systems  
19 within the project areas whenever practicable. This agree-  
20 ment shall include, but not be limited to, the use of build-  
21 ings, grounds and buses. Whenever possible, the support-  
22 ive services, education and training programs should be  
23 offered at the existing school facilities.

24 The commissioner shall give priority to participants of  
25 the works program within the various programs of the  
26 bureau of employment programs. The secretary and the  
27 commissioner shall develop reporting and monitoring  
28 mechanisms between their respective agencies.

**§9-9-17. Public-private partnerships.**

1 The secretary is authorized to enter into agreements  
2 with any private, nonprofit, charitable or religious organi-  
3 zations to promote the development of the community  
4 support services necessary for the effective implementa-  
5 tion of this program.

**§9-9-18. Relationship with other law.**

1 If any provision of this article conflicts with any other  
2 provision of this code or rules, the provisions of this article  
3 shall supersede such provisions: *Provided*, That the provi-  
4 sions of this article shall not supersede any provisions  
5 which are required or mandated by federal law.

**§9-9-19. Legislative oversight.**

1 The legislative oversight commission on health and  
2 human resources accountability is charged with immediate  
3 and ongoing oversight of the program created by this  
4 article. This commission shall study, review and examine  
5 the work of the program, the department and its staff;  
6 study, review and examine all rules proposed by the de-  
7 partment; and monitor the development and implementa-  
8 tion of the West Virginia works program. The commis-  
9 sion shall review and make recommendations to the Legis-  
10 lature and the legislative rule-making review committee  
11 regarding any plan, policy or rule proposed by the secre-  
12 tary, the division or the program.

# CHAPTER 260

(H. B. 4608—By Delegate Everson)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to extend the time for the county commission of Barbour County to meet as a levying body for the purpose of presenting to the voters of the county an election to consider an excess levy for the fire departments and emergency squads in Barbour County, from the third Tuesday of April until the last Thursday in May, one thousand nine hundred ninety-six.

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

**BARBOUR COUNTY EXCESS LEVY.**

**§1. Extended time for Barbour County commission to meet as levying body for election to consider an excess levy for fire department and emergency squads.**

1       Notwithstanding, the provisions of article eight,  
2 chapter eleven of the code of West Virginia, one thousand  
3 nine hundred thirty-one, as amended, to the contrary, the  
4 county commission of Barbour County is hereby  
5 authorized to extend the time for its meeting as a levying  
6 body, setting the levy rate and certifying its actions to the  
7 state tax commissioner from the third Tuesday in April,  
8 until the last Thursday in May, one thousand nine  
9 hundred ninety-six, for the purpose of submitting to the  
10 voters of Barbour County the consideration of an excess  
11 levy for fire departments and emergency squads.



## CHAPTER 261

(Com. Sub. for S. B. 36—By Senator Wiedebusch)

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[Passed February 26, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to authorize the municipalities of Cairo, Harrisville and Pennsboro to construct and maintain a centralized water treatment plant, storage facilities and transmission lines for the purpose of providing potable water to those municipalities; authorizing the municipalities to create the Hughes river water board to assume ownership of the facilities; membership; powers and duties; board of directors; bylaws; rules; support, maintenance and operation; funds; and severability.

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

### HUGHES RIVER WATER BOARD. .

#### §1. Municipalities of Cairo, Harrisville and Pennsboro authorized to create and join the Hughes River Water Board; powers and duties generally.

1       The municipalities of Cairo, Harrisville and Pennsboro  
2       are hereby authorized and empowered to create a joint  
3       endeavor of the three governing authorities and join a  
4       board to be known as the Hughes river water board to own  
5       and operate a centralized water treatment plant, water stor-  
6       age facilities and transmission lines to provide these and  
7       other water service demands within the county. The board  
8       shall have the power and authority to own and operate a  
9       water treatment plant and transmission system, to sell and  
10      contract for the sale of water and to provide for the proper  
11      maintenance, repair and upgrade to the water system, in-  
12      cluding the power of eminent domain, to buy, sell or lease  
13      real and personal property and to take all other actions as  
14      may be necessary to carry out such purposes. The bor-  
15      rowing of money and the notes, bonds and security inter-  
16      ests evidencing any borrowing shall be authorized by  
17      resolution approved by the board, shall bear the date or  
18      dates, and shall mature at the time or times, in the case of  
19      any bonds, as the resolution or resolutions may provide.  
20      The notes, bonds and security interests shall bear interest

21 at such rate or rates, be in such denominations, be in the  
22 form, either coupon or registered, carry the registration  
23 privileges, be executed in the manner, be payable in the  
24 medium of payment, at the place or places, and be subject  
25 to the terms or conditions of redemption as the resolution  
26 or resolutions may provide: *Provided*, That every issue of  
27 notes, security interests and bonds shall be limited obliga-  
28 tions of the board payable solely out of any revenues or  
29 moneys of the board, subject only to any agreements with  
30 the holders of particular notes, security interests or bonds  
31 pledging particular revenues. The notes, security interests  
32 and bonds issued by the board shall be and hereby are  
33 made negotiable instruments under the provisions of arti-  
34 cle eight, chapter forty-six of the code of West Virginia,  
35 one thousand nine hundred thirty-one, as amended, sub-  
36 ject only to the provisions of the notes, security interests or  
37 bonds for registration.

**§2. Board of directors; appointment; officers; procedures;  
bylaws; rules.**

1       There shall be a board of directors, consisting of one  
2 member representing each of the participating municipali-  
3 ties. The municipalities shall make appointments to the  
4 board through their duly constituted government authori-  
5 ties as provided herein. No later than the first day of July,  
6 one thousand nine hundred ninety-six, the municipality of  
7 Cairo shall appoint one member of the board of directors  
8 for the term of three years. The municipality of  
9 Harrisville shall appoint one member for the term of four  
10 years. The municipality of Pennsboro shall appoint one  
11 member for the term of five years. Although members  
12 shall serve from date of appointment, terms of office shall  
13 expire as if said terms had commenced on the first day of  
14 July, one thousand nine hundred ninety-six. Each succes-  
15 sor member of the board of directors shall be appointed  
16 by the respective municipality that appointed the prede-  
17 cessor member and each successor member shall be ap-  
18 pointed for a term of three years, except that any person  
19 appointed to fill a vacancy occurring before the expiration  
20 of the term shall serve only for the unexpired portion  
21 thereof. Any member of the board shall be eligible for

22 reappointment and the appointing municipality which  
23 appointed the member may remove that member at any  
24 time for any reason. There shall be an annual meeting of  
25 the board of directors on the second Monday in July of  
26 each year and a monthly meeting on the day in each  
27 month which the board may designate in its bylaws. A  
28 special meeting may be called by the president or any two  
29 members of the board and shall be held only after all of  
30 the directors are given notice thereof in writing. At all  
31 meetings two members shall constitute a quorum and at  
32 each annual meeting of the board of directors it shall elect,  
33 from its membership, a president, a vice president, a secre-  
34 tary and a treasurer: *Provided*, That a member may be  
35 elected both secretary and treasurer. The board of direc-  
36 tors shall adopt those bylaws and rules which it deems  
37 necessary for its own guidance and for the administration,  
38 supervision and protection of the water board and all of  
39 the property belonging to the water board. The board of  
40 directors shall have all the powers necessary, convenient  
41 and advisable for the proper operation, equipment and  
42 management of the water board; and except as otherwise  
43 especially provided in this act, shall have the powers and  
44 be subject to the duties which are conferred and imposed  
45 upon the cooperating municipalities by article  
46 twenty-three, chapter eight of the code of West Virginia,  
47 one thousand nine hundred thirty-one, as amended. The  
48 qualifications of the directors shall be determined by each  
49 participating municipality.

**§3. Same—A body corporate.**

1 The Hughes river water board hereby created shall be  
2 a public corporation and governmental instrumentality.  
3 As such it may contract and be contracted with, sue and be  
4 sued, plead and be impleaded and shall have and use a  
5 common seal.

**§4. Title to property.**

1 The title to all property, both real and personal, that  
2 will provide potable water to the municipalities in connec-  
3 tion with the operation by it shall vest in the board of  
4 directors of the Hughes river water board, hereby created.

**§5. Support, maintenance and operation.**

1 Each governing authority of the municipalities that  
2 appoint membership to the board of directors or that are  
3 served by the water facilities governed by the board here-  
4 by created may support the board with general or special  
5 revenues or excess levies. All income realized by the  
6 operation of the water board from the sale of water to  
7 municipalities or from any other sources shall be used by  
8 the board of directors for the support of the Hughes river  
9 water board.

**§6. Deposit and disbursement of funds.**

1 All money collected or appropriated by the three  
2 governing authorities for water board purposes shall be  
3 deposited in a special account for the Hughes river water  
4 board, and shall be disbursed by the board for the purpose  
5 of operating a public water system.

**§7. Workers' compensation; social security and public employees' retirement benefits for employees.**

1 All employees of the Hughes river water board here-  
2 by created shall be entitled to the benefits of the provi-  
3 sions of chapter twenty-three, and articles seven and ten,  
4 chapter five of the code of West Virginia, one thousand  
5 nine hundred thirty-one, as amended.

**§8. Effect of future amendments of general law.**

1 Amendments to article twenty-three, chapter eight of  
2 the code of West Virginia, one thousand nine hundred  
3 thirty-one, as amended, and other general laws shall con-  
4 trol this act only to the extent that they do not conflict  
5 with the special features hereof, or unless the intent to  
6 amend this act is clear and unmistakable.

**§9. Severability.**

1 If any provision hereof is held invalid, such invalidity  
2 shall not affect other provisions hereof which can be given  
3 effect without the invalid provision, and to this end the  
4 provisions of this act are declared to be severable.

## CHAPTER 262

(S. B. 409—By Senators Wooton, Bailey, Wagner, Chafin,  
Ross, Helmick, Sharpe, Buckalew, Love and Oliverio)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to establish the coalfields expressway authority; functions; members; appointment; powers and duties; officers; bylaws; rules and regulations; compensation; authority as corporate body; and severability.

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

### COALFIELDS EXPRESSWAY AUTHORITY.

#### §1. Parkway authority created; functions.

1       There is hereby created a coalfields expressway au-  
2       thority to promote and advance the construction of a  
3       modern highway through McDowell, Raleigh and Wyo-  
4       ming counties and to coordinate with counties, municipali-  
5       ties, state and federal agencies, public nonprofit corpora-  
6       tions, private corporations, associations, partnerships and  
7       individuals for the purpose of planning, assisting and  
8       establishing recreational, tourism, industrial, economic and  
9       community development of the coalfields expressway for  
10      the benefit of West Virginians.

#### §2. Members; appointment; powers and duties generally; officers; bylaws; rules and regulations; compensation.

1       (a) The authority consists of nine voting members and  
2       three ex officio nonvoting members. All members shall  
3       be appointed before the first day of July, one thousand  
4       nine hundred ninety-six.

5       (b) Each of the county commissions of the counties of  
6       McDowell, Raleigh and Wyoming shall appoint three vot-  
7       ing members to the commission. The terms of the voting  
8       members initially appointed by a county commission are  
9       as follows: One member shall be appointed for a term of  
10      one year and two members shall be appointed for a term

11 of two years. All successive appointments shall be for a  
12 term of four years. Any voting member may be removed  
13 for cause by the appointing county commission.

14 (c) The three ex officio nonvoting members are the  
15 commissioner of highways or designee, the director of  
16 natural resources or designee and the executive director of  
17 the West Virginia development office or designee. All  
18 terms of ex officio nonvoting members are for four years.

19 (d) Should a vacancy occur, the person appointed to  
20 fill the vacancy shall serve only for the unexpired portion  
21 thereof. All members are eligible for reappointment.

22 (e) There shall be an annual meeting of the authority  
23 on the third Monday in July in each year and a monthly  
24 meeting on a day and at a time as the authority may desig-  
25 nate in its bylaws. A special meeting may be called by the  
26 president, the secretary or any two members of the author-  
27 ity and may be held only after all members are given  
28 notice of the meeting in writing. Five voting members  
29 constitute a quorum for all meetings. At each annual  
30 meeting of the authority, it shall elect a president, vice  
31 president, secretary and treasurer. The authority shall  
32 adopt bylaws, rules and regulations as may be necessary  
33 for its operation and management. The authority has all,  
34 but only, those powers necessary, incidental, convenient  
35 and advisable for the following purposes:

36 (1) The promotion of economic development and  
37 tourism along the coalfields expressway;

38 (2) Advocating actions consistent with that plan or its  
39 provisions to or before any governmental entity or any  
40 private person or entity; and

41 (3) Otherwise acting in an advisory capacity with re-  
42 gard to any aspects of the coalfields expressway at the  
43 request of or without the request of any governmental  
44 entity or private person or entity.

45 The authority may not own any of the real estate or  
46 real property herein described for development and may  
47 not be responsible for operating or maintaining the park-  
48 way.

49 Each voting member of the authority shall be  
50 compensated monthly by the governing bodies which  
51 appointed the members in an amount to be fixed by the  
52 governing body.

**§3. Body corporate.**

1 The authority hereby created shall be a public  
2 corporation and as such it may contract and be contracted  
3 with, sue and be sued, plead and be impleaded and may  
4 have and use a corporate seal.

**§4. Severability.**

1 If any provision hereof is held invalid, such invalidity  
2 shall not affect other provisions hereof which can be given  
3 effect without the invalid provision, and to this end the  
4 provisions of this act are declared to be severable.

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## CHAPTER 263

(H. B. 4852—By Delegate Manuel)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to authorize cooperation between the Dunkard Creek Watershed Association and like bodies in Greene County, Pennsylvania; and providing for the development of a Memorandum of Understanding.

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

**DUNKARD CREEK WATERSHED ASSOCIATION.**

**§1. Dunkard Creek Watershed Association.**

1 The Dunkard Creek Watershed Association of  
2 Monongalia County, West Virginia, is hereby authorized  
3 to cooperate with like bodies of Greene County,  
4 Pennsylvania, in developing a memorandum of under-  
5 standing for the purpose of enhancing the economic  
6 potential of Dunkard Creek, increasing the quality of life  
7 for stakeholders, and to receive and disburse funds,  
8 regardless of perceived boundaries.

## CHAPTER 264

(H. B. 4070—By Delegate Kerns)

[Passed February 15, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to name the bridge spanning Tygart Valley River and the CSX Railroad on U.S. Route No. 50 in Taylor County the John F. "Jack" Bennett Memorial Bridge and to require that signs be erected designating the name of the bridge.

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

**WEST VIRGINIA DEPARTMENT OF HIGHWAYS.**

### **§1. John F. "Jack" Bennett Memorial Bridge.**

1       The bridge spanning Tygart Valley River and the CSX  
2 Railroad on U.S. Route No. 50 in Taylor County shall be  
3 named the John F. "Jack" Bennett Memorial Bridge.  
4 Additionally, any bridge built to replace the bridge or any  
5 refurbishment of the current bridge shall also be named  
6 the John F. "Jack" Bennett Memorial Bridge. At least two  
7 signs shall be erected at the bridge designating the name  
8 of the bridge. The signs shall be erected such that  
9 motorists traveling in each direction on U.S. Route No. 50  
10 can easily view the signs.

## CHAPTER 265

(Com. Sub. for H. B. 4822—By Delegates Amores, Hunt,  
Seacrist, Walters and Manuel)

[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

AN ACT to allow the Kanawha County commission the authority to construct and maintain county transportation, parking and other public facilities; delegation of authority to board or commission; financing.

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



**KANAWHA COUNTY PUBLIC PARKING FACILITIES.****§1. Authority to construct and maintain county transportation, parking, and other public facilities; delegation of authority to board or commission; financing; additional special provisions as to motor vehicle parking facilities.**

1 (a) The Kanawha County commission is hereby  
2 authorized and empowered to construct, reconstruct,  
3 establish, acquire, improve, renovate, extend, enlarge,  
4 increase, own, equip, repair (including replacement),  
5 maintain and operate transportation terminals, county and  
6 other public facilities and motor vehicle parking facilities  
7 including parking lots, buildings, ramps, curblin parking,  
8 meters and other facilities deemed necessary, appropriate,  
9 useful, convenient or incidental to the regulation, control  
10 and parking of motor vehicles.

**§2. Definitions.**

1 "Governing body" means the Kanawha County  
2 commission exercising the power and authority directly,  
3 or any commission or board created by the Kanawha  
4 County commission for the purposes described herein.

**§3. Delegation of power and authority.**

1 The power and authority conferred upon the Kanawha  
2 County commission may be exercised by the Kanawha  
3 County commission directly or may be delegated to  
4 commissions or boards created by the county commission  
5 for this purpose.

**§4. Issuance of bonds; financing.**

1 (a) In order to pay for all costs and expenses incurred  
2 in carrying out the provisions of this section, the Kanawha  
3 County commission is authorized to issue general  
4 obligation bonds of the county if the issuance thereof has  
5 been authorized by the voters of county as provided by  
6 law. Further, the Kanawha County commission may  
7 finance the costs and expenses by any other method  
8 permitted by law, including, without limiting the generality  
9 of the foregoing, the use of lease purchase financing  
10 through a building commission created pursuant to article

11 thirty-three, chapter eight of this code or from any other  
12 person.

13 (b) The Kanawha County commission, in its discretion,  
14 may provide for the following:

15 (1) The leasing, or subleasing if the governing body is  
16 leasing the motor vehicle parking facility from a building  
17 commission created pursuant to article thirty-three,  
18 chapter eight of this code or from any other person, by  
19 the governing body as lessor or sublessor of space in or  
20 on a motor vehicle parking facility for any business,  
21 commercial or charitable use to the person, for fair and  
22 adequate consideration, for the period or periods of time  
23 and upon other terms and conditions to which the  
24 governing body may agree. In connection with the  
25 leasing or subleasing of any space, the governing body  
26 may agree to provide in or on the motor vehicle parking  
27 facility structures, accommodations or improvements as  
28 may be necessary for the business, commercial or  
29 charitable use or space may be leased or subleased upon  
30 condition that the lessee or sublessee shall provide the  
31 same in or on the space so leased or subleased.

32 (2) The leasing, or subleasing if the governing body is  
33 leasing the motor vehicle parking facility from a building  
34 commission created pursuant to article thirty-three,  
35 chapter eight of this code or from any other person, by  
36 the governing body as lessor or sublessor of air space over  
37 a motor vehicle parking facility for any business,  
38 commercial or charitable use to such person, for fair and  
39 adequate consideration, for period or periods of time and  
40 upon other terms and conditions to which the governing  
41 body may agree. Any lease or sublease of such air space  
42 may contain provisions: (i) Authorizing the use of areas  
43 of the underlying motor vehicle parking facility as are  
44 essential for ingress or egress to and from the air space;  
45 (ii) relating to the support of any building or other  
46 structure to be erected in the air space; and (iii) relating to  
47 the connection of essential public or private utilities to any  
48 building or other structure in the air space.

49 Every lease or sublease shall be authorized by  
50 resolution of the Kanawha County commission, which

51 resolution may specify terms and conditions which must  
52 be contained in the lease or sublease: *Provided*, That  
53 before any proposed lease or sublease is authorized by  
54 resolution of the Kanawha County commission, a public  
55 hearing on the proposed lease or sublease shall be held by  
56 the Kanawha County commission after notice of the date,  
57 time, place and purpose of the public hearing has been  
58 published as a Class I legal advertisement in compliance  
59 with the provisions of article three, chapter fifty-nine of  
60 this code, which publication shall occur at least ten days  
61 prior to the public hearing, and the publication area for  
62 the publication shall be the county in which the motor  
63 vehicle parking facility is situate.

64 (c) The proceeds from any lease or sublease as  
65 provided in this section may be used by the governing  
66 body to pay all or any portion of the rental payments  
67 payable by the governing body for such motor vehicle  
68 parking facility if the governing body is leasing such  
69 facility from a building commission created pursuant to  
70 article thirty-three, chapter eight of this code or from any  
71 other person, to defray the costs of operation of such  
72 motor vehicle parking facility, or for any other lawful  
73 purpose, as the Kanawha County commission shall direct  
74 in the resolution approving such lease or sublease.

75 (d) Notwithstanding the fact that any motor vehicle  
76 parking facility subject to the provisions of this article is  
77 county owned or leased and the fact that a lease or  
78 sublease under the provisions of subdivision (1) or  
79 subdivision (2), subsection (c) of this section is for a  
80 public purpose as declared in subsection (b) of this  
81 section, any leasehold interest under subdivision (1), and  
82 any building, structure, accommodation or improvement  
83 erected, made or operated in any air space leased or  
84 subleased under subdivision (2) shall be subject to all  
85 property taxes, which shall be assessed and imposed  
86 against the lessee or sublessee, as the case may be, unless  
87 the use of the leasehold interest, building, structure,  
88 accommodation or improvement is otherwise exempt from  
89 property taxation under the provisions of section nine,  
90 article three, chapter eleven of this code.

91 (e) Without limiting the generality of the foregoing  
92 provisions of this section, any governing body is hereby  
93 authorized and empowered, but shall not be required to  
94 construct, reconstruct, establish, acquire, improve, renovate,  
95 extend, enlarge, increase, own, lease, equip (including  
96 replacement), maintain and operate motor vehicle parking  
97 facilities (including parking lots, buildings, ramps,  
98 curblin parking, meters and other facilities deemed  
99 necessary, appropriate, useful, convenient or incidental to  
100 the regulation, control and parking of motor vehicles) for  
101 use by the public as well as by employees, officers and  
102 agents of the Kanawha County commission or of any  
103 other governmental body, and to charge any person for  
104 the use of the facilities, the rates and charges as may be  
105 established from time to time by the governing body. The  
106 rates and charges may include the costs of operation of  
107 the facilities, the costs of leasing or financing the facilities,  
108 reimbursement for prior capital expenditures, and other  
109 costs, charges and other considerations as the governing  
110 body shall determine to be appropriate in its sole  
111 discretion.

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## CHAPTER 266

(S. B. 543—By Senators Wagner, Wooton, Bailey and Chafin)

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[Passed March 8, 1996; in effect ninety days from passage. Approved by the Governor.]

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AN ACT to establish a three-district economic council for the Sandy River district in McDowell County, the Huff district in Wyoming County and the Stafford district in Mingo County; providing the council with power to determine the economic and infrastructure needs of the districts and determine and implement remedies thereto; providing for a governing board of three members; providing for appointment of representatives to the board; and providing for the funding of the council.

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

**ROUTE 52 TRI-DISTRICT ECONOMIC DEVELOPMENT COUNCIL.****§1. Economic council for Sandy river, Huff and Stafford districts created; functions.**

1       There is hereby created a three-district economic de-  
2       velopment council, consisting of the districts of Sandy  
3       River in McDowell County, Huff in Wyoming County and  
4       Stafford in Mingo County, which shall determine the eco-  
5       nomic and infrastructure needs of the districts and deter-  
6       mine and implement remedies thereto.

**§2. Board of directors; appointment; terms; removal; compensation.**

1       The management and control of the council, its prop-  
2       erty, operations, business and affairs is lodged in a board  
3       of directors, consisting of three members. The county  
4       commission of each county shall appoint a member to the  
5       board to represent the county. The board is not autho-  
6       rized to act until each member has been appointed.

7       Members shall serve three-year terms, except that the  
8       initial terms shall be staggered so that one member serves  
9       for one year, one member serves for two years and one  
10      member serves for three years. Members may be reap-  
11      pointed to additional terms. Members shall continue to  
12      serve until a successor has been appointed. No member  
13      may receive compensation for service as a board member.

**§3. Funding.**

1       The council is authorized to receive funds from pri-  
2       vate sources and may disburse the funds as it deems neces-  
3       sary to carry out the duties of the council.

**§4. Powers.**

1       Except as otherwise specially provided in this act, the  
2       authority has the powers and duties which are conferred  
3       and imposed, respectively, upon county or municipal  
4       development authorities by sections seven, seven-a, eight,  
5       nine, ten, eleven, twelve, thirteen and fourteen, article

6 twelve, chapter seven of the code of West Virginia, one  
7 thousand nine hundred thirty-one, as amended.

8 In addition to the powers referred to above, the  
9 council has the power to maintain an office or offices as it  
10 deems necessary to carry out its responsibilities and to  
11 staff and equip the office or offices, which may include  
12 hiring an executive director.

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## CHAPTER 267

(H. B. 4096—By Delegate Clements)

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[Passed February 20, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to extend the time for the county commission of Wetzel County, West Virginia, to meet as a levying body for the purpose of presenting to the voters of said county an election to consider an excess levy for operation of the West Virginia University extension service for the residents of Wetzel County, from the third Tuesday in April until the fourth Tuesday in May, one thousand nine hundred ninety-six.

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

**COUNTY COMMISSION OF WETZEL COUNTY MEETING AS  
LEVYING BODY EXTENDED TO CONSIDER AN EXCESS  
LEVY.**

**§1. Extending time for county commission of Wetzel County to meet as levying body for election to consider an excess levy for operation of the West Virginia University extension service for residents of Wetzel County.**

1 Notwithstanding the provisions of article eight, chapter  
2 eleven of the code of West Virginia, one thousand nine  
3 hundred thirty-one, as amended, to the contrary, the  
4 county commission of Wetzel County, West Virginia, is

5 hereby authorized to extend the time for its meeting as a  
6 levying body, setting the levy rate and certifying its  
7 actions to the state tax commissioner from the third  
8 Tuesday in April until the fourth Tuesday in May, one  
9 thousand nine hundred ninety-six, for the purpose of  
10 submitting to the voters of Wetzel County the  
11 consideration of an excess levy for operation of the West  
12 Virginia University extension service for county residents.

# RESOLUTIONS

(Only resolutions of general interest are included herein.)

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## COMMITTEE SUBSTITUTE FOR HOUSE JOINT RESOLUTION 22

(By Delegate Nesbitt)

[Adopted March 10, 1996]

Proposing an amendment to the Constitution of the State of West Virginia, relating to authorizing the Legislature to issue and sell state bonds not exceeding the aggregate amount of five hundred fifty million dollars to be used for improvement and construction of state roads; numbering and designating such proposed amendment; and providing a summarized statement of the purpose of such proposed amendment.

*Resolved by the Legislature of West Virginia, two thirds of the members elected to each house agreeing thereto:*

That the question of ratification or rejection of an amendment to the Constitution of the State of West Virginia be submitted to the voters of the State at the next general election to be held in the year one thousand nine hundred ninety-six, which proposed amendment is to read as follows:

### **SAFE ROADS AMENDMENT OF 1996.**

(a) The Legislature shall have power to authorize the issuing and selling of state bonds not exceeding in the aggregate five hundred fifty million dollars. The proceeds of said bonds hereby authorized to be issued and sold over a five-year period in the following amounts:

(1) The first day of July, one thousand nine hundred ninety-seven, one hundred ten million dollars;

(2) The first day of July, one thousand nine hundred ninety-eight, one hundred ten million dollars;



(3) The first day of July, one thousand nine hundred ninety-nine, one hundred ten million dollars;

(4) The first day of July, two thousand, one hundred ten million dollars;

(5) The first day of July, two thousand one, one hundred ten million dollars.

Any bonds not issued under the provisions of subdivisions (1) through (4) of this subsection may be carried forward and issued in any subsequent year.

(b) The proceeds of the bonds shall be used and appropriated for the following purposes:

(1) Matching available federal funds for highway construction in this state; and

(2) General highway construction or improvements in each of the fifty-five counties.

(c) When a bond issue as aforesaid is authorized, the Legislature shall at the same time provide for the collection of an annual state tax sufficient to pay as it may accrue the interest on such bonds and the principal thereof within and not exceeding twenty-five years. Such tax shall be levied in any year only to the extent that the moneys in the state road fund irrevocably set aside and appropriated for and applied to the payment of the interest on and the principal of said bonds becoming due and payable in such year are insufficient therefor. Any interest that accrues on the issued bonds prior to payment shall only be used for the purposes of the bonds.

*Resolved further*, That in accordance with the provisions of article eleven, chapter three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, such proposed amendment is hereby numbered "Amendment No. 3" and designated as the "Safe Roads Amendment of 1996" and the purpose of the proposed amendment is summarized as follows: "To provide for the improvement and construction of safe roads in the state."

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**HOUSE CONCURRENT RESOLUTION 18**

(By Mr. Speaker, Mr. Chambers, and Ninety-four Members  
of the House of Delegates)

[Adopted February 27, 1996]

Urging the Congress of the United States to amend the Federal Food and Drug and Cosmetic Act and the Public Health Service Act to facilitate the development and approval of new drugs and biologics.

WHEREAS, Improving patient access to quality health care is the number one national goal; and

WHEREAS, The key to improved health care, especially for persons with serious unmet medical needs, is the rapid approval of safe and effective new drugs, biological products and medical devices; and

WHEREAS, Two thirds of all new drugs approved in the last six years by the Food and Drug Administration were approved first in other countries with approval of a new drug currently taking 14.8 years; and

WHEREAS, The United States has long led the world in discovering new drugs, but too many new medicines first are introduced in other countries, with forty drugs currently approved in one or more foreign countries still in development in the United States or awaiting FDA approval; and

WHEREAS, The patient is waiting for the industry to discover and efficiently develop safe and effective new medicines and for the FDA to facilitate the development and approval of safe medicines sooner; and

WHEREAS, There is a broad bipartisan consensus that the FDA must be re-engineered to meet the demands of the twenty-first century; and

WHEREAS, The current rules and practices governing the review of new drugs, biological products and medical devices by the United States Food and Drug Administration can delay approvals and are unnecessarily expensive; therefore, be it

*Resolved by the Legislature of West Virginia:*

That this Legislature respectfully urges the Congress of the United States to address this important issue by enacting comprehensive legislation to facilitate the rapid review and approval of innovative new drugs, biological products and medical devices, without compromising patient safety or product effectiveness; and, be it

*Further Resolved*, That the Clerk of the House of Delegates be hereby directed to transmit appropriate copies of this resolution to the President of the United States, the Speaker of the United States House of Representatives, the President of the United States Senate, and to each member of the West Virginia Delegation of the Congress.

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## HOUSE RESOLUTION 1

(By Delegate Rowe)

[Adopted January 11, 1996]

Authorizing printing and distribution of Acts of the Legislature and Journals of the House of Delegates.

*Resolved by the House of Delegates:*

That under authority of section thirteen, article one, chapter four of the Code of West Virginia, the Clerk of the House of Delegates is hereby authorized to have printed not to exceed 500 copies of the advance acts of the 1996 Regular Session of the Legislature bound in paper binding and to include therein the acts of any extraordinary sessions which have not been printed.

The Clerk of the Senate shall be furnished sufficient copies of said advance acts to supply each member of the Senate with five copies, as the same may be requested, and the Clerk of the House of Delegates shall forward five copies to each member of the House of Delegates, upon request of each such member. The Clerk of the House shall provide copies of said acts for distribution as provided by section six, article eight, chapter fifty-one of the code insofar as such distribution is practicable.

The Clerk of the House of Delegates is also authorized to publish not to exceed 500 copies of said acts, bound in buckram, and not to exceed 250 copies of the Journal of the House of Delegates for the second regular session of the 72nd Legislature

and include therein the unpublished Journals of any extraordinary sessions. In addition, there shall be printed twelve official copies of any Journal published, properly bound and designated. A copy of the Journal and five copies of said acts shall be furnished to each member of the Legislature, upon request of each such member. The Clerk shall retain sufficient copies of the buckram bound acts to supply legislative offices and the remaining copies shall be turned over to the Department of Administration for sale by that department.

For the work required in indexing, printing and distributing said acts and in the publication of said Journal of the House of Delegates and for completing other work of the session, the Speaker is hereby authorized to appoint such persons as he may deem necessary to perform technical, clerical, stenographic, custodial and other services required by the House of Delegates.

The Speaker shall certify a list of persons entitled to compensation under authority of this resolution to the Clerk of the House of Delegates, and the Clerk shall draw his requisition in favor of such persons at per diems or at monthly salaries, which shall be paid from the Per Diem of Officers and Employees Fund or the Contingent Fund of the House of Delegates.

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#### HOUSE RESOLUTION 4

(By Mr. Speaker, Mr. Chambers, and Delegate Ashley,  
offered on behalf of the entire membership of the  
House of Delegates)

[Adopted January 24, 1996]

Creating a standing Committee on Veterans' Affairs.

*Resolved by the House of Delegates:*

That a standing committee of the House, to be known as the Committee on Veterans' Affairs, be and it is hereby created; and, be it

*Further Resolved,* That the Speaker of the House be, and he is hereby, authorized to appoint the membership of such committee.

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**HOUSE RESOLUTION 5**

(By Mr. Speaker, Mr. Chambers, and Delegate Ashley, offered on behalf of the entire membership of the House of Delegates)

[Adopted January 29, 1996]

In memory of John F. "Jack" Bennett, former member of the House of Delegates from the County of Taylor.

WHEREAS, John F. Bennett served as a member of this House of Delegates with distinction and honor until his death on April 15, 1995, having been elected to the House from the Forty-second Delegate District, comprised of Taylor and portions of Marion and Monongalia counties, in 1992 and in 1994.

Jack Bennett was born on April 23, 1933. The son of Donley B. Bennett and Elsie M. Kester Bennett, he was educated in the public schools and attended West Virginia Wesleyan College. He received the Bachelor of Arts degree from Fairmont State College, the M. B. A. degree from West Virginia University, attended the University of Heidelberg, the University of Maryland, the Berlitz School of Language and held a paralegal degree from Marshall University.

Jack Bennett sought to be, and was, of assistance to his State and his fellow West Virginians through his active participation in various civic, benevolent and veteran's organizations. He was a veteran of the Korean Conflict, serving with the United States Air Force and retiring therefrom as Lieutenant Colonel with thirty-five years of service. He retired in January, 1993, as Executive Director of the West Virginia Safety Council.

A Past State Commander and life member of the Veterans of Foreign Wars Memorial City Post 3081 of Grafton, he was a member of the American Legion, Benevolent and Protective Order of Elks #308 of Grafton, Moose Lodge of Charleston, Military Order of Cooties, Kentucky Colonel, Admiral of the Cherry River Navy, U. S. Army Reserves, U. S. Air Force Reserves, U. S. Marine Corps Reserves, Color Guard for Memorial City Post 3081, Grafton Lodge #15 A. F. A. M., Scottish Rite Bodies of Wheeling, a Thirty-third Degree Mason, Osiris Temple of Wheeling, Legion of Honor, Central West Virginia Shrine Club, Taylor County Shrine Club, American Society of Safety

Engineers, Association of Safety Council Executives, the Jaycees, N. R. A. and the Marine Corp League.

A Methodist by faith, he was married to Margaret Elane Maxwell Bennett and they had three daughters: Mrs. Edwin (Denise) Propst, Jr., of Clarksburg; Miss Deborah Ann Bennett of Springfield, Virginia; and Mrs. James (Darlene) Hershman of Grafton. He is survived by his wife, his daughters and seven grandchildren; therefore, be it

*Resolved by the House of Delegates:*

That the life, contributions and public service of Jack Bennett should not go unnoticed, and it is with heartfelt sympathy that this House of Delegates hereby publicly notes his passing and extends to his family sincere condolences; and, be it

*Further Resolved,* That the Clerk of the House of Delegates be hereby directed to furnish appropriate copies of this resolution to his surviving wife, Margaret Elane Maxwell Bennett, and to his three daughters.

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### HOUSE RESOLUTION 9

(By Mr. Speaker, Mr. Chambers, and Delegates Kallai, Adkins, Rowe, J. Martin, Mezzatesta and Michael, offered on behalf of the entire membership of the House of Delegates)

[Adopted February 9, 1996]

Paying tribute to the life, accomplishments and memory of C. Farrell Johnson, former member of the House of Delegates from the Thirty-fifth Delegate District.

WHEREAS, The earthly life of C. Farrell Johnson ended on September 12, 1995, at his home following a sudden illness.

C. Farrell Johnson was born at Swandale, West Virginia, on November 14, 1925, to the late Roy and Elsie Johnson. He was educated in the public schools and studied engineering in Louisville, Kentucky. Mr. Johnson also held extension credits from Alderson-Broadus College.

Married May 21, 1949, to Sara A. Malcolm, they were the parents of two children, Jeanie J. Brown and Kellie June. He was preceded in death by his daughter, Kellie, in 1969. He is survived by his wife, Sara; his daughter, Jeanie Brown; two brothers, Darrell Johnson of Ravenswood and Johnny Johnson of Summersville; his sister, Jean Westfall of Ravenswood; and two grandchildren, Wesley and Jennifer Brown.

C. Farrell Johnson was involved in various local civic organizations and church-affiliated groups. He was the owner of R-S Broadcasting, with radio stations in Summersville, Richwood and Montgomery and was the host of the Gospel Showcase. He was a former co-owner of Modern Appliance and Furniture in Summersville, and was a past Mayor and member of the Town Council of Summersville.

Known to his friends simply as "Farrell", he was a member and past deacon of the Summersville Baptist Church, a Shriner, member of the Masonic Lodge, VFW and American Legion in Summersville and a United States Army veteran of World War II. He served as assistant tour leader to the Holy Land and traveled throughout the State as a representative of the American Baptist Convention, giving lectures on the Holy Land.

A dedicated, patriotic person, his favorite ending to a patriotic speech was "In the sundown side of life, can you look up at Old Glory as she waves gently in the breeze and say 'I gave you more than I have taken from you'?"

During his term as Mayor, he initiated procedures which hopefully will culminate in bringing of the hydroelectric power plant on the Summersville Dam, which will generate considerable revenue for the Town of Summersville.

As a Gospel music enthusiast, C. Farrell served as MC for many concerts, including the Music Fest each year in Summersville, and he received much recognition from professional groups for his promotions through broadcasting. Early in his broadcasting career he served as a national reporter in the mining disaster at Hominy Falls. That particular incident of reporting was picked up by national networks from Richwood radio and received worldwide attention.

C. Farrell Johnson was elected to the House of Delegates in 1986, 1988, 1990 and 1992, serving as House Chaplain for six of his eight years. As House Chaplain, he promoted the annual Legislative Prayer Breakfast, which evidenced that he always put his God first in his life. On a lighter side, Farrell Johnson took great pleasure in leading the House of Delegates in birthday wishes to any member when the occasion presented itself. As a legislator, he worked continuously on water and road projects for his District, was very attentive to the needs of his constituents and was equally kind to all with whom he came in contact.

C. Farrell Johnson will be remembered for his love of life, his jovial nature, his firmness in his convictions and his deep and abiding concern for the welfare of others, both young and old alike; therefore, be it

*Resolved by the House of Delegates:*

That it is with sadness and respect that this House of Delegates hereby formally notes the passing of C. Farrell Johnson, former member and friend, extols his memory, colorful life and character, and extends to his family heartfelt condolences upon the occasion of our collective loss; and, be it

*Further Resolved,* That the Clerk of the House of Delegates be hereby directed to furnish copies of this resolution to Sara A. Malcolm Johnson, his wife, and to his daughter, Jeanie Brown of Summersville.

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## HOUSE RESOLUTION 10

(By Delegates Tomblin, Dempsey, Whitman and Ellis)

[Adopted February 12, 1996]

Commemorating the passing of former House of Delegates member, Paul Hicks.

WHEREAS, Paul Hicks was appointed to the House of Delegates on August 15, 1968, and reelected later in that year and again in 1970; and

WHEREAS, The son of the late Cecil L. and Almita Bryant Hicks, he was married to Betty Rayburn Hicks and was the proud father of a son, David, and daughters, Mary and Paula Hicks; and



WHEREAS, Mr. Hicks was a veteran of the United States Air Force, serving in WWII and the Korean Conflict and was active in his community through his long-standing membership at the West Logan Missionary Baptist Church, Aracoma Lodge #99 AF&AM and as mayor of West Logan; therefore, be it

*Resolved by the House of Delegates:*

That regret and sympathy is hereby expressed to the family of Paul Hicks and his loving wife, Betty, upon their loss; and, be it

*Further Resolved,* That the Clerk of the House of Delegates be hereby directed to forward a copy of this memorial resolution to the members of the Hicks family.

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**COMMITTEE SUBSTITUTE FOR  
HOUSE RESOLUTION 12**

(By Delegates Greear, Seacrist, Hunt, Amores,  
Walters, Nesbitt, Farris, Calvert,  
Henderson, Miller, Sprouse, Harrison and Pulliam)

[Adopted February 21, 1996]

Amending House Rule Nos. 92a and 93, relating to bill carryover and bills to be presented in quadruplicate.

*Resolved by the House of Delegates:*

That House Rule Nos. 92a and 93, be amended to read as follows:

**Bill Carryover.**

92a. Any bill or joint resolution pending in the House at the time of *sine die* adjournment of the First Regular Session of a Legislature or extended First Regular Session thereof, which has not been rejected, laid on the table or postponed indefinitely by the House shall carry over in its original form to the Second Regular Session only at the request of the first-named sponsor of the bill or resolution, such request to be made to the Clerk of the House not later than ten days prior to the commencement of the session.

After receiving notice from the first-named sponsor of his or her intent to carry over the bill, the Clerk of the House shall notify all cosponsors that the bill will be carried over. All cosponsors shall have ten days after the date of notice to notify the Clerk of the House that their names should be removed from the bill to be carried over.

Any such bill or joint resolution shall retain this original number and shall be deemed to be reintroduced on the first day of the Second Regular Session and shall, except as otherwise directed by the Speaker, be treated as referred to the committee or committees to which it was originally referred.

In the case of any House bill or joint resolution which has been passed or adopted by the House, such bill or resolution shall likewise be deemed to be reintroduced and referred, except as otherwise directed by the Speaker, to the committee or committees to which it was originally referred.

This rule shall not apply to any bill or joint resolution solely sponsored by a former member, to supplemental appropriation or budget bills, to bills which promulgate legislative rules, to bills which expire or continue state agencies pursuant to the West Virginia Sunset Law, to bills of a local nature, or to any bill or joint resolution introduced during any extraordinary session.

### **Bills to Be Presented in Quadruplicate.**

93. All bills for introduction shall be presented in quadruplicate bearing the name of the first-named sponsor and the name or names of all cosponsors by whom they are to be introduced. The original copy shall constitute the official bill for use of committees and for the permanent files of the House, one copy shall be used for printing and copying, one for the use and accommodation of the news media, and one for the Clerk's office files.

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## **HOUSE RESOLUTION 18**

(By Mr. Speaker, Mr. Chambers, and Delegates Givens, Thompson and Yeager, offered on behalf of the entire membership of the House of Delegates)

[Adopted March 6, 1996]

A resolution of support for the troops in Bosnia.

WHEREAS, Many West Virginians have distinguished themselves by their unselfish dedication to the principles of freedom and the American way of life; and

WHEREAS, West Virginians have a proud tradition of service in the Armed Forces of the United States; and

WHEREAS, Members of the West Virginia Army and Air National Guard have been called upon to provide direct or indirect support in every major military action of the United States since World War II; and

WHEREAS, Seventeen West Virginia Army National Guardsmen of the 152nd Military Police Detachment of Moundsville, West Virginia, have been called to active federal duty and deployed in Bosnia with the United States Army and other forces of the United Nations in support of the peacekeeping mission there; and

WHEREAS, Those seventeen men and women have volunteered to be placed in harms way so the citizens of Bosnia may enjoy a better quality of life; and

WHEREAS, There may be additional members of the 152nd or other units of the West Virginia Army or Air National Guard called to federal duty as the Bosnian mission continues; therefore, be it

*Resolved by the House of Delegates:*

That the West Virginia House of Delegates hereby pledges its full support of the efforts of the brave men and women of the West Virginia National Guard; and be it

*Further Resolved,* That the West Virginia House of Delegates is proud of your service to our State and Nation, and wish you God's speed in the completion of your mission and your safe return to Almost Heaven; and be it

*Further Resolved,* That the Clerk of the House of Delegates is hereby directed to provide a copy of this resolution to each member of the 152nd Military Police Detachment currently activated for this federal mission and a copy to those additional soldiers and airmen of the West Virginia National Guard who are activated before the conclusion of this peacekeeping mission.

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**HOUSE RESOLUTION 21**

(By Delegates Kiss, Mezzatesta, Prezioso, Staton,  
Faircloth, J. Martin, Michael, Rowe,  
Ashley, Miller and Riggs)

[Adopted March 9, 1996]

Paying tribute to the Honorable Speaker of the House of Delegates, Robert C. "Chuck" Chambers.

WHEREAS, The close of the 72nd Legislature will mark the end of an era of public service rendered by the Speaker of the House, the Honorable Robert C. Chambers.

Born on August 27, 1952, in Mingo County to Geraldine Kiser Chambers and the late James E. Chambers, he received his education in the public schools, graduating from Barboursville High School in 1970, the Bachelor of Arts degree in Political Science from Marshall University in 1974 and received the Doctor of Law degree from West Virginia University College of Law in 1978.

Interested in the political aspect of West Virginia life, Chuck Chambers was first elected to the House of Delegates in 1978. He served as a member of the Committee on the Judiciary during his entire tenure, and was appointed Chairman in 1985 by then-Speaker of the House, Joseph P. Albright.

As Chairman of the Committee on the Judiciary, he won the respect of his colleagues and a reputation for clear thinking, straight talk and fairness to all sides of a given issue. These qualities led to his election as Speaker of the House of Delegates on January 14, 1987. Robert C. "Chuck" Chambers is the 53rd Speaker of the House of Delegates and the longest serving Speaker in the history of the State of West Virginia.

As Speaker, he shepherds the House with a blend of dignity, quick wit and humor. On the theory that a government of laws is preferable to a government of men, Chuck Chambers presides over the House with an excellent command of the rules and has consistently recognized the importance of following its precedents. In looking to resolve a point of order or other procedural question, Speaker Chambers has applied a doctrine analogous to that known to the courts as "stare decisis", under which a judge in

making a ruling will look to earlier cases involving the same question of law. In the same way, the Speaker has adhered to settled rulings that have been established by prior decision; and

WHEREAS, The legislative career of Speaker Chambers will come to a voluntary close, but his accomplishments and ideals will continue through the remaining history of the State and, in this regard, a scholarship fund at Marshall University has been established by the members of the House of Delegates in memory of his late father, to be known as the "Robert 'Chuck' Chambers Scholarship Fund"; therefore, be it

*Resolved by the House of Delegates:*

That it is with admiration and affection that this House of Delegates hereby formally recognizes the public service of its Speaker, the Honorable Robert C. "Chuck" Chambers, upon the occasion of his choosing to retire from the legislative arena; that the members of this House hereby extend to him their collective best wishes for the future and their collective word of thanks for the past and the present, and their sincere congratulations for an outstanding career of leadership; and, be it

*Further Resolved*, That the Clerk of the House of Delegates be hereby directed to furnish certified copies of this resolution to the Honorable Speaker of the House, Robert C. "Chuck" Chambers.

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### HOUSE RESOLUTION 23

(By Mr. Speaker, Mr. Chambers, and Delegates J. Martin, Michael, Rowe, Kiss, Mezzatesta, Prezioso and Staton)

[Adopted March 9, 1996]

Recognizing the outstanding public service and accomplishments of the Honorable Gaston Caperton, Governor of West Virginia.

WHEREAS, Gaston Caperton has served the people of West Virginia with vision, determination, compassion and courage; and

WHEREAS, Gaston Caperton has worked hand-in-hand with the West Virginia Legislature, making the tough decisions and sticking to the right goals; and

WHEREAS, He always has been deeply committed to improving the quality of life for West Virginia's citizens and their communities; and

WHEREAS, His tenure as governor is an exceptional success story, particularly in the areas of education and job growth; and

WHEREAS, Governor Caperton led the state from the brink of bankruptcy to consistent budget surpluses and reliable fiscal management; and

WHEREAS, 75,000 new jobs, 12,000 miles of road improvements, a nationally-recognized regional jail system, an innovative public-private sector partnership and historic environmental laws are among his landmark improvements; and

WHEREAS, West Virginia students have benefitted from a much-advanced and nationally heralded education system under his leadership; and

WHEREAS, The basic skills computer program, professional training, new schools and renovations under the School Building Authority and a rise in teachers' salary ranking from 49th to 31st can be directly attributed to Gaston Caperton's vision for education; and

WHEREAS, Gaston Caperton will be remembered as one of this state's greatest governors for his unprecedented accomplishments, establishing West Virginia as a state strong and full of promise, gaining national recognition for superior performance on several fronts; and

WHEREAS, Gaston Caperton's love, dedication, faith and pride in the Mountain State have been the hallmarks of his leadership; therefore, be it

*Resolved by the House of Delegates:*

That it is with admiration and affection that this House of Delegates hereby formally recognizes the public service of the Governor, the Honorable Gaston Caperton, and that the members of this House hereby extend to him their collective best wishes

for the future and sincere congratulations for an outstanding career of leadership.

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### HOUSE RESOLUTION 25

(By Delegate Willison)

[Adopted March 9, 1996]

Commemorating the passing of the Honorable Forest Buck, former member of the West Virginia House of Delegates from Tyler County.

WHEREAS, On the 13th day of February, 1996, the community of Sistersville suffered the loss of an outstanding citizen and community leader with the passing of Forest Buck; and

WHEREAS, Forest was born on March 8, 1909, in Aliquippa, PA, the son of the late Luster Buck and Kathrine Marshall Buck; and

WHEREAS, Forest was married to the late Mary "Madie" Harrington, and he and Mary were the devoted parents of four children, Lawrence, Edward, Barbara and the late Willis Buck; and

WHEREAS, Forest was a member of the House of Delegates from Tyler County from 1960 to 1972; and

WHEREAS, In addition to his public service, Forest was the former director of the Union Bank of Tyler County and former Co-owner of Buck Chevrolet in Sistersville and St. Marys, West Virginia. He also dedicated much of his time and effort to several civic and social organizations, including First Presbyterian Church of Sistersville; member, Phoenix Lodge #73 AF&AM; member, Nemesis Shrine, Parkersburg; member BPOE #333, Sistersville; member, Sigma Chi Fraternity; therefore, be it

*Resolved by the House of Delegates:*

That the House of Delegates of the West Virginia Legislature hereby expresses its deepest regret at the passing of Forest Buck; and, be it

*Further Resolved*, That the Clerk of the House of Delegates forward copies of this resolution to Lawrence "Larry" Buck, Edward "Bud" Buck, and Barbara Robertson, his children.

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### SENATE RESOLUTION 5

(By Senator Tomblin, Mr. President)

[Adopted January 29, 1996]

Memorializing the life of the Honorable J. Howard Myers, former sheriff, political leader, Clerk of the West Virginia Senate and distinguished West Virginian.

WHEREAS, The Honorable J. Howard Myers was born October 24, 1901, in Berkeley County, West Virginia, the son of James C. and Lillie E. Myers; and

WHEREAS, The Honorable J. Howard Myers received his education at Shepherd College and West Virginia University; and

WHEREAS, The Honorable J. Howard Myers was married February 6, 1937, to his beloved wife Elizabeth Trump of Kearneysville, West Virginia; and

WHEREAS, The Honorable J. Howard Myers served as Sheriff of Berkeley County, West Virginia, from 1938 to 1945. He served in a number of Democratic Party positions, including chairman of the State Democratic Executive Committee. He was also a member of a myriad of civic organizations, including the Masonic Lodge, where he served as a 32nd Degree Mason; and

WHEREAS, The Honorable J. Howard Myers was elected in 1945 as the fifteenth Clerk of the West Virginia Senate, a position he held with dedication and distinction until 1971. He was the longest-serving Senate Clerk in the history of West Virginia, serving fourteen consecutive terms; therefore, be it

*Resolved by the Senate:*

That the Senate hereby expresses its sincere sadness at the passing of the Honorable J. Howard Myers, former sheriff, political leader and longest-serving Clerk of the West Virginia Senate; and, be it



*Further Resolved*, That the Clerk is hereby directed to forward a copy of this resolution to the members of the family of the late J. Howard Myers.

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### SENATE RESOLUTION 6

(By Senators Ross, Helmick, Anderson, Bailey, Blatnik, Boley, Bowman, Buckalew, Chafin, Craigo, Deem, Dittmar, Dugan, Grubb, Jackson, Kimble, Love, Macnaughtan, Manchin, Miller, Minear, Oliverio, Plymale, Schoonover, Scott, Sharpe, Tomblin, Mr. President, Wagner, Walker, Whitlow, Wiedebusch, Wooton and Yoder)

[Adopted January 31, 1996]

Requesting Columbia Gas Transmission, Incorporated, to maintain its headquarters in Charleston, West Virginia.

WHEREAS, Officials of Columbia Gas Transmission, Incorporated, have indicated a possibility of relocating their Charleston, West Virginia, headquarters; and

WHEREAS, Columbia Gas Transmission, Incorporated, has long been a leading employer for many West Virginians and has been a major economic force in West Virginia; and

WHEREAS, Columbia Gas Transmission, Incorporated, employs approximately one thousand people at its Charleston, West Virginia, headquarters and approximately one thousand six hundred people throughout the state; and

WHEREAS, The employees of Columbia Gas Transmission, Incorporated, have performed their jobs with exceptional dedication and reliability; and

WHEREAS, The economic impact of the loss of Columbia Gas Transmission, Incorporated, in West Virginia would be devastating to the city of Charleston, Kanawha County, and the state of West Virginia, as well as other businesses and industries within the state of West Virginia who rely on Columbia Gas Transmission, Incorporated, as a major source of income; therefore, be it

*Resolved by the Senate:*

That the Senate hereby requests Columbia Gas Transmission, Incorporated, to maintain its headquarters in Charleston, West Virginia, and continue to be a predominant economic force to the city of Charleston, Kanawha County, and the state of West Virginia, and, be it

*Further Resolved*, That the Clerk is hereby directed to forward a copy of this resolution to Catherine Abbott, chairman and chief executive officer of Columbia Gas Transmission, Incorporated.

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### SENATE RESOLUTION 9

(By Senators Blatnik, Bowman, Wiedebusch and Macnaughtan)

[Adopted February 12, 1996]

Requesting the United States Postal Service to preserve and maintain the Wheeling, West Virginia, postmark and to assure the future maintenance of the Wheeling, West Virginia, processing center at the level that will sustain the high quality of service that the residents of the northern panhandle of West Virginia deserve.

WHEREAS, The city of Wheeling, West Virginia, has served a prominent role in the history of this state, including service as the state capitol and as the "Gateway to the West"; and

WHEREAS, The city of Wheeling, West Virginia, remains an important municipality in West Virginia and continues to be the third largest city in the state; and

WHEREAS, The United States Postal Service has operated mail service out of Wheeling for residents of the northern panhandle of West Virginia for over one hundred years, including service in the counties of Hancock, Brooke, Ohio, Marshall and Wetzel; and

WHEREAS, The Wheeling, West Virginia, postmark has become a symbol for the unique importance of Wheeling as a city and the role it has played in the development of the great state of West Virginia; and

WHEREAS, The United States Postal Service is contemplating a transfer of some mail processing services to Pittsburgh, Pennsylvania, which may lead to the elimination of some employment

and services and ultimately of the Wheeling, West Virginia, postmark; and

WHEREAS, The cancellation of the Wheeling, West Virginia, postmark and mail processing services could pose a degradation of mail service within West Virginia and could diminish the identity of Wheeling and the northern panhandle of West Virginia as an important historical, cultural and economic point in our nation; therefore, be it

*Resolved by the Senate:*

That the United States Postal Service heed the plea of the residents to preserve and maintain the Wheeling, West Virginia, postmark and maintain the Wheeling, West Virginia, processing center at the level that will sustain the high quality of service that the residents of the northern panhandle of West Virginia deserve; and, be it

*Further Resolved,* That the Clerk is hereby requested to forward a copy of this resolution to the Postmaster General of the United States and the members of the United States Senate from West Virginia.

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### SENATE RESOLUTION 13

(By Senators Tomblin, Mr. President, Jackson and Sharpe)

[Adopted February 16, 1996]

Memorializing the life of the Honorable Todd C. Willis, former educator, coach, senator, Senate Clerk, distinguished West Virginian and statesman.

WHEREAS, The Honorable Todd C. Willis was born April 4, 1925, in Logan County, West Virginia, the son of Thelma (Chambers) and Todd Charles Willis; and

WHEREAS, The Honorable Todd C. Willis received his education at Salem College, where he earned an AB degree, and at Marshall University where he received an MA degree; and

WHEREAS, The Honorable Todd C. Willis was married to his beloved wife Elizabeth Bartlett of Clarksburg, West Virginia, with whom he shared the joy of having three children: Elizabeth Core, Taunja Gay and Todd Bartlett; and

WHEREAS, The Honorable Todd C. Willis served as comptroller for the Logan County Board of Education. He also served as a teacher and head football coach for Logan High School. He served his community through his active involvement in the Logan Junior Chamber of Commerce as a member and past president. He was also a former vice president of the West Virginia Junior Chamber of Commerce; and

WHEREAS, The Honorable Todd C. Willis was elected to the West Virginia Senate in 1972 from the seventh senatorial district. As a member of the West Virginia Senate, Senator Willis served as Chairman of the Senate Committee on Transportation; and

WHEREAS, The Honorable Todd C. Willis was elected as the eighteenth Clerk of the West Virginia Senate in 1980 and was reelected in 1981, 1983, 1985, 1987 and 1989. As Senate Clerk he served as a member of the American Society of Legislative Clerks and Secretaries and the National Conference of State Legislatures; and

WHEREAS, The Honorable Todd C. Willis retired as Senate Clerk on July 31, 1989, bringing to an end a long and dedicated career of public service to the citizens of West Virginia. The guidance and legislative expertise he contributed to the Senate was sorely missed by all who knew him; and

WHEREAS, Sadly, the life of the Honorable Todd C. Willis came to an end on December 12, 1995, in his beloved Logan County, West Virginia; therefore, be it

*Resolved by the Senate:*

That the Senate hereby extends its sincere sadness at the passing of the Honorable Todd C. Willis, a man who served the West Virginia Senate with dedication and commitment to the legislative process, a former educator, coach, senator, Senate Clerk, distinguished West Virginian and statesman; and, be it

*Further Resolved,* That the Clerk is hereby directed to forward a copy of this resolution to his beloved wife, Elizabeth Bartlett Willis; and his beloved children, Elizabeth Cole, Taunja Gay and Todd Bartlett.

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**SENATE RESOLUTION 21**

(By Senators Tomblin, Mr. President, Anderson, Bailey, Blatnik, Boley, Bowman, Buckalew, Chafin, Craigo, Deem, Dittmar, Dugan, Grubb, Helmick, Jackson, Kimble, Love, Macnaughtan, Manchin, Miller, Minear, Oliverio, Plymale, Ross, Schoonover, Scott, Sharpe, Wagner, Walker, White, Whitlow, Wiedebusch, Wooton and Yoder)

[Adopted February 27, 1996]

Memorializing the life of the Honorable Porter Cotton, Doorkeeper of the West Virginia Senate and distinguished West Virginian.

WHEREAS, The Honorable Porter Cotton was born October 14, 1911, in Bessemer, Alabama; and

WHEREAS, The Honorable Porter Cotton was married to his beloved wife, Delores Eddy, with whom he shared the joy of having one daughter, Doris Fields; and

WHEREAS, The Honorable Porter Cotton served his nation with pride and patriotism in the United States Army; and

WHEREAS, The Honorable Porter Cotton was retired from Bethlehem Steel Corporation and was a member of a myriad of community service organizations, including member and treasurer of his Masonic Lodge; the United Mine Workers of America; member of the board of the Cabin Creek Medical Center; member of the Miner Training and Education Certification Board for the Department of Energy; and member of the Kanawha County Housing Authority; and

WHEREAS, The Honorable Porter Cotton was elected in 1989, 1991 and 1993 as the forty-ninth Doorkeeper of the West Virginia Senate and continued to serve the Senate with distinction and dedication until his death in January, 1996; therefore, be it

*Resolved by the Senate:*

That the Senate hereby extends its sincere sadness at the passing of the Honorable Porter Cotton, a man who had dedicated his life to his community and the betterment of his fellow man; and, be it

*Further Resolved*, That the Senate, posthumously, extends its sincere appreciation to the Honorable Porter Cotton for his dedication and commitment to the West Virginia Senate during his tenure as the forty-ninth Doorkeeper; and, be it

*Further Resolved*, That the Clerk is hereby directed to forward a copy of this resolution to Delores Eddy Cotton, beloved wife of the Honorable Porter Cotton, and his beloved daughter, Doris Fields.

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**LEGISLATURE OF WEST VIRGINIA**

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**ACTS**

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**FIRST EXTRAORDINARY SESSION, 1996**

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**CHAPTER 1**

**(S. B. 2—By Senators Tomblin, Mr. President, and Boley)  
[By Request of the Executive]**

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*[Passed July 16, 1996; in effect from passage. Approved by the Governor.]*

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AN ACT expiring funds to the unappropriated surplus balance in the state fund, general revenue, for the fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-seven, in the amount of eighteen million dollars from the revenue shortfall reserve fund, account no. fund 2038, organization 0201, activity 999, and making a supplementary appropriation of public moneys out of the treasury from the unappropriated surplus balance for the fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-seven, to the governor's office, civil contingent fund, account no. fund 0105, fiscal year 1997, organization 0100.

WHEREAS, The Legislature finds that it anticipates that the funds available to assist flood victims and to fund other needed infrastructure and other projects throughout the state will fall short of that needed during the fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-seven; and

WHEREAS, The revenue shortfall reserve fund has a sufficient balance available for appropriation in the fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-seven; and,

WHEREAS, By the provisions of this legislation there now remains an unappropriated surplus balance in the state treasury which is available for appropriation during the fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-seven; therefore,

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

That the balance of funds in the revenue shortfall reserve fund, account no. fund 2038, organization 0201, activity 999, be decreased by expiring the amount of eighteen million dollars to the unappropriated surplus balance of the state fund, general revenue, and that the total appropriation for fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-seven, to account no. fund 0105, fiscal year 1997, organization 0100, be supplemented and amended by increasing the total appropriation by eighteen million dollars as follows:

1	<b>TITLE II—APPROPRIATIONS.</b>		
2	<b>Section 1. Appropriations from general revenue.</b>		
3	<b>8—Governor's Office</b>		
4	<b>Civil Contingent Fund</b>		
5	(WV Code Chapter 5)		
6	Account No.		
7	Fund <u>0105</u> FY <u>1997</u> Org <u>0100</u>		
8		<b>Act-</b>	<b>General</b>
9		<b>ivity</b>	<b>Revenue</b>
10			<b>Fund</b>
11	1 Civil Contingent Fund—		
12	Surplus (R) . . . . .	263	\$ 18,000,000

13 The purpose of this bill is to expire the sum of eigh-  
 14 teen million dollars from the revenue shortfall reserve  
 15 fund, account no. fund 2038, organization 0201, activity



16 999, and to supplement the governor's office, civil contin-  
17 gent fund, account no. fund 0105, fiscal year 1997, orga-  
18 nization 0100, in the budget act for the fiscal year ending  
19 the thirtieth day of June, one thousand nine hundred  
20 ninety-seven, by adding eighteen million dollars to the  
21 existing appropriation.

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## CHAPTER 2

(S. B. 3—By Senators Tomblin, Mr. President, and Boley)  
[By Request of the Executive]

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[Passed July 16, 1996; in effect from passage. Approved by the Governor.]

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AN ACT making a supplementary appropriation of public mon-  
eys out of the treasury from the state fund, general revenue,  
from surplus accrued as of the thirty-first day of July, one  
thousand nine hundred ninety-six, and authorizing the trans-  
fer of these funds to the revenue shortfall reserve fund, ac-  
count no. fund 2038, organization 0201, activity 999, sup-  
plementing and amending chapter eight, acts of the Legisla-  
ture, regular session, one thousand nine hundred ninety-six,  
known as the "Budget Bill".

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

1 That section eight, chapter eight, acts of the Legisla-  
2 ture, regular session, one thousand nine hundred  
3 ninety-six, be supplemented and amended following line  
4 fifty-three by adding the following:

5 After allocating funds as necessary to provide for the  
6 appropriations set forth in this section, the remainder of  
7 the surplus accrued as of the thirty-first day of July, one  
8 thousand nine hundred ninety-six, shall be transferred to  
9 the revenue shortfall reserve fund, account no. fund 2038,  
10 organization 0201, activity 999.

11 The purpose of this bill is to provide for the transfer  
12 of the remainder of the surplus accrued as of the  
13 thirty-first day of July, one thousand nine hundred  
14 ninety-six, to the revenue shortfall reserve fund established

15 in section twenty, article two, chapter five-a of the code of  
16 West Virginia, one thousand nine hundred thirty-one, as  
17 amended. This transfer is being made to replenish the  
18 amounts of money being withdrawn from the fund for  
19 purposes of providing flood relief and funding water,  
20 sewer and other projects.

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## CHAPTER 3

(S. B. 6—By Senators Tomblin, Mr. President, and Boley)  
[By Request of the Executive]

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[Passed July 15, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact sections one, two, four, five, six, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and eighteen, article seventeen, chapter thirty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section twenty; to amend and reenact sections six and seven, article two, chapter thirty-one-a of said code; to further amend said article by adding thereto a new section, designated section sixteen; and to amend and reenact section one hundred five, article one, chapter forty-six-a of said code, all generally relating to licensure of consumer lending offices, banking institutions and secondary mortgage companies operating in West Virginia; changing definitions; clarifying that license requirements for lenders or brokers do not apply to federally insured depository institutions; requiring annual license renewal; removing residence requirements for licensure of lenders and brokers and establishing licensing requirements for out-of-state lenders and brokers wishing to do business in West Virginia; modifying the allowable amount of finance and other charges and extending the maximum time period for second mortgage loans; requiring the banking commissioner to study the effect of extending the maximum time period for second mortgage loans; prohibiting certain charges from being assessed if second mortgage is refinanced or another loan is obtained on same property within

twenty-four months and modifying allowable charges for secondary mortgages; requiring lender to provide proof of insurance to borrower within thirty days; allowing lenders to provide revolving lines of credit in certain circumstances; prohibiting brokers from receiving payment prior to completion of services unless all requirements of article six, chapter forty-six-a of this code are met; making the annual review of licensee's books and accounts by the commissioner discretionary; making it grounds to revoke or suspend licenses if lender makes consumer loans with intent to acquire secured property; modifying licensee's duty to relinquish license following suspension or revocation; modifying hearing requirements; providing that the penalties in article seventeen, chapter thirty-one of this code are cumulative; changing the periodic examination requirements for financial institutions; making the effective date of the amendments to chapters thirty-one and thirty-one-a of this code the seventh day of June, one thousand nine hundred ninety-six; establishing a per hour fee amount that the commissioner of banking may charge financial institutions for periodic record reviews; and exempting secondary mortgage lender and broker licensees from the provisions of chapter forty-six-a of this code when those provisions conflict with the provisions of chapter thirty-one or thirty-one-a of this code.

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

That sections one, two, four, five, six, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and eighteen, article seventeen, chapter thirty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section twenty; that sections six and seven, article two, chapter thirty-one-a of said code be amended and reenacted; that said article be further amended by adding thereto a new section, designated section sixteen; and that section one hundred five, article one, chapter forty-six-a of said code be amended and reenacted, all to read as follows:

## **Chapter**

- 31. Corporations.**
- 31A. Banks and Banking.**
- 46A. West Virginia Consumer Credit and Protection Act.**

## CHAPTER 31. CORPORATIONS.

### ARTICLE 17. SECONDARY MORTGAGE LOANS.

- §31-17-1. Definitions and general provisions.
- §31-17-2. License required for lender or broker; exemptions.
- §31-17-4. Applications for licenses; requirements; bonds; fees; renewals.
- §31-17-5. Refusal or issuance of license.
- §31-17-6. Minimum net assets to be maintained; bond to be kept in full force and effect; foreign corporation to remain qualified to do business in this state.
- §31-17-8. Maximum period of loan; maximum interest and charge or charges; insurance; other prohibitions.
- §31-17-9. Disclosure; closing statements; other records required.
- §31-17-10. Advertising requirements.
- §31-17-11. Records and reports; examination of records; analysis.
- §31-17-12. Grounds for suspension or revocation of license; suspension and revocation generally; reinstatement or new license.
- §31-17-13. Notice of refusal, or suspension or revocation, of license; relinquishing license.
- §31-17-14. Hearing before commissioner; provisions pertaining to hearing.
- §31-17-15. Judicial review.
- §31-17-16. Actions to enjoin violations.
- §31-17-18. Violations and penalties.
- §31-17-20. Effective date.

#### §31-17-1. Definitions and general provisions.

1 As used in this article:

2 (1) "Secondary mortgage loan" means a loan made to  
 3 an individual or partnership which is secured in whole or  
 4 in part by a mortgage or deed of trust upon any interest in  
 5 real property used as a dwelling with accommodations for  
 6 not more than four families, which property is subject to  
 7 the lien of one or more prior recorded mortgages, deeds  
 8 of trust or vendor's liens.

9 (2) "Person" means an individual, partnership, associa-  
 10 tion, trust, corporation or any other legal entity, or any  
 11 combination thereof.

12 (3) "Lender" means any person who makes or offers  
 13 to make or accepts or offers to accept any secondary  
 14 mortgage loan in the regular course of business. A person  
 15 shall be deemed to be acting in the regular course of busi-  
 16 ness if he or she makes or accepts, or offers to make or  
 17 accept, more than five secondary mortgage loans in any  
 18 one calendar year.

19 (4) "Broker" means any person who, for a fee or com-  
20 mission or other consideration, negotiates or arranges, or  
21 who offers to negotiate or arrange, a secondary mortgage  
22 loan between a lender and a borrower.

23 (5) "Brokerage fee" means the fee or commission or  
24 other consideration charged by a broker for the services  
25 described in subdivision (4) of this section.

26 (6) "Principal" or "principal sum" means the total of:

27 (a) The net amount paid to, receivable by or paid or  
28 payable for the account of the debtor;

29 (b) The amount of any discount excluded from the  
30 loan finance charge; and

31 (c) To the extent that payment is deferred:

32 (i) Amounts actually paid or to be paid by the lender  
33 for registration, certificate of title or license fees if not  
34 included in paragraph (a) of this subdivision; and

35 (ii) Additional charges permitted by this article.

36 (7) "Additional charges" means every type of charge  
37 arising out of the making or acceptance of a secondary  
38 mortgage loan, except finance charges, including, but not  
39 limited to, official fees and taxes, reasonable closing costs  
40 and certain documentary charges and insurance premiums  
41 and other charges which definition is to be read in con-  
42 junction with, and permitted by section one hundred nine,  
43 article three, chapter forty-six-a of this code.

44 (8) "Finance charge" means the sum of all interest and  
45 similar charges payable directly or indirectly by the debt-  
46 or imposed or collected by the lender incident to the ex-  
47 tension of credit, as coextensive with the definition of  
48 "loan finance charge" set forth in section one hundred two,  
49 article one, chapter forty-six-a of this code.

50 (9) "Commissioner" means the commissioner of bank-  
51 ing of this state.

52 (10) "Applicant" means a person who has applied for a  
53 lender's or broker's license.

54 (11) "Licensee" means any person duly licensed by  
55 the commissioner under the provisions of this article as a  
56 lender or broker.

57 (12) "Amount financed" means the total of the follow-  
58 ing items to the extent that payment is deferred:

59 (a) The cash price of the goods, services or interest in  
60 land, less the amount of any down payment, whether made  
61 in cash or in property traded in;

62 (b) The amount actually paid or to be paid by the  
63 seller pursuant to an agreement with the buyer to dis-  
64 charge a security interest in or a lien on property traded  
65 in; and

66 (c) If not included in the cash price:

67 (i) Any applicable sales, use, privilege, excise or docu-  
68 mentary stamp taxes;

69 (ii) Amounts actually paid or to be paid by the seller  
70 for registration, certificate of title or license fees; and

71 (iii) Additional charges permitted by this article.

**§31-17-2. License required for lender or broker; exemptions.**

1 (a) No person shall engage in this state in the business  
2 of lender or broker unless and until he or she shall first  
3 obtain a license to do so from the commissioner, which  
4 license remains unexpired, unsuspended and unrevoked,  
5 and no foreign corporation shall, notwithstanding the  
6 provisions of section seventy-nine-a, article one of this  
7 chapter, engage in such business in this state unless it shall  
8 qualify to hold property and transact business in this state.

9 (b) The provisions of this article do not apply to loans  
10 made by banking institutions, trust companies, savings and  
11 loan associations, industrial loan companies, insurance  
12 companies, credit unions or any federally insured deposi-  
13 tory institution, or to loans made by any other lender  
14 licensed by and under the supervision of any agency of  
15 the federal government, or to loans made by, or on behalf  
16 of, any agency or instrumentality of this state or federal  
17 government or by a nonprofit community development

18 organization which loans are subject to federal or state  
19 government supervision and oversight.

**§31-17-4. Applications for licenses; requirements; bonds; fees; renewals.**

1 (a) Application for a lender's or broker's license shall  
2 each year be submitted in writing under oath, in the form  
3 prescribed by the commissioner, and shall contain the full  
4 name and address (both of the residence and place of  
5 business) of the applicant and, if the applicant is a partner-  
6 ship or association, of every member thereof, and, if a  
7 corporation, of each officer, director and owner of five  
8 percent or more of the capital stock thereof, and such  
9 further information as the commissioner may reasonably  
10 require. Any application shall also disclose the location in  
11 this state at which the business of lender or broker is to be  
12 conducted.

13 (b) At the time of making application for a lender's  
14 license, the applicant therefor shall:

15 (1) If a foreign corporation, submit a certificate from  
16 the secretary of state certifying that such applicant has  
17 qualified to hold property and transact business in this  
18 state;

19 (2) Submit proof that he or she has available for the  
20 operation of the business at the location specified in the  
21 application net assets of at least two hundred fifty thou-  
22 sand dollars;

23 (3) File with the commissioner a bond in favor of the  
24 state in the amount of one hundred thousand dollars, in  
25 such form and with such conditions as the commissioner  
26 may prescribe, and executed by a surety company autho-  
27 rized to do business in this state;

28 (4) Pay to the commissioner a license fee of one thou-  
29 sand dollars and an investigation fee of two hundred fifty  
30 dollars. If the commissioner shall determine that an inves-  
31 tigation outside this state is required to ascertain facts or  
32 information relative to the applicant or information set  
33 forth in the application, the applicant may be required to  
34 advance sufficient funds to pay the estimated cost of the

35 investigation. An itemized statement of the actual cost of  
36 the investigation outside this state shall be furnished to the  
37 applicant by the commissioner, and the applicant shall pay  
38 or shall have returned to him or her, as the case may be,  
39 the difference between his or her payment in advance of  
40 the estimated cost and the actual cost of the investigation;  
41 and

42 (5) Submit proof that the applicant is a business in  
43 good standing in its state of incorporation, or if not a  
44 corporation, its state of business registration, and a full and  
45 complete disclosure of any litigation or unresolved com-  
46 plaint filed by a governmental authority or class action  
47 lawsuit on behalf of consumers relating to the operation of  
48 the license applicant.

49 (c) At the time of making application for a broker's  
50 license, the applicant therefor shall:

51 (1) If a foreign corporation, submit a certificate from  
52 the secretary of state certifying that the applicant has qual-  
53 ified to hold property and transact business in this state;

54 (2) Submit proof that he or she has available for the  
55 operation of the business at the location specified in the  
56 application net assets of at least ten thousand dollars;

57 (3) File with the commissioner a bond in favor of the  
58 state in the amount of one hundred thousand dollars, in  
59 such form and with such conditions as the commissioner  
60 may prescribe, and executed by a surety company autho-  
61 rized to do business in this state;

62 (4) Pay to the commissioner a license fee of one hun-  
63 dred dollars and an investigation fee of fifty dollars; and

64 (5) Submit proof that the applicant is a business in  
65 good standing in its state of incorporation, or if not a  
66 corporation, its state of business registration, and a full and  
67 complete disclosure of any litigation or unresolved com-  
68 plaint filed by a governmental authority or class action  
69 lawsuit on behalf of consumers relating to the operation of  
70 the license applicant.



71 (d) The aggregate liability of the surety on any bond  
72 given pursuant to the provisions of this section shall in no  
73 event exceed the amount of such bond.

74 (e) Nonresident lenders and brokers licensed under  
75 this article by their acceptance of such license acknowl-  
76 edge that they are subject to the jurisdiction of the courts  
77 of West Virginia and the service of process pursuant to  
78 section one hundred thirty-seven, article two, chapter  
79 forty-six-a of this code and section thirty-three, article  
80 three, chapter fifty-six of this code.

**§31-17-5. Refusal or issuance of license.**

1 (a) Upon an applicant's full compliance with the provi-  
2 sions of section four of this article, the commissioner shall  
3 investigate the relevant facts with regard to the applicant  
4 and his or her application for a lender's or broker's license,  
5 as the case may be. Upon the basis of the application and  
6 all other information before him or her, the commissioner  
7 shall make and enter an order denying the application and  
8 refusing the license sought if the commissioner finds that:

9 (1) The applicant does not have available the net assets  
10 required by the provisions of section four of this article;

11 (2) The applicant, individually, if an individual, or the  
12 partners, if a partnership, or the officers and directors, if a  
13 corporation, is of such character and reputation as reason-  
14 ably to warrant the belief that the business will not be  
15 operated lawfully and properly in accordance with the  
16 provisions of this article;

17 (3) The applicant has habitually defaulted on finan-  
18 cial obligations; or

19 (4) The applicant has done any act or has failed or  
20 refused to perform any duty or obligation for which the  
21 license sought could be suspended or revoked were it then  
22 issued and outstanding.

23 Otherwise, the commissioner shall issue to the appli-  
24 cant a lender's or broker's license which shall entitle the  
25 applicant to engage in the business of lender or broker, as

26 the case may be, during the period, unless sooner suspend-  
27 ed or revoked, for which the license is issued.

28 (b) Every application for a lender's or broker's license  
29 shall be passed upon and the license issued or refused  
30 within forty-five days after the applicant therefor has fully  
31 complied with the provisions of section four of this article.  
32 Under no circumstances whatever shall the same person  
33 hold both a lender's and a broker's license. Whenever an  
34 application for a lender's or broker's license is denied and  
35 the license sought is refused, which refusal has become  
36 final, the commissioner shall retain the investigation fee or  
37 fees but shall return the license fee to the applicant.

**§31-17-6. Minimum net assets to be maintained; bond to be kept in full force and effect; foreign corporation to remain qualified to do business in this state.**

1 At all times, a licensee shall: (1) Have available the net  
2 assets required by the provisions of section four of this  
3 article; (2) keep the bond required by said section in full  
4 force and effect; and (3) if the licensee be a foreign cor-  
5 poration, remain qualified to hold property and transact  
6 business in this state.

**§31-17-8. Maximum period of loan; maximum interest and charge or charges; insurance; other prohibitions.**

1 (a) The maximum rate of finance charges and maxi-  
2 mum total additional charges on or in connection with any  
3 secondary mortgage loan shall be as follows:

4 (1) The maximum rate of finance charge shall not  
5 exceed eighteen percent per year on the unpaid balance of  
6 the amount financed: *Provided*, That the borrower shall  
7 have the right to prepay his or her debt in whole or in part  
8 at any time and shall receive a rebate for any unearned  
9 finance charge, exclusive of any points, investigation fees  
10 and loan origination fees, which rebate shall be computed  
11 in accordance with section one hundred eleven, article  
12 three, chapter forty-six-a of this code: *Provided, however*,  
13 That the sum of any points, investigation fees and loan

14 origination fees charged may not exceed five percent of  
15 the amount financed;

16 (2) A secondary mortgage loan shall be payable over  
17 a period not to exceed sixty months. This sixty-month  
18 maximum loan period is temporarily extended, as of the  
19 effective date of this section, to one hundred twenty  
20 months until the first day of July, two thousand, at which  
21 time it reverts to the sixty-month maximum loan limit time  
22 period. The commissioner shall report to the Legislature  
23 by the first day of July, one thousand nine hundred  
24 ninety-nine, on the impact of this extended loan time  
25 period upon the citizens of this state. The report shall  
26 include analysis of the impact of this loan period exten-  
27 sion on the secondary mortgage industry in this state,  
28 impacts of this extension on various socio-economic class-  
29 es of citizens of this state, statistics regarding the number  
30 of homes which have been foreclosed upon based on this  
31 extension and the effect of this extension to any other  
32 citizens of this state. The commissioner may require any  
33 licensee to provide the commissioner with any information  
34 necessary to make this report;

35 (3) The total of additional charges as permitted by this  
36 section and by section one hundred nine, article three,  
37 chapter forty-six-a of this code, excluding official fees  
38 and taxes, and insurance, may equal, but shall not be in  
39 excess of, ten percent of the principal sum: *Provided,*  
40 That where the principal sum at the inception of the sec-  
41 ondary mortgage loan is one thousand five hundred dol-  
42 lars or less, the total additional charge or charges, exclud-  
43 ing official fees, taxes and insurance, may exceed said ten  
44 percent, but shall not be in excess of one hundred fifty  
45 dollars: *Provided, however,* That no additional charges  
46 other than official fees, taxes and hazard insurance may be  
47 required by the same or affiliated lender more often than  
48 once each twenty-four months by renewal of a secondary  
49 mortgage loan or an additional secondary mortgage loan  
50 secured by the same residential property;

51 (4) Where loan origination fees, investigation fees or  
52 points have been charged by the licensee, such fees may  
53 not be imposed again by the same or affiliated lender in

54 any refinancing of that loan or any additional loan on that  
55 property made within twenty-four months thereof, unless  
56 these earlier charges have been rebated by payment or  
57 credit to the consumer under the actuarial method, or the  
58 total of the earlier and current changes does not exceed  
59 the five percent amount.

60 (b) Notwithstanding the provisions of subsection (a) of  
61 this section, a delinquent or "late charge" may be charged  
62 on any installment made ten or more days after the regu-  
63 larly scheduled due date in accordance with section one  
64 hundred twelve or one hundred thirteen, article three,  
65 chapter forty-six-a of this code, whichever is applicable.  
66 The charge may be made only once on any one install-  
67 ment during the term of the secondary mortgage loan.

68 (c) Hazard insurance may be required by the lender of  
69 the borrower, as provided in section one hundred nine,  
70 article three, chapter forty-six-a of this code. Decreasing  
71 term life insurance, in an amount not exceeding the  
72 amount of the secondary mortgage loan and for a period  
73 not exceeding the term of the loan, and accident and  
74 health insurance in an amount sufficient to make the  
75 monthly payments due on said loan in the event of the  
76 disability of the borrower and for a period not exceeding  
77 the life of said loan, may also be offered by the lender to  
78 the borrower and the premium therefor may be financed.  
79 The charges for any insurance shall not exceed the stan-  
80 dard rate approved by the insurance commissioner for  
81 such insurance. Proof of all insurance in connection with  
82 secondary mortgage loans subject to this article shall be  
83 furnished to the borrower within thirty days from and  
84 after the date of application therefor by said borrower.

85 (d) No application fee may be allowed whether or not  
86 the secondary mortgage loan is consummated; however,  
87 the borrower may be required to reimburse the lender for  
88 actual expenses incurred by the lender after acceptance  
89 and approval of a secondary mortgage loan proposal  
90 made in accordance with the provisions of this article  
91 which is not consummated because of:

92 (1) The borrower's willful failure to close said loan; or

93           (2) The borrower's false or fraudulent representation  
94 of a material fact which prevents closing of said loan as  
95 proposed.

96           (e) No licensee shall make, offer to make, accept or  
97 offer to accept, any secondary mortgage loan except on  
98 the terms and conditions authorized in this article.

99           (f) No licensee shall induce or permit any husband  
100 and wife, jointly and severally, to become obligated to the  
101 licensee under this article, directly or contingently, or  
102 both, under more than one secondary mortgage loan at  
103 the same time for the purpose or with the result of obtain-  
104 ing greater charges than would otherwise be permitted  
105 under the provisions of this article.

106           (g) No instrument evidencing or securing a secondary  
107 mortgage loan shall contain:

108           (1) Any acceleration clause under which any part or  
109 all of the unpaid balance of the obligation not yet matured  
110 may be declared due and payable because the holder  
111 deems himself to be insecure;

112           (2) Any power of attorney to confess judgment or any  
113 other power of attorney;

114           (3) Any provision whereby the borrower waives any  
115 rights accruing to him under the provisions of this article;

116           (4) Any requirement that more than one installment  
117 be payable in any one installment period, or that the  
118 amount of any installment be greater or less than that of  
119 any other installment, except for the final installment  
120 which may be in a lesser amount, or unless the loan is  
121 structured as a revolving line of credit having no set final  
122 payment date; or

123           (5) Any assignment of or order for the payment of  
124 any salary, wages, commissions or other compensation for  
125 services, or any part thereof, earned or to be earned.

126           (h) No broker licensee shall charge a borrower or  
127 receive from a borrower money or other valuable consid-  
128 eration before completing performance of all services the  
129 broker has agreed to perform for the borrower, unless the

130 licensee also registers and complies with all requirements  
131 set forth for credit service organizations in article six-c,  
132 chapter forty-six-a of this code, including all additional  
133 bonding requirements as may be established therein.

134 (i) No lender licensee shall make revolving loans se-  
135 cured by a secondary mortgage lien for the retail purchase  
136 of consumer goods and services by use of a lender credit  
137 card.

**§31-17-9. Disclosure; closing statements; other records re-  
quired.**

1 (a) Any licensee or person making on his own behalf,  
2 or as agent, broker or in other representative capacity on  
3 behalf of any other person, a secondary mortgage loan,  
4 whether lawfully or unlawfully, shall at the time of the  
5 closing furnish to the borrower a complete and itemized  
6 closing statement which shall show in detail:

7 (1) The amount and date of the note or secondary  
8 mortgage loan contract and the date of maturity;

9 (2) The nature of the security;

10 (3) The finance charge rate per annum and the item-  
11 ized amount of finance charges and additional charges;

12 (4) The amount financed and total of payments;

13 (5) Disposition of the principal;

14 (6) A description of the payment schedule;

15 (7) The terms on which additional advances, if any,  
16 will be made;

17 (8) The charge to be imposed for past-due install-  
18 ments;

19 (9) A description and the cost of insurance required  
20 by the lender or purchased by the borrower in connection  
21 with the secondary mortgage loan;

22 (10) The name and address of the borrower and of the  
23 lender; and

24 (11) That the borrower may prepay the secondary  
25 mortgage loan in whole or in part on any installment date,  
26 and that the borrower will receive a rebate in full for any  
27 unearned finance charge.

28 Such detailed closing statement shall be signed by the  
29 lender or his representative, and a completed and signed  
30 copy thereof shall be retained by the lender and made  
31 available at all reasonable times to the borrower, the bor-  
32 rower's successor in interest to the residential property, or  
33 the authorized agent of the borrower or the borrower's  
34 successor, until the time as the indebtedness shall be satis-  
35 fied in full.

36 The commissioner may, from time to time, by rules  
37 prescribe additional information to be included in a clos-  
38 ing statement.

39 (b) Upon written request from the borrower, the hold-  
40 er of a secondary mortgage loan instrument shall deliver  
41 to the borrower, within ten days from and after receipt of  
42 the written request, a statement of the borrower's account  
43 showing the date and amount of all payments made or  
44 credited to the account and the total unpaid balance. Not  
45 more than two statements shall be requested in any  
46 twelve-month period.

47 (c) Upon satisfaction of a secondary mortgage loan  
48 obligation in full, the holder of the instrument evidencing  
49 or securing the obligation shall deliver to the borrower a  
50 recordable release and all writings signed by the borrower  
51 which were incident to applying for and obtaining the  
52 secondary mortgage loan.

### §31-17-10. Advertising requirements.

1 It shall be unlawful and an unfair trade practice for  
2 any person to cause to be placed before the public in this  
3 state, directly or indirectly, any false, misleading or decep-  
4 tive advertising matter pertaining to secondary mortgage  
5 loans or the availability thereof: *Provided*, That this sec-  
6 tion shall not apply to the owner, publisher, operator or  
7 employees of any publication or radio or television station

8 which disseminates such advertising matter without actual  
9 knowledge of the false or misleading character thereof.

**§31-17-11. Records and reports; examination of records;  
analysis.**

1 (a) Every licensee shall maintain at his or her place of  
2 business in this state, if any, or if he or she has no place of  
3 business in this state at his or her principal place of busi-  
4 ness outside this state, such books, accounts and records  
5 relating to all transactions within this article as are neces-  
6 sary to enable the commissioner to enforce the provisions  
7 of this article. All the books, accounts and records shall  
8 be preserved, exhibited to the commissioner and kept  
9 available as provided herein for the reasonable period of  
10 time as the commissioner may by rules require. The com-  
11 missioner is hereby authorized to prescribe by rules the  
12 minimum information to be shown in the books, accounts  
13 and records.

14 (b) Each licensee shall file with the commissioner on  
15 or before the fifteenth day of April of each year a report  
16 under oath or affirmation concerning his or her business  
17 and operations in this state for the preceding license year  
18 in the form prescribed by the commissioner, which shall  
19 show the annual volume and outstanding amounts of sec-  
20 ondary mortgage loans, the classification of the secondary  
21 mortgage loans by size and by security, and the gross  
22 income from, and expenses properly chargeable to, such  
23 secondary mortgage loans.

24 (c) The commissioner may, at his or her discretion,  
25 make or cause to be made an examination of the books,  
26 accounts and records of every licensee pertaining to sec-  
27 ondary mortgage loans made in this state under the provi-  
28 sions of this article, for the purpose of determining wheth-  
29 er each licensee is complying with the provisions hereof  
30 and for the purpose of verifying each licensee's annual  
31 report. If the examination is made outside this state, the  
32 licensee shall pay the cost thereof in like manner as appli-  
33 cants are required to pay the cost of investigations outside  
34 this state.



35 (d) The commissioner shall publish annually an analy-  
36 sis of the information furnished in accordance with the  
37 provisions of subsection (b) of this section, but the indi-  
38 vidual reports shall not be public records and shall not be  
39 open to public inspection.

**§31-17-12. Grounds for suspension or revocation of license;  
suspension and revocation generally; reinstatement or new license.**

1 (a) The commissioner may suspend or revoke any  
2 license issued hereunder if he or she finds that the licensee  
3 and/or any owner, director, officer, member, partner,  
4 stockholder, employee or agent of such licensee:

5 (1) Has knowingly violated any provision of this arti-  
6 cle or any order, decision or rule of the commissioner  
7 lawfully made pursuant to the authority of this article; or

8 (2) Has knowingly made any material misstatement in  
9 the application for such license; or

10 (3) Does not have available the net assets required by  
11 the provisions of section four of this article; or

12 (4) Has failed or refused to keep the bond required by  
13 section four of this article in full force and effect; or

14 (5) In the case of a foreign corporation, does not re-  
15 main qualified to do business in this state; or

16 (6) Has committed any fraud or engaged in any dis-  
17 honest activities with respect to such secondary mortgage  
18 loan business in this state, or failed to disclose any of the  
19 material particulars of any secondary mortgage loan trans-  
20 action in this state to anyone entitled to the information;  
21 or

22 (7) Has otherwise demonstrated bad faith, dishonesty  
23 or any other quality indicating that the business of the  
24 licensee in this state has not been or will not be conducted  
25 honestly or fairly within the purpose of this article. It shall  
26 be a demonstration of bad faith and an unfair or deceptive  
27 act or practice to engage in a pattern of making loans  
28 where the consumer has insufficient sources of income to  
29 timely repay the debt, and the lender had the primary

30 intent to acquire the property upon default rather than to  
31 derive profit from the loan. This section shall not limit  
32 any right the consumer may have to bring an action for a  
33 violation of section one hundred four, article six, chapter  
34 forty-six-a of this code in an individual case.

35 The commissioner may also suspend or revoke the  
36 license of a licensee if he or she finds the existence of any  
37 ground upon which the license could have been refused,  
38 or any ground which would be cause for refusing a license  
39 to such licensee were he then applying for the same. The  
40 commissioner may also suspend or revoke the license of a  
41 licensee pursuant to his or her authority under section  
42 thirteen, article two, chapter thirty-one-a of this code.

43 (b) The suspension or revocation of the license of any  
44 licensee shall not impair or affect the obligation of any  
45 preexisting lawful secondary mortgage loan between such  
46 licensee and any obligor.

47 (c) The commissioner may reinstate a suspended li-  
48 cense, or issue a new license to a licensee whose license has  
49 been revoked, if the grounds upon which any such license  
50 was suspended or revoked have been eliminated or cor-  
51 rected and the commissioner is satisfied that the grounds  
52 are not likely to recur.

**§31-17-13. Notice of refusal, or suspension or revocation, of  
license; relinquishing license.**

1 (a) Whenever the commissioner shall refuse to issue a  
2 license, or shall suspend or revoke a license, he shall make  
3 and enter an order to that effect and shall cause a copy of  
4 such order to be served in person or by certified mail,  
5 return receipt requested, or in any other manner in which  
6 process in a civil action in this state may be served, on the  
7 applicant or licensee, as the case may be.

8 (b) Whenever a license is suspended or revoked, the  
9 commissioner shall in the order of suspension or revoca-  
10 tion direct the licensee to return to the commissioner its  
11 license. It shall be the duty of the licensee to comply with  
12 any such order: (i) Immediately if the license was sus-  
13 pended either following a hearing or for failure to keep

14 the bond required by the provisions of section four of this  
15 article in full force and effect; or otherwise (ii) following  
16 expiration of the period provided in section fourteen of  
17 this article in which such licensee, if not previously provid-  
18 ed the opportunity to a hearing on the matter, may de-  
19 mand a hearing before the commissioner without such  
20 demand having been timely made.

**§31-17-14. Hearing before commissioner; provisions pertain-  
ing to hearing.**

1 (a) Any applicant or licensee, as the case may be, ad-  
2 versely affected by an order made and entered by the  
3 commissioner in accordance with the provisions of section  
4 thirteen of this article, if not previously provided the op-  
5 portunity to a hearing on the matter, may in writing de-  
6 mand a hearing before the commissioner. The written  
7 demand for a hearing must be filed with the commissioner  
8 within thirty days after the date upon which the applicant  
9 or licensee was served with a copy of such order. The  
10 timely filing of a written demand for hearing shall stay or  
11 suspend execution of the order in question, pending a  
12 final determination, except for an order suspending a  
13 license for failure of the licensee to maintain the bond  
14 required by section four of this article in full force and  
15 effect. If a written demand is timely filed as aforesaid, the  
16 aggrieved party shall be entitled to a hearing as a matter of  
17 right.

18 (b) All of the pertinent provisions of article five, chap-  
19 ter twenty-nine-a of this code shall apply to and govern  
20 the hearing and the administrative procedures in connec-  
21 tion with and following such hearing, with like effect as if  
22 the provisions of said article were set forth in extenso in  
23 this subsection.

24 (c) For the purpose of conducting any such hearing  
25 hereunder, the commissioner shall have the power and  
26 authority to issue subpoenas and subpoenas duces tecum,  
27 in accordance with the provisions of section one, article  
28 five, chapter twenty-nine-a of this code. All subpoenas  
29 and subpoenas duces tecum shall be issued and served in  
30 the manner, within the time and for the fees and shall be  
31 enforced, as specified in said section, and all of the said

32 section provisions dealing with subpoenas and subpoenas  
33 duces tecum shall apply to subpoenas and subpoenas  
34 duces tecum issued for the purpose of a hearing hereun-  
35 der.

36 (d) Any such hearing shall be held within twenty days  
37 after the date upon which the commissioner received the  
38 timely written demand therefor, unless there is a postpone-  
39 ment or continuance. The commissioner may postpone or  
40 continue any hearing on his own motion, or for good  
41 cause shown upon the application of the aggrieved party.  
42 At any such hearing, the aggrieved party may represent  
43 himself or be represented by any attorney-at-law admitted  
44 to practice before any circuit court of this state.

45 (e) After such hearing and consideration of all of the  
46 testimony, evidence and record in the case, the commis-  
47 sioner shall make and enter an order affirming, modifying  
48 or vacating his earlier order, or shall make and enter such  
49 order as is deemed appropriate, meet and proper. Such  
50 order shall be accompanied by findings of fact and con-  
51 clusions of law as specified in section three, article five,  
52 chapter twenty-nine-a of this code, and a copy of such  
53 order and accompanying findings and conclusions shall  
54 be served upon the aggrieved party and his attorney of  
55 record, if any, in person or by certified mail, return receipt  
56 requested, or in any other manner in which process in a  
57 civil action in this state may be served. The order of the  
58 commissioner shall be final unless vacated or modified on  
59 judicial review thereof in accordance with the provisions  
60 of section fifteen of this article.

#### §31-17-15. Judicial review.

1 (a) Any person adversely affected by a final order  
2 made and entered by the commissioner after hearing held  
3 in accordance with the provisions of section fourteen of  
4 this article is entitled to judicial review thereof. All of the  
5 pertinent provisions of section four, article five, chapter  
6 twenty-nine-a of this code shall apply to and govern such  
7 review with like effect as if the provisions of said section  
8 were set forth in extenso in this section.

9 (b) The judgment of the circuit court shall be final  
10 unless reversed, vacated or modified on appeal to the su-  
11 preme court of appeals in accordance with the provisions  
12 of section one, article six, chapter twenty-nine-a of this  
13 code.

14 (c) Legal counsel and services for the commissioner in  
15 all appeal proceedings in any circuit court and the su-  
16 preme court of appeals shall upon request be provided by  
17 the attorney general or his assistants, all without additional  
18 compensation.

**§31-17-16. Actions to enjoin violations.**

1 (a) Whenever it appears to the commissioner that any  
2 person has been or is violating or is about to violate any  
3 provision of this article, any rules of the commissioner or  
4 any final order of the commissioner, the commissioner  
5 may apply in the name of the state, to the circuit court of  
6 the county in which the violation or violations, or any part  
7 thereof, has occurred, is occurring or is about to occur, or  
8 the judge thereof in vacation, for an injunction against  
9 such person and any other persons who have been, are or  
10 are about to be, involved in, or in any way participating in,  
11 any practices, acts or omissions, so in violation, enjoining  
12 such person or persons from any such violation or viola-  
13 tions. Such application may be made and prosecuted to  
14 conclusion whether or not any such violation or violations  
15 have resulted or shall result in prosecution or conviction  
16 under the provisions of section eighteen of this article.

17 (b) Upon application by the commissioner as afore-  
18 said, the circuit courts of this state may by mandatory or  
19 prohibitory injunction compel compliance with the provi-  
20 sions of this article, any rules of the commissioner and all  
21 final orders of the commissioner. The court may issue a  
22 temporary injunction in any case pending a decision on  
23 the merits of any application filed.

24 (c) The judgment of the circuit court upon any appli-  
25 cation permitted by the provisions of this section shall be  
26 final unless reversed, vacated or modified on appeal to the  
27 supreme court of appeals. Any such appeal shall be

28 sought in the manner and within the time provided by law  
29 for appeals from circuit courts in other civil cases.

30 (d) The commissioner shall upon request be represent-  
31 ed in all such proceedings by the attorney general or his  
32 assistants, all without additional compensation.

### **§31-17-18. Violations and penalties.**

1 (a) Any person, or any member, officer, director,  
2 agent or employee of such person, who violates or partici-  
3 pates in the violation of this article shall be guilty of a  
4 misdemeanor, and, upon conviction thereof, shall be fined  
5 not more than five hundred dollars, or imprisoned in a  
6 county or regional jail for not more than six months, or  
7 both fined and imprisoned, at the discretion of the court.

8 (b) The penalties and remedies embodied in this arti-  
9 cle are not exclusive, but are cumulative with other appli-  
10 cable provisions of this code, including, but not limited to,  
11 the consumer protection laws in chapter forty-six-a of this  
12 code.

### **§31-17-20. Effective date.**

1 The amendments to this article enacted during the first  
2 extraordinary session of the Legislature in the year one  
3 thousand nine hundred ninety-six shall be effective as of  
4 the seventh day of June, one thousand nine hundred  
5 ninety-six.

## **CHAPTER 31A. BANKS AND BANKING.**

### **ARTICLE 2. DIVISION OF BANKING.**

§31A-2-6. Commissioner's examinations of financial institution; reports;  
records; communications from commissioner to institution;  
examination by federal agency in lieu of commissioner's  
examination.

§31A-2-7. Duties of officers, employees, etc., of financial institution in  
connection with examination; examination under oath;  
offenses and penalties.

§31A-2-16. Effective date.

§31A-2-6. Commissioner's examinations of financial institu-  
tion; reports; records; communications from  
commissioner to institution; examination by

**federal agency in lieu of commissioner's examination.**

1       The commissioner of banking shall make, at least once  
2 every eighteen months, a thorough examination of all the  
3 books, accounts, records and papers of every depository  
4 financial institution. He or she shall carefully examine all  
5 of the assets of each such institution, including its notes,  
6 drafts, checks, mortgages, securities deposited to assure the  
7 payment of debts unto it, and all papers, documents and  
8 records showing, or in any manner relating to, its business  
9 affairs, and shall ascertain the full amount and the nature  
10 in detail of all of its assets and liabilities. The commis-  
11 sioner may also, at his or her discretion, make or cause to  
12 be made, an annual or periodic examination of the books,  
13 accounts, records and papers of other financial institutions  
14 under his or her supervision for the purposes of determin-  
15 ing compliance with applicable consumer and credit lend-  
16 ing laws, and verifying information provided in any li-  
17 cense application or annual report submitted to the com-  
18 missioner. The commissioner may also make such exami-  
19 nation of any subsidiaries or affiliates of a financial insti-  
20 tution as he or she may deem necessary to ascertain the  
21 financial condition of the financial institution, the relations  
22 between the financial institution and its subsidiaries and  
23 affiliates and the effect of the relations upon the affairs of  
24 such financial institution. A full report of every examina-  
25 tion shall be made and filed and preserved in the office of  
26 the commissioner and a copy thereof forthwith mailed to  
27 the institution examined. Every institution shall retain all  
28 of its records of final entry for the period of time as re-  
29 quired in section thirty-five, article four of this chapter for  
30 banking institutions. Unless otherwise covered by assess-  
31 ments or a specific provision of this code, the cost of ex-  
32 aminations made pursuant to this section shall be borne by  
33 the financial institution at a rate of fifty dollars per each  
34 examiner hour expended.

35       Every official communication from the commissioner  
36 to any institution, or to any officer thereof, relating to an  
37 examination or an investigation of the affairs of the insti-  
38 tution conducted by the commissioner or containing sug-  
39 gestions or recommendations as to the manner of con-

40 ducting the business of the institution, shall be read to the  
41 board of directors at the next meeting after the receipt  
42 thereof, and the president, or other executive officer, of  
43 the institution shall forthwith notify the commissioner in  
44 writing of the presentation and reading of the communica-  
45 tion and of any action taken thereon by the institution.

46 The commissioner of banking, in his or her discretion,  
47 may accept a copy of a reasonably current examination of  
48 any banking institution made by the federal deposit insur-  
49 ance corporation or the federal reserve system in lieu of  
50 an examination of the banking institution required or  
51 authorized to be made by the laws of this state, and the  
52 commissioner may furnish to the federal deposit insurance  
53 corporation or the federal reserve system or to any official  
54 or examiner thereof, any copy or copies of the commis-  
55 sioner's examinations of and reports on the banking insti-  
56 tutions; but nothing herein shall be construed to limit the  
57 duty and responsibility of banking institutions to comply  
58 with all provisions of law relating to examinations and  
59 reports, nor to limit the powers and authority of the com-  
60 missioner of banking with reference to examinations and  
61 reports under existing laws.

**§31A-2-7. Duties of officers, employees, etc., of financial institution in connection with examination; examination under oath; offenses and penalties.**

1 All officers, directors, employees and other persons  
2 connected with any financial institution, upon request of  
3 the commissioner of banking, or his or her duly autho-  
4 rized representative, shall furnish and give full access to all  
5 of the books, papers, notes, bills and other evidences of  
6 debts due to the institution; produce and furnish all docu-  
7 ments, records, writings and papers relating to the business  
8 of the institution which the commissioner is authorized to  
9 examine; disclose fully, accurately and in detail all of the  
10 debts and liabilities of the institution; and furnish the clerical  
11 aid and assistance as may be required in the performance  
12 of the commissioner's duties as provided by law.  
13 The commissioner or his or her representative, as the case  
14 may be, shall have the right and authority to administer  
15 oaths and to examine under oath each officer, director,  
16 employee or other person connected with the institution



17 concerning any matter and thing pertaining to the busi-  
18 ness and condition of the institution.

19 Any officer, director, employee or other person con-  
20 nected with any such institution who willfully fails or re-  
21 fuses to so furnish the documents, papers, materials or  
22 information as herein required or who willfully fails to  
23 discharge any other duty or obligation as herein provided  
24 shall be guilty of a misdemeanor and, upon conviction  
25 thereof, shall be subject to the penalties provided in sec-  
26 tion fifteen, article eight of this chapter.

#### **§31A-2-16. Effective date.**

1 The amendments to this article enacted during the first  
2 extraordinary session of the Legislature in the year one  
3 thousand nine hundred ninety-six shall be effective as of  
4 the seventh day of June, one thousand nine hundred  
5 ninety-six.

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

#### **ARTICLE 1. SHORT TITLE, DEFINITIONS AND GENERAL PRO- VISIONS.**

##### **§46A-1-105. Exclusions.**

- 1 (a) This chapter does not apply to:
  - 2 (1) Extensions of credit to government or governmen-  
3 tal agencies or instrumentalities;
  - 4 (2) The sale of insurance by an insurer, except as  
5 otherwise provided in this chapter;
  - 6 (3) Transactions under public utility or common carri-  
7 er tariffs if a subdivision or agency of this state or of the  
8 United States regulates the charges for the services in-  
9 volved, the charges for delayed payment, and any discount  
10 allowed for early payment; or
  - 11 (4) Licensed pawnbrokers.
- 12 (b) Secondary mortgage lender and broker licensees  
13 are excluded from the provisions of this chapter to the  
14 extent those provisions directly conflict with any section  
15 of article seventeen, chapter thirty-one of this code.

## CHAPTER 4

(H. B. 106—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)  
[By Request of the Executive]

[Passed July 14, 1996; in effect from passage. Approved by the Governor.]

AN ACT to amend and reenact section two, article five, chapter forty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the admissibility of extrajudicial statements made by juveniles to law-enforcement officers or while in custody.

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

That section two, article five, chapter forty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 5. JUVENILE PROCEEDINGS.

#### §49-5-2. Juvenile jurisdiction of circuit courts, magistrate courts and municipal courts; constitutional guarantees; hearings; evidence and transcripts.

1 (a) The circuit court shall have original jurisdiction of  
2 proceedings brought under this article.

3 (b) If during a criminal proceeding in any court it is  
4 ascertained or appears that the defendant is under the age  
5 of nineteen years and was under the age of eighteen years  
6 at the time of the alleged offense, the matter shall be im-  
7 mediately certified to the juvenile jurisdiction of the cir-  
8 cuit court. The circuit court shall assume jurisdiction of  
9 the case in the same manner as cases which are originally  
10 instituted in the circuit court by petition.

11 (c) Notwithstanding any other provision of this article,  
12 magistrate courts shall have concurrent juvenile jurisdic-  
13 tion with the circuit court for a violation of a traffic law of  
14 West Virginia or for any violation of chapter twenty of this  
15 code. Juveniles shall be liable for punishment for viola-  
16 tions of such laws in the same manner as adults except

17 that magistrate courts shall have no jurisdiction to impose  
18 a sentence of incarceration for the violation of such laws.

19 (d) Notwithstanding any other provision of this article,  
20 municipal courts shall have concurrent juvenile jurisdic-  
21 tion with the circuit court for a violation of any municipal  
22 ordinance regulating traffic or for any municipal curfew  
23 ordinance which is enforceable. Municipal courts may  
24 impose the same punishment for such violations as a cir-  
25 cuit court exercising its juvenile jurisdiction could prop-  
26 erly impose, except that municipal courts shall have no  
27 jurisdiction to impose a sentence of incarceration for the  
28 violation of such laws.

29 (e) A juvenile may be brought before the circuit court  
30 for proceedings under this article only by the following  
31 means:

32 (1) By a juvenile petition requesting that the juvenile  
33 be adjudged neglected or delinquent;

34 (2) By certification or transfer to the juvenile jurisdic-  
35 tion of the circuit court from the criminal jurisdiction of  
36 the circuit court, from any foreign court, or from any  
37 magistrate court or municipal court in West Virginia; or

38 (3) By a warrant, capias or attachment which charges a  
39 juvenile with an act of delinquency, is issued by a judge,  
40 referee or magistrate, and is returnable to the circuit court.

41 (f) If a juvenile commits an act which would be a  
42 crime if committed by an adult, and the juvenile is ad-  
43 judged a delinquent for such act, the jurisdiction of the  
44 court which adjudged the juvenile a delinquent shall con-  
45 tinue until the juvenile becomes twenty-one years of age.  
46 The court shall have the same power over the person that it  
47 had before he or she became an adult, and shall have the  
48 further power to sentence the person to a term of incar-  
49 ceration which cannot exceed six months. This authority  
50 shall not preclude the court from exercising criminal juris-  
51 diction over the person if he or she violates the law after  
52 becoming an adult or if the proceedings have been trans-  
53 ferred to the court's criminal jurisdiction pursuant to sec-  
54 tion ten of this article.

55 (g) A juvenile shall be entitled to be admitted to bail  
56 or recognizance in the same manner as an adult and shall  
57 have the protection guaranteed by Article III of the West  
58 Virginia Constitution.

59 (h) A juvenile shall have the right to be effectively  
60 represented by counsel at all stages of proceedings under  
61 the provisions of this article. If the juvenile or the juve-  
62 nile's parents or custodian executes an affidavit showing  
63 that the juvenile cannot afford an attorney, the court shall  
64 appoint an attorney, who will be paid in accordance with  
65 article twenty-one, chapter twenty-nine of this code.

66 (i) In all proceedings under this article, the juvenile  
67 shall have a meaningful opportunity to be heard. This  
68 includes the opportunity to testify and to present and  
69 cross-examine witnesses. The general public shall be ex-  
70 cluded from all such proceedings except persons whose  
71 presence is requested by the parties and other persons  
72 whom the circuit court determines have a legitimate inter-  
73 est in the proceedings.

74 (j) At all adjudicatory hearings held under this article,  
75 all procedural rights afforded to adults in criminal pro-  
76 ceedings shall be applicable unless specifically provided  
77 otherwise in this chapter.

78 (k) At all adjudicatory hearings held under this article,  
79 the rules of evidence applicable in criminal cases shall  
80 apply, including the rule against written reports based  
81 upon hearsay.

82 (l) Extrajudicial statements, other than *res gestae*, which  
83 were made by a juvenile under fourteen years of age to  
84 law-enforcement officials or while in custody shall not be  
85 admissible unless such statements were made in the pres-  
86 ence of the juvenile's counsel. Extrajudicial statements,  
87 other than *res gestae*, which were made by a juvenile who  
88 is under sixteen years of age but above the age of thirteen  
89 to law-enforcement officers or while in custody, shall not  
90 be admissible unless made in the presence of the juvenile's  
91 counsel or made in the presence of, and with the consent  
92 of, the juvenile's parent or custodian who has been fully  
93 informed regarding the juvenile's right to a prompt deten-

94 tion hearing, the juvenile's right to counsel, including  
95 appointed counsel if the juvenile cannot afford counsel,  
96 and the juvenile's privilege against self-incrimination.

97 (m) A transcript or recording shall be made of all  
98 transfer, adjudicatory and dispositional hearings. At the  
99 conclusion of any hearing, the circuit court shall make  
100 findings of fact and conclusions of law, both of which  
101 shall appear on the record. The court reporter shall fur-  
102 nish a transcript of the proceedings at no charge to any  
103 indigent juvenile who seeks review of any proceeding  
104 under this article if an affidavit is filed stating that neither  
105 the juvenile nor the juvenile's parents or custodian have  
106 the ability to pay for the transcript.

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## CHAPTER 5

(H. B. 109—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)  
[By Request of the Executive]

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[Passed July 16, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section five, article six, chapter twenty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the requirements for an enhanced emergency telephone system; and describing the territory which may be included in an enhanced emergency telephone system.

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

That section five, article six, chapter twenty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 6. LOCAL EMERGENCY TELEPHONE SYSTEM.

#### §24-6-5. Enhanced emergency telephone system requirements.

1 (a) An enhanced emergency telephone system, at a  
2 minimum, shall provide that:

3       (1) All the territory in the county, including every  
4 municipal corporation in the county, which is served by  
5 telephone company central office equipment that will  
6 permit such a system to be established shall be included in  
7 the system: *Provided*, That if a portion of the county or a  
8 portion of a municipal corporation within the county is  
9 already being served by an enhanced emergency tele-  
10 phone system, that portion of the county or municipality  
11 may be excluded from the county enhanced emergency  
12 telephone system;

13       (2) Every emergency service provider that provides  
14 emergency service within the territory of a county partici-  
15 pate in the system;

16       (3) Each county answering point be operated con-  
17 stantly;

18       (4) Each emergency service provider participating in  
19 the system maintain a telephone number in addition to the  
20 one provided for in the system; and

21       (5) If the county answering point personnel reason-  
22 ably determine that a call is not an emergency, the person-  
23 nel provide the caller with the number of the appropriate  
24 emergency service provider.

25       (b) To the extent possible, enhanced emergency tele-  
26 phone systems shall be centralized.

27       (c) In developing an enhanced emergency telephone  
28 system, the county commission or the West Virginia State  
29 Police shall seek the advice of both the telephone compa-  
30 nies providing local exchange service within the county  
31 and the local emergency providers.

32       (d) As a condition of continued employment, persons  
33 employed to dispatch emergency calls shall successfully  
34 complete a forty-hour nationally recognized training  
35 course for dispatchers within one year of the date of their  
36 employment; except that persons employed to dispatch  
37 emergency calls prior to the effective date of this subsec-  
38 tion, as a condition of continuing employment, shall suc-  
39 cessfully complete such a course not later than the first  
40 day of July, one thousand nine hundred ninety-five.

41 (e) Each county or municipality shall appoint for each  
42 answering point an enhanced emergency telephone system  
43 advisory board consisting of at least six members to moni-  
44 tor the operation of the system. The board shall be ap-  
45 pointed by the county or municipality and shall include at  
46 least one member from affected fire service providers,  
47 law-enforcement providers, emergency medical providers  
48 and emergency services providers participating in the  
49 system and at least one member from the county or mu-  
50 nicipality. The board may make recommendations to the  
51 county or municipality concerning the operation of the  
52 system.

53 In addition, the director of the county or municipal  
54 enhanced telephone system shall serve as an ex officio  
55 member of the advisory board. The initial advisory board  
56 shall serve staggered terms of one, two and three years.  
57 The initial terms of these appointees shall commence on  
58 the first day of July, one thousand nine hundred  
59 ninety-four. All future appointments shall be for terms of  
60 three years, except that an appointment to fill a vacancy  
61 shall be for the unexpired term. All members shall serve  
62 without compensation. The board shall adopt such poli-  
63 cies, rules and regulations as are necessary for its own  
64 guidance. The board shall meet monthly on the day of  
65 each month which the board may designate. The board  
66 may make recommendations to the county or municipali-  
67 ty concerning the operation of the system.

68 (f) Any advisory board established prior to the first  
69 day of January, one thousand nine hundred ninety-four,  
70 shall have three years to meet the criteria of subsection (e)  
71 of this section.

72 (g) Nothing herein contained shall be construed to  
73 prohibit or discourage in any way the establishment of  
74 multijurisdictional or regional systems, or multijurisdic-  
75 tional or regional agreements for the establishment of  
76 enhanced emergency telephone systems, and any system  
77 established pursuant to this article may include the territo-  
78 ry of more than one public agency, or may include only a  
79 portion of the territory of a public agency.

## CHAPTER 6

(H. B. 108—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)  
[By Request of the Executive]

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[Passed July 15, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new chapter, designated chapter twenty-four-c, relating to underground facilities damage prevention; declaring legislative purpose; defining certain terms; requiring operators of underground facilities to be members of a one-call system; exempting certain entities and activities from such requirement; authorizing voluntary membership of certain exempted entities; setting forth duties and responsibilities of members of a one-call system; providing for the operation and responsibilities of a one-call system; requiring certification of one-call systems by the public service commission; exceptions; setting forth duties and responsibilities of persons who perform excavation or demolition work; establishing standard color code for temporary markings of underground facilities and work site boundaries; creating exceptions from notification requirements in emergency situations; providing for liberal construction of article; and preserving sovereign immunity of state agencies.

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

That the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new chapter, designated chapter twenty-four-c, to read as follows:

### **CHAPTER 24C. UNDERGROUND FACILITIES DAMAGE PREVENTION.**

#### **ARTICLE 1. ONE-CALL SYSTEM.**

§24C-1-1. Purpose.

§24C-1-2. Definitions.

§24C-1-3. Duties and responsibilities of operators of underground facilities; failure of operator to comply.



- §24C-1-4. Qualifications for certification and responsibilities of a one-call system.
- §24C-1-5. Duties and responsibilities of excavators; failure of excavator to comply.
- §24C-1-6. Standard color code for temporary markings.
- §24C-1-7. Exceptions during emergencies.
- §24C-1-8. Construction; sovereign immunity.

**§24C-1-1. Purpose.**

1       It is hereby declared to be the purpose and policy of  
2 the Legislature in enacting this article to enhance the safe-  
3 ty of the citizens of this state and to provide increased  
4 protection to underground facilities from damage due to  
5 excavation or demolition by providing for the operation  
6 of a one-call system for use by operators of underground  
7 facilities and by persons engaged in excavation or demoli-  
8 tion in the vicinity of underground facilities.

**§24C-1-2. Definitions.**

1       As used in this chapter, unless the context clearly  
2 requires a different meaning:

3       (a) "Damage" means any impact or contact with or  
4 weakening of the support for an underground facility, its  
5 appurtenances, protective casing, coating or housing,  
6 which, according to the operation practices of the operator  
7 or state or federal regulation, requires repair.

8       (b) "Demolish" or "demolition" means any operation  
9 by which a structure or mass of material is wrecked, razed,  
10 rendered, moved, or removed by means of any tools,  
11 equipment or discharge of explosives which could damage  
12 underground facilities: *Provided*, That "demolish" and  
13 "demolition" do not include earth-disturbing activities  
14 authorized pursuant to the provisions of article three,  
15 chapter twenty-two of this code or article two, chapter  
16 twenty-two-a of this code.

17       (c) "Emergency" means:

18       (1) A condition constituting a clear and present dan-  
19 ger to life, health or property by reason of escaping toxic,  
20 corrosive or explosive product, oil or oil-gas or natural gas

21 hydrocarbon product, exposed wires or other breaks or  
22 defects in an underground facility; or

23 (2) A condition that requires immediate correction to  
24 assure continuity of service provided by or through an  
25 underground facility.

26 (d) "Equipment operator" means any individual in  
27 physical control of powered equipment or explosives  
28 when being used to perform excavation work or demoli-  
29 tion work.

30 (e) "Excavate" or "excavation" means any operation in  
31 which earth, rock or other material in the ground is  
32 moved, removed or otherwise displaced by means of any  
33 tools, equipment or explosives, and includes, without limi-  
34 tation, grading, trenching, digging, ditching, dredging,  
35 drilling, auguring, tunnelling, moleing, scraping, cable or  
36 pipe plowing and driving, wrecking, razing, rendering,  
37 moving or removing any structure or mass of material, but  
38 does not include underground or surface mining opera-  
39 tions or related activities or the tilling of soil for agricul-  
40 tural purposes or for domestic gardening. Further, for  
41 purposes of this article, the terms "excavate" and "excava-  
42 tion" do not include routine maintenance of paved public  
43 roads or highways by employees of state, county or mu-  
44 nicipal entities or authorities which:

45 (1) Perform all work within the confines of the trav-  
46 eled portion of the paved public way; and

47 (2) Do not excavate to a depth greater than twelve  
48 inches measured from the top of the paved road surface.

49 (f) "Excavator" means any person intending to en-  
50 gage or engaged in excavation or demolition work.

51 (g) "Member" means a member of a one-call system  
52 as authorized by this article.

53 (h) "One-call system" means a communication system  
54 that receives notification from excavators of intended  
55 excavation work and prepares and transmits such notifica-  
56 tion to operators of underground facilities in accordance  
57 with this article.

58 (i) "Operator" means any person who owns or oper-  
59 ates an underground facility used in the providing or  
60 transmission of any of the goods or services described in  
61 subsection (1) of this section.

62 (j) "Person" means any individual, firm, joint venture,  
63 partnership, corporation, association, state agency, county,  
64 municipality, cooperative association or joint stock associ-  
65 ation, and any trustee, receiver, assignee, agency or per-  
66 sonal representative thereof.

67 (k) "Powered equipment" means any equipment ener-  
68 gized by an engine, motor or hydraulic, pneumatic or  
69 electrical device and used in excavation or demolition  
70 work.

71 (l) "Underground facility" means any underground  
72 pipeline facility, owned by a utility and regulated by the  
73 public service commission, which is used in the transporta-  
74 tion or distribution of gas, oil or a hazardous liquid; any  
75 underground pipeline facility, owned by a company sub-  
76 ject to the jurisdiction of the federal energy regulatory  
77 commission, which is used in the gathering, transportation  
78 or distribution of gas, oil or a hazardous liquid; any un-  
79 derground facility used as a water main, storm sewer, sani-  
80 tary sewer or steam line; any underground facility used  
81 for electrical power transmission or distribution; any un-  
82 derground cable, conductor, waveguide, glass fiber or  
83 facility used to transport telecommunications, optical,  
84 radio, telemetry, television, or other similar transmissions;  
85 and any facility used in connection with any of the fore-  
86 going facilities on a bridge, a pole or other span, or on the  
87 surface of the ground, any appurtenance, device, cathodic  
88 protection system, conduit, protective casing or housing  
89 used in connection with any of the foregoing facilities:  
90 *Provided*, That "underground facility" does not include  
91 underground or surface coal mine operations.

92 (m) "Workday" means any day except Saturday, Sun-  
93 day or a federal or state legal holiday.

94 (n) "Work site" means the location of excavation or  
95 demolition work as described by an excavator, operator, or  
96 person or persons performing the work.

**§24C-1-3. Duties and responsibilities of operators of underground facilities; failure of operator to comply.**

1 (a) Each operator of an underground facility in this  
2 state, except any privately owned public water utility regu-  
3 lated by the public service commission, any state agency,  
4 any municipality or county, or any municipal or county  
5 agency, shall be a member of a one-call system for the  
6 area in which the underground facility is located. Private-  
7 ly owned public water utilities regulated by the public  
8 service commission, state agencies, municipalities and  
9 counties and municipal and county agencies may be vol-  
10 untary members of such a one-call system.

11 (b) Each member shall provide the following infor-  
12 mation to the one-call system on forms developed and  
13 provided for that purpose by the one-call system:

14 (1) The name of the member;

15 (2) The geographic location of the member's under-  
16 ground facilities as prescribed by the one-call system; and

17 (3) The member's office address and telephone num-  
18 ber to which inquiries may be directed as to the locations  
19 of the operator's underground facilities.

20 (c) Each member shall revise in writing the informa-  
21 tion required by subsection (b) of this section as soon as  
22 reasonably practicable, but not to exceed one hundred  
23 eighty days, after any change.

24 (d) Within forty-eight hours, excluding Saturdays,  
25 Sundays and legal federal or state holidays, after receipt of  
26 a notification by the one-call system from an excavator of  
27 a specific area where excavation or demolition will be  
28 performed, the operator of underground facilities shall:

29 (1) Respond to such notification by providing to the  
30 excavator the approximate location, within two feet hori-  
31 zontally from the outside walls of such facilities, and type  
32 of underground facilities at the site; and

33 (2) Use the color code prescribed in section six of this  
34 article when providing temporary marking of the approxi-  
35 mate location of underground facilities.

36 (e) Failure of an operator who is required to be a  
37 member to comply with the provisions of this article may  
38 not prevent the excavator from proceeding but shall bar  
39 the operator from recovery of any costs associated with  
40 damage to its underground facilities resulting from such  
41 failure, except for damage caused by the willful or inten-  
42 tional act of the excavator.

43 (f) Notwithstanding the provisions of subsection (e)  
44 of this section, such a member is not barred from recovery  
45 under subsection (e) for failure to comply with subdivi-  
46 sion (1), subsection (d) of this section, but shall have his or  
47 her right to recover, if any, determined by common law, if  
48 the operator responded to one-call notification in a timely  
49 manner, but was unable to accurately locate lines because  
50 such lines were nonmetallic and had no locating wire or  
51 other marker.

**§24C-1-4. Qualifications for certification and responsibilities  
of a one-call system.**

1 (a) In order to qualify for certification as a one-call  
2 system under the provisions of this article, a one-call sys-  
3 tem shall be operated on a not-for-profit basis but may be  
4 operated by any one or more of the following:

5 (1) A person who operates underground facilities;

6 (2) A private contractor;

7 (3) A state or local government agency; or

8 (4) A person who is otherwise eligible under state or  
9 federal law to operate a one-call system.

10 (b) A one-call system which complies with the re-  
11 quirements set forth in subsection (a) of this section shall  
12 be certified by the public service commission for the area  
13 in which it will conduct operations prior to commencing  
14 such operations: *Provided*, That any one-call system in  
15 operation prior to the first day of January, one thousand  
16 nine hundred ninety-six, may not be required to be so  
17 certified. The public service commission shall certify a  
18 one-call system where the public interest so requires and

19 when such system complies with the provisions of this  
20 article.

21 (c) A one-call system operating under the provisions  
22 of this article shall:

23 (1) Receive and record information from excavators  
24 about intended excavation or demolition activities;

25 (2) Promptly transmit to its affected members the  
26 information received from excavators about intended  
27 excavation or demolition;

28 (3) Maintain a record of each notice of intent to en-  
29 gage in excavation or demolition, provided pursuant to the  
30 requirements of section five of this article;

31 (4) Upon receipt of notification of intended excava-  
32 tion or demolition from an excavator, inform the person  
33 making such notification of the names of all members  
34 having underground facilities in the vicinity of the intend-  
35 ed work site; and

36 (5) Assign a serial number for each notification re-  
37 ceived from an excavator and provide that serial number  
38 to both the excavator and affected members.

**§24C-1-5. Duties and responsibilities of excavators; failure of  
excavator to comply.**

1 (a) Except as provided in section seven of this article,  
2 any person who intends to perform excavation or demoli-  
3 tion work shall:

4 (1) Not less than forty-eight hours, excluding Satur-  
5 days, Sundays and federal or state legal holidays, nor  
6 more than ten work days prior to the beginning of such  
7 work, notify the one-call system of the intended excava-  
8 tion or demolition and provide the following information:

9 (A) Name of the individual making the notification;

10 (B) Company name;

11 (C) Telephone number;

12 (D) Company address;

- 13 (E) Work site location; including county, nearest city  
14 or town, street location, nearest cross street and landmarks  
15 or other location information;
- 16 (F) Work to be performed;
- 17 (G) Whether or not use of explosives is planned;
- 18 (H) Name and telephone number of individual to  
19 contact; and
- 20 (I) Starting date and time;
- 21 (2) Notify the one-call system not less than  
22 twenty-four hours, excluding Saturdays, Sundays and  
23 federal or state legal holidays, in advance of any change in  
24 the starting date or time of the intended work; and
- 25 (3) Instruct each such equipment operator involved in  
26 the intended work:
- 27 (A) To perform all excavation or demolition work in  
28 such a manner as to avoid damage to underground facili-  
29 ties in the vicinity of the intended work site, including  
30 hand digging, when necessary;
- 31 (B) To report immediately any break or leak in un-  
32 derground facilities, or any dent, gouge, groove or other  
33 damage to such facilities, made or discovered in the course  
34 of the excavation or demolition, and to allow the operator  
35 a reasonable time to accomplish necessary repairs before  
36 continuing the excavation or demolition in the immediate  
37 area of such facilities;
- 38 (C) To immediately alert the public at or near the  
39 work site as to any emergency created or discovered at or  
40 near such work site;
- 41 (D) To maintain a clearance between each under-  
42 ground facility and the cutting edge or point of any pow-  
43 ered equipment, taking into account the known limit of  
44 control of such cutting edge or point, as may be reason-  
45 ably necessary for the protection of such facility;

46 (E) To protect and preserve markers, stakes and other  
47 designations identifying the location of underground  
48 facilities at the work site; and

49 (F) To provide such support for underground facili-  
50 ties in the location of the work site, including during  
51 backfilling operations, as may be reasonably necessary for  
52 the protection of such facilities. Temporary support and  
53 backfill shall provide support for such facilities at least  
54 equivalent to the previously existing support.

55 (b) If any underground facility is damaged by a per-  
56 son who has failed to comply with any provision of this  
57 section, that person is liable to the operator of the under-  
58 ground facility for the total cost to repair the damage in  
59 an amount equal to that as is normally computed by the  
60 operator, provided that the operator:

61 (1) Is a member of the one-call system covering the  
62 area in which the damage to the facility takes place; and

63 (2) Upon receiving the proper notice in accordance  
64 with this article, has complied with the provisions of sec-  
65 tion three of this article: *Provided*, That a member is not  
66 barred from recovering costs solely for his or her own  
67 failure to comply with subdivision (1), subsection (d) of  
68 said section, but shall have his or her right to recover, if  
69 any, determined by common law, if the conditions of  
70 subsection (f) of said section are met.

71 The liability of such person for such damage is not  
72 limited by reason of this article.

73 (c) If any excavation or demolition causes damage to  
74 any underground facilities owned by an operator who is  
75 not required to be a member of a one-call system, and  
76 who is not a member of such a system at the time of dam-  
77 age, the liability of the person causing such damage shall  
78 be determined solely by applicable principles of common  
79 law.

80 (d) Nothing in this chapter may be construed to re-  
81 strict or expand the rights, duties and liabilities provided in  
82 common law or by other provisions of this code of an



83 operator who is not required to be a member of a one-call  
84 system and who is not a member of such a system.

**§24C-1-6. Standard color code for temporary markings.**

1 Temporary marking provided by operators and exca-  
2 vators to indicate the approximate location of under-  
3 ground facilities and work site boundaries shall utilize the  
4 following color code:

5	Facility Type	Identifying Color or Equivalent
6	(a) Electrical power	Safety Red
7	distribution and	
8	transmission	
9	(b) Municipal electric	Safety Red
10	systems	
11	(c) Gas distribution and	High Visibility Safety Yellow
12	transmission	
13	(d) Oil and petroleum	High Visibility Safety Yellow
14	transmission	
15	(e) Dangerous materials,	High Visibility Safety Yellow
16	product lines, steam	
17	lines	
18	(f) Telephone and	Safety Alert Orange
19	telegraph systems	
20	(g) Police and fire	Safety Alert Orange
21	communications	
22	(h) Cable television	Safety Alert Orange
23	(i) Water systems	Safety Precaution Blue
24	(j) Slurry systems	Safety Precaution Blue
25	(k) Sewer systems	Safety Green
26	(l) Proposed excavations	White

**§24C-1-7. Exceptions during emergencies.**

1 (a) Compliance with the notification requirements of  
2 section five of this article is not required of any person  
3 engaging in excavation or demolition in the event of an  
4 emergency: *Provided*, That the person gives oral notifica-  
5 tion of the emergency work as soon as reasonably practi-  
6 cable to the one-call system.

7 (b) During any emergency, excavation or demolition  
8 may begin immediately: *Provided*, That reasonable pre-  
9 cautions are taken to protect underground facilities: *Pro-*  
10 *vided, however*, That such precautions may not serve to  
11 relieve the excavator from liability for damage to under-  
12 ground facilities. The one-call system shall accept all  
13 emergency notifications and shall provide immediate  
14 notice to the affected members and indicate the emergen-  
15 cy nature of the notice.

**§24C-1-8. Construction; sovereign immunity.**

1 (a) This article shall be liberally construed so as to  
2 effectuate the public policy set forth in section one of this  
3 article.

4 (b) Nothing in this article may be construed as impos-  
5 ing liability upon a state agency from which the agency is  
6 otherwise immune.

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## CHAPTER 7

(H. B. 103—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)  
[By Request of the Executive]

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[Passed July 16, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend and reenact section twenty, article two, chap-  
ter five-a of the code of West Virginia, one thousand nine  
hundred thirty-one, as amended, relating to the revenue  
shortfall reserve fund; clarifying permissible expenditures  
from the fund; authorizing moneys to be borrowed from the

fund under specific circumstances; and requiring repayment of borrowed funds.

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

That section twenty, article two, chapter five-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

**ARTICLE 2. FINANCE DIVISION.**

**§5A-2-20. Reduction of appropriations; powers of governor; revenue shortfall reserve fund and permissible expenditures therefrom.**

1 (a) Notwithstanding any provision of this section, the  
2 governor may reduce appropriations according to any of  
3 the methods set forth in sections twenty-one and  
4 twenty-two of this article. The governor may, in lieu of  
5 imposing a reduction in appropriations, request an appro-  
6 priation by the Legislature from the revenue shortfall  
7 reserve fund established in this section.

8 (b) A revenue shortfall reserve fund is hereby contin-  
9 ued within the state treasury. The revenue shortfall reserve  
10 fund shall be funded as set forth in this subsection from  
11 surplus revenues, if any, in the state fund, general revenue,  
12 as the surplus revenues may accrue from time to time.  
13 Within sixty days of the end of each fiscal year, the secre-  
14 tary shall cause to be deposited into the revenue shortfall  
15 reserve fund the first fifty percent of all surplus revenues,  
16 if any, determined to have accrued during the fiscal year  
17 just ended. The revenue shortfall reserve fund shall be  
18 funded continuously and on a revolving basis in accor-  
19 dance with this subsection up to an aggregate amount not  
20 to exceed five percent of the total appropriations from the  
21 state fund, general revenue, for the fiscal year just ended.  
22 If at the end of any fiscal year the revenue shortfall re-  
23 serve fund is funded at an amount equal to or exceeding  
24 five percent of the state's general revenue fund budget for  
25 the fiscal year just ended, then there shall be no further  
26 obligation of the secretary under the provisions of this

27 section to apply any surplus revenues as set forth in this  
28 subsection until such time as the revenue shortfall reserve  
29 fund balance is less than five percent of the total appropri-  
30 ations from the state fund, general revenue.

31 (c) Not earlier than the first day of November of each  
32 calendar year, if the state's fiscal circumstances are such as  
33 to otherwise trigger the authority of the governor to re-  
34 duce appropriations under section twenty, twenty-one or  
35 twenty-two of this article, then in that event the governor  
36 may notify the presiding officers of both houses of the  
37 Legislature in writing of his or her intention to convene  
38 the Legislature pursuant to section 19, article VI of the  
39 West Virginia Constitution for the purpose of requesting  
40 the introduction of a supplementary appropriation bill or  
41 to request a supplementary appropriation bill at the next  
42 preceding regular session of the Legislature to draw mon-  
43 ey from the surplus revenue shortfall reserve fund to meet  
44 any anticipated revenue shortfall. If the Legislature fails  
45 to enact a supplementary appropriation from the revenue  
46 shortfall reserve fund during any special legislative session  
47 called for the purposes set forth in this section or during  
48 the next preceding regular session of the Legislature, then  
49 the governor may proceed with a reduction of appropria-  
50 tions pursuant to sections twenty-one and twenty-two of  
51 this article. Should any amount drawn from the revenue  
52 shortfall reserve fund pursuant to an appropriation made  
53 by the Legislature prove insufficient to address any antici-  
54 pated shortfall, then the governor may also proceed with a  
55 reduction of appropriations pursuant to sections  
56 twenty-one and twenty-two of this article.

57 (d) Upon the creation of the fund, the Legislature is  
58 authorized and may make an appropriation from the reve-  
59 nue shortfall reserve fund for revenue shortfalls, for emer-  
60 gency revenue needs caused by acts of God or natural  
61 disasters or for other fiscal needs as determined solely by  
62 the Legislature.

63 (e) Prior to the thirty-first day of October, in any  
64 fiscal year in which revenues are inadequate to make time-  
65 ly payments of the state's obligations, the governor may

66 by executive order, after first notifying the presiding offi-  
67 cers of both houses of the Legislature in writing, borrow  
68 funds from the revenue shortfall reserve fund. The  
69 amount of funds borrowed under this subsection shall not  
70 exceed one percent of the general revenue estimate for the  
71 fiscal year in which the funds are to be borrowed, or the  
72 amount the governor determines is necessary to make  
73 timely payment of the state's obligations, whichever is less.  
74 Any funds borrowed pursuant to this subsection shall be  
75 repaid, without interest, and redeposited to the credit of the  
76 revenue shortfall reserve fund within ninety days of their  
77 withdrawal.

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## CHAPTER 8

(Com. Sub. for H. B. 101—By Mr. Speaker, Mr. Chambers, and Delegate Ashley)  
[By Request of the Executive]

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[Passed July 16, 1996; in effect from passage. Approved by the Governor.]

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AN ACT to amend chapter eleven of the code of West Virginia, one thousand nine-hundred thirty-one, as amended, by adding thereto two new articles, designated articles six-e and thirteen-l, generally relating to taxation and economic development; setting forth short titles; defining terms, specifying the valuation of specialized manufacturing production property for purposes of the ad valorem property tax; specifying initial determination of whether a given item of property is specialized manufacturing production property to be made by county assessor of the county; setting forth methods and procedures for protest and appeal and time limitations therefor; setting forth effective date; establishing the natural gas industry jobs retention tax credit; specifying the amount of credit allowed; application of annual tax credit; annual computation of the number of jobs held by qualified employees; methods for determining jobs in place during the tax year; treatment of any decreases in the number of West Virginia employees during the taxable year; the tax commissioner's authority to prescribe alternative methods for determining

the number of jobs held by qualified employees during the taxable year; availability of tax credit to successors of eligible taxpayers; allocation of credit between predecessor eligible taxpayers and successor taxpayers in the year of transfer or successorship; methods for computation of jobs held by qualified employees of successors to qualified taxpayers; requirements for recapture of credit; interest penalties and additions to tax; specifying the statute of limitations; and setting forth effective date.

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

That chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto two new articles, designated articles six-e and thirteen-l, all to read as follows:

**Article**

**6E. Special Method for Valuation of Certain Manufacturing Production Property.**

**13L. The Natural Gas Industry Jobs Retention Act.**

**ARTICLE 6E. SPECIAL METHOD FOR VALUATION OF CERTAIN MANUFACTURING PRODUCTION PROPERTY.**

§11-6E-1. Short title.

§11-6E-2. Definitions.

§11-6E-3. Valuation of specialized manufacturing production property.

§11-6E-4. Initial determination by county assessor.

§11-6E-5. Protest and appeal.

§11-6E-6. Effective date.

**§11-6E-1. Short title.**

- 1 This article shall be known and cited as the "Special-
- 2 ized Manufacturing Production Property Valuation Act".

**§11-6E-2. Definitions.**

- 1 (a) When used in this article, or in the administration
- 2 of this article, terms defined in subsection (b) of this sec-
- 3 tion have the meanings ascribed to them by this section,
- 4 unless a different meaning is clearly required by the con-
- 5 text in which the term is used.

- 6 (b) Terms defined.

7 (1) "Die" means a device for shaping, forming or  
8 stamping material by pressure or by a blow, or for im-  
9 pressing a figure or design on material by pressure or by a  
10 blow, and other devices as set forth in this subdivision.

11 (A) The term "die" means and includes:

12 (i) Dies used in compression molding, transfer mold-  
13 ing, injection molding, blow molding or blowing, vacuum  
14 forming and extrusion molding;

15 (ii) Extrusion dies and drawing dies consisting of a  
16 block made of metal or other material which is perforated  
17 by a hole having a particular cross section which imparts a  
18 shape to plastic, thermoplastic, hot or ductile metal or  
19 other material that is extruded through the hole by ram-  
20 ming or pressure, or drawn through the hole;

21 (iii) A block made of metal or other material which is  
22 pressed into a blank of material, often sheet metal, posi-  
23 tioned between the die and a mold, so that the material is  
24 pressed into the mold by the die and caused to assume a  
25 desired shape in manufacturing; and

26 (iv) A block or blocks of metal or other material con-  
27 structed in halves, which operate in such a way that, when a  
28 blank of sheet metal is positioned between the halves of  
29 the die and pressed between the halves of the die, a desired  
30 shape is imparted to the sheet metal.

31 (B) The term "die" does not include threading dies,  
32 screwing dies, chasers, or any die holder or die stock for  
33 threading dies, screwing dies or chasers. For purposes of  
34 this section, the terms "threading die", "screwing die" or  
35 "chaser" mean one or more blocks made of steel, or other  
36 material, threaded internally with cutting points, or surfac-  
37 es for producing screw threads. Threading dies, screwing  
38 dies or chasers can be made in a single block or in seg-  
39 ments.

40 (2) "*Directly used in manufacturing*", in relation to  
41 specialized manufacturing production property directly  
42 used in manufacturing, means directly used in those activi-  
43 ties or operations which constitute an integral and essential  
44 part of the manufacturing activity, as contrasted with and

45 distinguished from those activities or operations which are  
46 simply incidental, convenient or remote to the manufac-  
47 turing activity.

48 Those uses of specialized manufacturing production  
49 property which constitute direct use in the activity of man-  
50 ufacturing include only:

51 (A) Use of the property to cause a direct physical  
52 change upon property undergoing manufacturing;

53 (B) In the case of jigs, use of the property to physical-  
54 ly control or direct the physical movement or operation of  
55 property undergoing manufacturing in conjunction with  
56 and during the making of a direct physical change upon  
57 that property, or use of a jig in direct physical contact with  
58 the property undergoing manufacturing as a checking  
59 fixture, to test the property undergoing manufacturing or  
60 part for conformity to specifications;

61 (C) In the case of patterns, use of a pattern in each  
62 production cycle to make a new mold in the ongoing  
63 manufacturing process, where the mold made from the  
64 pattern is directly used to cause a direct physical change  
65 upon property undergoing manufacturing; and

66 (D) In the case of templates, use of templates by plac-  
67 ing them in physical contact with property undergoing  
68 manufacturing for the direct marking of, or direct location  
69 of, holes, contours, cuts, cutout sections or shapes to be  
70 incorporated into the manufactured property.

71 (3) "*Form*" means a mold, as defined in this section,  
72 or a frame, shape, body or implement around which or on  
73 which a manufactured product is shaped or made, and  
74 which is designed to cause the manufactured product to  
75 take on a specific particular shape.

76 (4) "*Jig*" means and includes a mechanical device  
77 used to accurately guide or locate a tool or other imple-  
78 ment that causes a direct physical change in property  
79 undergoing manufacturing or used to maintain the correct  
80 position between property undergoing manufacturing and  
81 a tool or implement. The jig is mainly used for producing  
82 interchangeable parts or exact reproductions of the same



83 manufactured item or product. The term "jig" shall not  
84 include any conveyor belt, roller conveyor, track convey-  
85 or, crane, chain line, chain conveyor or other apparatus  
86 which serves merely to move property from one operation  
87 or place in the manufacturing process to another opera-  
88 tion or place. The term "jig" includes a checking fixture,  
89 which is a jig built to test manufactured parts produced  
90 from a set of dies or other manufactured parts, for confor-  
91 mity to specifications.

92 (5) "*Manufacturer*" means a person engaged in the  
93 activity of manufacturing in this state.

94 (6) "*Manufacturing*" means a systematic operation or  
95 integrated series of systematic operations engaged in as a  
96 business or segment of a business which transforms or  
97 converts tangible personal property by physical, chemical  
98 or other means into a different form, composition or char-  
99 acter from that in which it originally existed. In no case  
100 shall the term "manufacturing" include the activities of  
101 building construction, construction of other structures or  
102 facilities affixed to or on realty, retailing or agriculture,  
103 food processing or food manufacturing, the operation of  
104 any restaurant or retail food preparation or sales opera-  
105 tion, the production of any natural resource, contract min-  
106 ing or any other activity of severing, producing, process-  
107 ing or extracting any natural resource. Manufacturing  
108 production begins with the arrival of raw materials and  
109 ends when the property has reached that point where no  
110 further chemical, physical or other changes are to be made  
111 to the resultant property in the production process.

112 (7) "*Manufacturing service provider*" means a person  
113 engaged in a manufacturing activity who does not have  
114 legal title to or any economic interest in the tangible per-  
115 sonal property transformed or converted by the manufac-  
116 turing process, and who engages in the manufacturing  
117 activity as a service to another person.

118 (8) "*Mold*" means a form, block, vessel or matrix  
119 containing a cavity or cavities into which fluid, molten  
120 material, plastic material or malleable material is poured,  
121 pressed, rammed or injected to form a manufactured ob-  
122 ject conforming to the contours of the mold and having

123 the desired shape, pattern or relief. The term "mold"  
124 includes molds and mold cavities used in compression  
125 molding, transfer molding, injection molding, blow mold-  
126 ing or blowing, and vacuum forming.

127 For purposes of this article, the term "mold" does not  
128 include any sand casting flask or other apparatus or  
129 equipment used in conjunction with sand casting. Howev-  
130 er, patterns used in sand casting may constitute specialized  
131 manufacturing production property, as defined in this  
132 section.

133 (9) "*Pattern*" means a model for making a mold, as  
134 defined in this section, where production of the manufac-  
135 tured product by use of the mold entails the destruction of  
136 the mold with each production cycle, such as sand casting.  
137 The term "pattern" includes a model for making a sand  
138 casting mold into which molten metal is poured to form a  
139 casting.

140 A pattern qualifies as specialized manufacturing pro-  
141 duction property under this article only where the pattern  
142 must be repeatedly used in each production cycle to make  
143 a new mold in the ongoing manufacturing process, and  
144 where the mold made from the pattern is directly used in  
145 manufacturing to cause a direct physical change upon  
146 property undergoing manufacturing.

147 For purposes of this subdivision, the term "model"  
148 means a shape or figure made of wood, metal or other  
149 material having the basic shape of the manufactured prod-  
150 uct, with such appropriate sprues, runners and other neces-  
151 sary additional features as may be needed for efficient  
152 casting or production of the manufactured product.

153 (10) "*Person*" means and includes any state, or its  
154 political subdivisions or an agency of the state of West  
155 Virginia or its political subdivisions, or any individual,  
156 firm, partnership, joint venture, joint stock company, the  
157 government of the United States or its agencies, any public  
158 or private corporation, municipal corporation, cooperative,  
159 estate, trust, business trust, receiver, executor, administrator,  
160 any other fiduciary, any representative appointed by order

161 of any court or otherwise acting on behalf of others, or  
162 any other group or combination acting as a unit.

163 (11) "*Salvage value*" means the lower of fair market  
164 salvage value or five percent of the original cost of the  
165 property.

166 (12) "*Specialized manufacturing production proper-*  
167 *ty*" means molds, jigs, dies, forms, patterns or templates, as  
168 defined in this section, directly used in manufacturing.  
169 Molds, jigs, dies, forms, patterns and templates directly  
170 used in manufacturing may qualify as specialized manu-  
171 facturing production property notwithstanding the fact  
172 that the molds, jigs, dies, forms, patterns and templates  
173 may be owned by a person other than the West Virginia  
174 manufacturer or the West Virginia manufacturing service  
175 provider. In no case shall specialized manufacturing pro-  
176 duction property include any property not actively and  
177 directly used by a West Virginia manufacturer or West  
178 Virginia manufacturing service provider in the activity of  
179 manufacturing.

180 For purposes of this article, specialized manufacturing  
181 production property does not include:

182 (A) Research and development equipment used in  
183 developing new products or improving present products;

184 (B) Computers and computer software;

185 (C) Layout and design equipment, including comput-  
186 ers and computer software;

187 (D) Machinery, tools, parts and materials used to re-  
188 pair equipment, including equipment directly used in the  
189 manufacturing process;

190 (E) Drawings, blueprints or blueprinting equipment;

191 (F) Tangible personal property used in testing and  
192 inspecting products on the production line or elsewhere  
193 for quality control purposes: *Provided*, That this exclu-  
194 sion shall not apply to tangible personal property which  
195 would otherwise meet the definition of a jig;

196 (G) Equipment, and supplies used in packaging or  
197 packing manufactured products for sale; and

198 (H) Any sand casting flask or sand casting equipment  
199 or other apparatus used in conjunction with sand casting.  
200 However, patterns used in sand casting may constitute  
201 specialized manufacturing production property.

202 (I) Any equipment or property other than molds, jigs,  
203 dies, forms, patterns or templates, as defined in this sec-  
204 tion.

205 (13) "*Template*" means an instrument or implement,  
206 often in the form of a flat or contoured sheet, plate, or  
207 strip of metal, plastic, wood or other material, having  
208 markings or lines, perforations, cuts, cutout sections, or  
209 one or more edges shaped to conform to a desired shape  
210 or any combination of perforations, cuts, cutout sections  
211 or shaped edges, to be used as a guide or gauge for mark-  
212 ing locations for, or otherwise locating the placement of  
213 cuts, cutout sections, holes or a desired shape to be trans-  
214 ferred to the property undergoing manufacturing. Only  
215 those templates, as defined in this section, which are physi-  
216 cally placed upon the property undergoing manufacturing  
217 for the direct marking of, or direct location of, holes, con-  
218 tours, cuts, cutout sections or shapes to be incorporated  
219 into the property qualify as specialized manufacturing  
220 production property for purposes of this article.

221 In no case shall templates constitute specialized manu-  
222 facturing production property for purposes of this article  
223 if the templates are used in:

224 (A) Drafting, drawing or design;

225 (B) Research and development;

226 (C) Layout and design of products or production  
227 equipment;

228 (D) Set up, adjustment, ongoing operation or repair  
229 of production machinery, tools and parts or other machin-  
230 ery, tools and parts;

231 (E) Testing and inspecting products on the produc-  
232 tion line or elsewhere for quality control purposes: *Pro-*

233 *vided*, That this exclusion shall not apply to tangible per-  
234 sonal property which would otherwise meet the definition  
235 of a jig; or

236 (F) Packaging or packing manufactured products for  
237 sale.

**§11-6E-3. Valuation of specialized manufacturing production property.**

1 Notwithstanding any other provision of this code to  
2 the contrary, the value of specialized manufacturing pro-  
3 duction property, for the purpose of ad valorem property  
4 taxation under this chapter and under Article X of the  
5 Constitution of this State, shall be its salvage value.

**§11-6E-4. Initial determination by county assessor.**

1 The assessor of the county in which a specific item of  
2 property is located shall determine, in writing, whether that  
3 specific item of property is specialized manufacturing  
4 production property subject to valuation in accordance  
5 with this article. Upon making a determination that a  
6 taxpayer has specialized manufacturing production prop-  
7 erty, the county assessor shall notify the tax commissioner  
8 of that determination, and shall provide such information  
9 to the tax commissioner as the tax commissioner may  
10 require relating to that determination.

**§11-6E-5. Protest and appeal.**

1 At any time after the property is returned for taxation  
2 but prior to the first day of January of the assessment year,  
3 any taxpayer may apply to the county assessor for infor-  
4 mation regarding the issue of whether any particular item  
5 or items or property constitute specialized production  
6 manufacturing property under this article which should be  
7 subject to valuation in accordance with this article. If the  
8 taxpayer believes that some portion of the taxpayer's  
9 property is subject to the provisions of this article, the  
10 taxpayer shall file objections in writing with the county  
11 assessor. The county assessor shall decide the matter by  
12 either sustaining the protest and making proper correc-  
13 tions, or by stating, in writing if requested, the reasons for  
14 the county assessor's refusal. The county assessor may,

15 and if the taxpayer requests, the county assessor shall,  
 16 before the first day of January of the assessment year,  
 17 certify the question to the tax commissioner in a statement  
 18 sworn to by both parties, or if the parties are unable to  
 19 agree, in separate sworn statements. The sworn statement  
 20 or statements shall contain a full description of the proper-  
 21 ty and any other information which the tax commissioner  
 22 may require.

23 The tax commissioner shall, as soon as possible on  
 24 receipt of the question, but in no case later than the  
 25 twenty-eighth day of February of the assessment year,  
 26 instruct the county assessor as to how the property shall be  
 27 treated. The instructions issued and forwarded by mail to  
 28 the county assessor are binding upon the county assessor,  
 29 but either the county assessor or the taxpayer may apply  
 30 to the circuit court of the county for review of the ques-  
 31 tion of the applicability of this article to the property in  
 32 the same fashion as is provided for appeals from the coun-  
 33 ty commission in section twenty-five, article three of this  
 34 chapter. The tax commissioner shall prescribe forms on  
 35 which the questions under this section shall be certified  
 36 and the tax commissioner has the authority to pursue any  
 37 inquiry and procure any information which may be neces-  
 38 sary for disposition of the matter.

**§11-6E-6. Effective date.**

1 This article shall be effective on and after the first day  
 2 of July, one thousand nine hundred ninety-seven.

**ARTICLE 13L. THE NATURAL GAS INDUSTRY JOBS RETEN-  
 TION ACT.**

- §11-13L-1. Short title.
- §11-13L-2. Definitions.
- §11-13L-3. Eligibility for tax credits; creation of the credit.
- §11-13L-4. Amount of credit allowed.
- §11-13L-5. Application of annual credit allowance.
- §11-13L-6. Annual computation of the number of jobs held by qualified employees.
- §11-13L-7. Availability of credit to successors.
- §11-13L-8. Credit recapture; interest; penalties; additions to tax; statute of limitations.
- §11-13L-9. Effective date.

**§11-13L-1. Short title.**

1 This article shall be known and cited as the "Natural  
2 Gas Industry Jobs Retention Act".

**§11-13L-2. Definitions.**

1 (a) *General.* — When used in this article, or in the  
2 administration of this article, terms defined in subsection  
3 (b) of this section have the meanings ascribed to them by  
4 this section, unless a different meaning is clearly required  
5 by the context in which the term is used.

6 (b) *Terms defined.*

7 (1) "*Affiliate*" means and includes all persons, as de-  
8 fined in this section, which are affiliates of each other  
9 when either directly or indirectly:

10 (A) One person controls or has the power to control  
11 the other, or

12 (B) A third party or third parties control or have the  
13 power to control two persons, the two thus being affiliates.  
14 In determining whether concerns are independently  
15 owned and operated and whether or not an affiliation  
16 exists, consideration shall be given to all appropriate fac-  
17 tors, including common ownership, common management  
18 and contractual relationships.

19 (2) "*Commissioner*" or "*tax commissioner*" means the  
20 tax commissioner of the state of West Virginia, or the tax  
21 commissioner's delegate.

22 (3) "*Corporation*" means any corporation, joint-stock  
23 company or association, and any business conducted by a  
24 trustee or trustees wherein interest or ownership is evi-  
25 denced by a certificate of interest or ownership or similar  
26 written instrument.

27 (4) "*Delegate*", when used in reference to the tax  
28 commissioner, means any officer or employee of the tax  
29 division of the department of tax and revenue duly autho-  
30 rized by the tax commissioner directly, or indirectly by

31 one or more redelegations of authority, to perform the  
32 functions mentioned or described in this article.

33 (5) "*Eligible taxpayer*" means any person subject to  
34 the tax prescribed by section two-e, article thirteen of this  
35 chapter that had at least one qualified employee on the  
36 first day of January, one thousand nine hundred  
37 ninety-six. "*Eligible taxpayer*" also means and includes  
38 those members of an affiliated group of taxpayers en-  
39 gaged in a unitary business, in which one or more mem-  
40 bers of the affiliated group is a person subject to the tax  
41 prescribed by section two-e, article thirteen of this chapter  
42 that had at least one qualified employee on the first day of  
43 January, one thousand nine hundred ninety-six. Affiliates  
44 not engaged in the unitary business with an affiliated  
45 group member subject to the tax prescribed by section  
46 two-e, article thirteen of this chapter that had at least one  
47 qualified employee on the first day of January, one thou-  
48 sand nine hundred ninety-six, do not qualify as eligible  
49 taxpayers.

50 (6) "*Full-time employee*" means an employee who  
51 works, is on a work site, on paid vacation leave or other  
52 paid leave, in the aggregate, at least one thousand five  
53 hundred hours per year.

54 (7) "*Natural person*" or "*individual*" means a human  
55 being.

56 (8) "*New job*" means a full-time employment position  
57 held by a West Virginia resident domiciled in this state  
58 which did not exist in this state with any employer prior to  
59 the taxpayer's current taxable year.

60 (9) "*Partnership*" and "*partner*" means and includes a  
61 syndicate, group, pool, joint venture or other unincorpo-  
62 rated organization through or by means of which any  
63 business, financial operation or venture is carried on, and  
64 which is not a trust or estate, a corporation or a sole pro-  
65 prietorship. The term "*partner*" includes a member in a  
66 syndicate, group, pool, joint venture or organization.



67 (10) "*Person*" means and includes any natural person,  
68 corporation, limited liability company or partnership.

69 (11) "*Qualified employee*" means a West Virginia  
70 resident domiciled in this state who is a full-time employee  
71 of a taxpayer.

72 (12) "*Related entity*", "*related person*", "*entity related*  
73 *to*" or "*person related to*" means:

74 (A) An individual, corporation, partnership, affiliate,  
75 association or trust or any combination or group thereof  
76 controlled by the taxpayer;

77 (B) An individual, corporation, partnership, affiliate,  
78 association or trust or any combination or group thereof  
79 that is in control of the taxpayer;

80 (C) An individual, corporation, partnership, affiliate,  
81 association or trust or any combination or group thereof  
82 controlled by an individual, corporation, partnership, affil-  
83 iate, association or trust or any combination or group  
84 thereof that is in control of the taxpayer; or

85 (D) A member of the same controlled group as the  
86 taxpayer.

87 For purposes of this article, "control", with respect to a  
88 corporation, means ownership, directly or indirectly, of  
89 stock possessing fifty percent or more of the total com-  
90 bined voting power of all classes of the stock of the corpo-  
91 ration which entitles its owner to vote. "Control", with  
92 respect to a trust, means ownership, directly or indirectly,  
93 of fifty percent or more of the beneficial interest in the  
94 principal or income of the trust. The ownership of stock  
95 in a corporation, of a capital or profits interest in a part-  
96 nership or association or of a beneficial interest in a trust  
97 shall be determined in accordance with the rules for con-  
98 structive ownership of stock provided in section 267(c) of  
99 the United States Internal Revenue Code, as amended:  
100 *Provided*, That paragraph (3) of section 267(c) of the  
101 United States Internal Revenue Code shall not apply.

102 (13) "*Tax year*" or "*taxable year*" means the tax year  
103 of the taxpayer for federal income tax purposes.

104 (14) "*Taxpayer*" means any person subject to the tax  
105 prescribed by section two-e, article thirteen of this chapter.

106 (15) "*Unitary business*" means a business structured so  
107 that the operations of the business segments of a corpora-  
108 tion, including segments consisting of members of an  
109 affiliated group of commonly owned and controlled cor-  
110 porations or entities, contribute to or depend on each  
111 other in such a way as to result in functional integration  
112 between business segments in engaging in the natural gas  
113 business. "Unitary natural gas business" includes business  
114 segments involved in the exploration, development, pur-  
115 chase, transportation, storage, marketing, distribution and  
116 sale of natural gas and distribution and sale of heavier  
117 hydrocarbons, such as propane, and such business seg-  
118 ments or affiliates which provide services supporting any  
119 of the foregoing natural gas business activities. Where the  
120 taxpayer asserts that business segments are unitary, the  
121 taxpayer has the burden of proof.

### §11-13L-3. Eligibility for tax credits; creation of the credit.

1 There shall be allowed to every eligible taxpayer a  
2 credit against the tax prescribed under section two-e, arti-  
3 cle thirteen of this chapter, as determined under this arti-  
4 cle.

### §11-13L-4. Amount of credit allowed.

1 (a) *Credit allowed.* — Eligible taxpayers shall be al-  
2 lowed a credit against the tax prescribed by section two-e,  
3 article thirteen of this chapter, the application of which  
4 and the amount of which shall be determined as provided  
5 in this article.

6 (b) *Amount of credit.* —

7 (1) The amount of credit allowed to the eligible tax-  
8 payer is one thousand dollars multiplied by the number of  
9 qualified employees employed by the eligible taxpayer

10 during the taxable year, as determined under section six of  
11 this article: *Provided*, That if the number of qualified  
12 employees employed by the eligible taxpayer during the  
13 taxable year, as determined under section six of this arti-  
14 cle, is less than sixty percent of the number of qualified  
15 employees employed by the eligible taxpayer on the first  
16 day of January, one thousand nine hundred ninety-six, as  
17 adjusted under subdivision (2) of this subsection, then no  
18 credit shall be allowed for the taxable year.

19 (2) For purposes of this section, the tax commissioner  
20 shall adjust the number of qualified employees deter-  
21 mined to be in place on the first day of January, one thou-  
22 sand nine hundred ninety-six, to reflect a sale, transfer or  
23 spin off of an affiliate or segment of the business of an  
24 eligible taxpayer in circumstances where the sale, transfer  
25 or spin off does not result in a decrease in the number of  
26 jobs in place in this state. A sale, transfer or spin off that  
27 results in no loss of jobs in this state shall not cause the  
28 eligible taxpayer to lose entitlement to the credit in cir-  
29 cumstances where the sixty percent limitation set forth in  
30 this section would otherwise operate to cause a disallow-  
31 ance of the credit. This subsection shall not be construed  
32 to prevent adjustment of the amount of credit allowed to  
33 the eligible taxpayer based upon the number of qualified  
34 employees employed by the eligible taxpayer during the  
35 taxable year, as determined under section six of this arti-  
36 cle.

37 (3) For any taxable year subsequent to a taxable year  
38 when credit was disallowed by reason of employment  
39 falling below the sixty percent level, an eligible taxpayer  
40 may be allowed credit under this article if the number of  
41 qualified employees employed by the eligible taxpayer  
42 during the taxable year, as determined under section six of  
43 this article, has increased to a number equal to or greater  
44 than sixty percent of the number of qualified employees  
45 employed by the eligible taxpayer on the first day of  
46 January, one thousand nine hundred ninety-six.

**§11-13L-5. Application of annual credit allowance.**

1       (a) *Application of credit.* — The amount of credit  
2 allowed shall be taken against the tax liabilities of the  
3 eligible taxpayer for the current taxable year prescribed  
4 by section two-e, article thirteen of this chapter. Any credit  
5 remaining after application of the credit against the tax  
6 liabilities for the current taxable year is forfeited and shall  
7 not carry back to any prior taxable year and shall not  
8 carry forward to any subsequent taxable year. The credit  
9 allowed under this article shall be applied after application  
10 of all other applicable tax credits allowed for the taxable  
11 year against the tax prescribed by section two-e, article  
12 thirteen of this chapter.

13       (b) For purposes of asserting the credit against tax, the  
14 taxpayer shall prepare and file with the monthly tax return  
15 filed under section two-e, article thirteen of this chapter  
16 for the last month of the taxpayer's tax year, an annual  
17 schedule showing the amount of tax paid for the taxable  
18 year, and the amount of credit allowed under this article.  
19 The annual schedule shall set forth the information and be  
20 in the form prescribed by the tax commissioner. The cred-  
21 it allowed under this article shall be allowed against a pro  
22 rata portion of monthly tax liabilities of the qualified  
23 taxpayer under section two-e, article thirteen of this chap-  
24 ter, in accordance with the procedures and requirements  
25 prescribed by the tax commissioner. The annual total tax  
26 liability and total tax credit allowed under this article are  
27 subject to adjustment and reconciliation pursuant to the  
28 filing of the annual schedule. The taxpayer shall pay any  
29 tax due or claim any credit allowable for the taxable year  
30 and shown on the annual schedule, with the monthly tax  
31 return filed under section two-e, article thirteen of this  
32 chapter for the last month of the taxpayer's tax year.

**§11-13L-6. Annual computation of the number of jobs held by  
qualified employees.**

1       (a) The taxpayer shall determine the number of jobs  
2 held by qualified employees of the taxpayer in the taxable  
3 year by calculating the average number of qualified em-  
4 ployees holding jobs for each month of the taxable year

5 by averaging the beginning and ending monthly employ-  
6 ment of qualified employees, then totalling the monthly  
7 averages and dividing that total by twelve.

8 (b) If, as a result of business growth, merger, expansion  
9 or any other growth in the number of jobs in place,  
10 the number of full-time employees employed by a tax-  
11 payer in the taxable year exceeds (1) the number of qualified  
12 employees employed by the taxpayer on the first day  
13 of January, one thousand nine hundred ninety-six, or (2)  
14 the number of qualified employees employed by the tax-  
15 payer during the prior taxable year, then only that portion  
16 of the increase in the number of full-time jobs that results  
17 from the creation of new jobs, as defined in section two of  
18 this article, shall be counted, along with qualified jobs in  
19 place from the prior taxable year, as part of the total number  
20 of qualified jobs in place for the taxable year. Preexisting  
21 jobs carried over from a corporation or other entity  
22 merged with the taxpayer, and not reflective of a true  
23 increase in the number of jobs in West Virginia, or preexisting  
24 jobs formerly in place with a contract service provider  
25 which are taken over or supplanted by the internal  
26 operations of the taxpayer, or any other increase in the  
27 count of jobs in place with a taxpayer which is not reflective  
28 of new jobs, as defined in section two of this article,  
29 shall not count as qualified jobs for purposes of the credit  
30 allowed under this article.

31 (c) The tax commissioner may prescribe alternative  
32 methods for determining the number of jobs held by  
33 qualified employees in place in the taxable year upon a  
34 finding by the tax commissioner that an alternative method  
35 is appropriate for ascertaining an accurate and realistic  
36 determination of jobs held by qualified employees in the  
37 taxable year. For purposes of prescribing alternative  
38 methods, the tax commissioner may require the deduction  
39 or inclusion of jobs in place with contract service providers  
40 that provide or at any time provided any service to any  
41 eligible taxpayer or to any member of the affiliated group  
42 related to any eligible taxpayer or to any one or more  
43 entities related to the eligible taxpayer: *Provided*, That  
44 deduction, or inclusion of those jobs shall only pertain to  
45 jobs held by employees of the contract service provider

46 that are attributable or that were formerly attributable to  
47 the service provided by the contract service provider to the  
48 taxpayer. The tax commissioner may require any  
49 deconsolidation of any filing entity, or may require an  
50 alternative method based on separate accounting, unitary  
51 combination, combination of the affiliated group or com-  
52 bination of the taxpayer and one or more entities related  
53 to the taxpayer, or any other method determined by the  
54 tax commissioner to be appropriate for ascertaining an  
55 accurate and realistic determination of jobs held by quali-  
56 fied employees in the taxable year.

**§11-13L-7. Availability of credit to successors.**

1 (a) (1) Where there has been a transfer or sale of the  
2 business assets of an eligible taxpayer to a successor tax-  
3 payer which continues to operate the business in this state,  
4 and remains subject to the tax prescribed under section  
5 two-e, article thirteen of this chapter, the successor taxpay-  
6 er is entitled to the credit allowed under this article: *Pro-*  
7 *vided,* That the successor taxpayer otherwise remains in  
8 compliance with the requirements of this article for entitle-  
9 ment to the credit.

10 (2) For any taxable year during which a transfer, or  
11 sale of the business assets of an eligible taxpayer to a suc-  
12 cessor taxpayer under this section occurs, or a merger  
13 allowed under this section occurs, the credit allowed under  
14 this article shall be apportioned between the predecessor  
15 eligible taxpayer and the successor taxpayer based on the  
16 number of days during the taxable year that each taxpayer  
17 acted as the legal employer of qualified employees upon  
18 which the credit allowed under this article is based and the  
19 number of days during the taxable year that each taxpayer  
20 owned the business assets transferred.

21 (b) *Stock purchases.* — Where a corporation which is  
22 an eligible taxpayer entitled to the credit allowed under  
23 this article is purchased through a stock purchase by a new  
24 owner and remains a legal entity so as to retain its corpo-  
25 rate identity, the entitlement of that corporation to the  
26 credit allowed under this article will not be affected by the  
27 ownership change.

28 (c) *Mergers.* —

29 (1) Where a corporation or other entity which is an  
30 eligible taxpayer entitled to the credit allowed under this  
31 article is merged with another corporation or entity, the  
32 surviving corporation or entity shall be entitled to the  
33 credit to which the predecessor eligible taxpayer was origi-  
34 nally entitled only if the surviving corporation or entity  
35 otherwise complies with the provisions of this article.

36 (2) The amount of credit available in any taxable year  
37 during which a merger occurs shall be apportioned be-  
38 tween the predecessor eligible taxpayer and the successor  
39 eligible taxpayer based on the number of days during the  
40 taxable year that each taxpayer acted as the legal employ-  
41 er of qualified employees upon which the credit allowed  
42 under this article is based and the number of days during  
43 the tax year that each owned the transferred business as-  
44 sets.

45 (d) No provision of this section or of this article shall  
46 be construed to allow sales or other transfers of the tax  
47 credit allowed under this article. The credit allowed under  
48 this article can be transferred only in circumstances where  
49 there is a valid successorship as described under this sec-  
50 tion.

**§11-13L-8. Credit recapture; interest; penalties; additions to tax; statute of limitations.**

1 (a) If it appears upon audit or otherwise that any per-  
2 son or entity has taken the credit against tax allowed under  
3 this article and was not entitled to take the credit, then the  
4 credit improperly taken under this article shall be recap-  
5 tured. Amended returns shall be filed for any tax year for  
6 which the credit was improperly taken. Any additional  
7 taxes due under this chapter shall be remitted with the  
8 amended return or returns filed with the tax commissioner,  
9 along with interest, as provided in section seventeen, article  
10 ten of this chapter and a ten percent penalty and such  
11 other penalties and additions to tax as may be applicable  
12 pursuant to the provisions of article ten of this chapter.

13 (b) *Recapture for jobs loss.* —

14 (1) In any tax year when the number of qualified  
15 employees employed by the taxpayer, as determined un-  
16 der section six of this article, is less than sixty percent of  
17 the number of qualified employees employed by the tax-  
18 payer on the first day of January, one thousand nine hun-  
19 dred ninety-six, as adjusted, in addition to the loss of cred-  
20 it allowed under this article for the tax year, credit recap-  
21 ture shall apply, and the taxpayer shall return to the state  
22 an amount of tax determined by subtracting the number  
23 of qualified employees for such tax year from sixty per-  
24 cent of the number of qualified employees employed by  
25 the taxpayer as of the first day of January, one thousand  
26 nine hundred ninety-six, as adjusted, and multiplying the  
27 difference by one thousand dollars. An amended return  
28 shall be filed for the prior tax year for which credit recap-  
29 ture is required. Any additional taxes due under this  
30 chapter shall be remitted with the amended return filed  
31 with the tax commissioner, along with interest, as provided  
32 in section seventeen, article ten of this chapter, and a ten  
33 percent penalty and such other penalties and additions to  
34 tax as may be applicable pursuant to the provisions of  
35 article ten of this chapter.

36 (2) Notwithstanding the provisions of article ten of this  
37 chapter, penalties and additions to tax imposed under  
38 article ten of this chapter and the ten percent penalty im-  
39 posed under this section may be waived at the discretion  
40 of the tax commissioner. However, interest is not subject to  
41 waiver.

42 (c) Notwithstanding the provisions of article ten of this  
43 chapter, the statute of limitations for the issuance of an  
44 assessment of tax by the tax commissioner shall be five  
45 years from the date of filing of any tax return on which  
46 this credit was taken or five years from the date of pay-  
47 ment of any tax liability calculated pursuant to the asser-  
48 tion of the credit allowed under this article, whichever is  
49 later.

#### §11-13L-9. Effective date.

1 This article shall be effective for tax years beginning  
2 on or after the first day of October, one thousand nine  
3 hundred ninety-six.



## CHAPTER 9

(S. B. 4—By Senators Tomblin, Mr. President, and Boley)

[By Request of the Executive]

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[Passed July 14, 1996; in effect from passage. Approved by the Governor.]

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A BILL to repeal section nine-b, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section nine-d of said article, all relating to repealing the current method for claiming exemptions, refunds of tax and credits against other taxes; providing for direct pay permits; validity of permit; promulgation of rules by the tax commissioner; filing of monthly returns by the permit holder along with remittance of the tax due; permitting quarterly or annual returns in lieu of the monthly returns; extensions of payment with interest; automatic renewal of the permit; notifying the vendor of the direct payment number; maintenance of records by the vendor; and expiration, cancellation or surrender of a direct pay permit.

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

That section nine-b, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that section nine-d of said article be amended and reenacted to read as follows:

### ARTICLE 15. CONSUMERS SALES TAX.

#### §11-15-9d. Direct pay permits.

- 1 (a) Notwithstanding any other provision of this article,
- 2 the tax commissioner may, pursuant to rules promulgated
- 3 by him or her in accordance with article three, chapter
- 4 twenty-nine-a of this code, authorize a person that is a
- 5 user, consumer, distributor or lessee to which sales or leas-
- 6 es of tangible personal property are made or services pro-
- 7 vided, to pay any tax levied by this article or article
- 8 fifteen-a of this chapter directly to the tax commissioner
- 9 and waive the collection of the tax by that person's vendor.
- 10 No such authority shall be granted or exercised except

11 upon application to the tax commissioner and after issu-  
12 ance by the tax commissioner of a direct pay permit.  
13 Each direct pay permit granted pursuant to this section is  
14 valid until surrendered by the holder or canceled for cause  
15 by the commissioner. The commissioner shall prescribe  
16 by rules promulgated in accordance with article three,  
17 chapter twenty-nine-a of this code, those activities which  
18 will cause cancellation of a direct pay permit issued pursu-  
19 ant to this section. Upon issuance of such a direct pay  
20 permit, payment of the tax imposed or assertion of the  
21 exemptions allowed by this article or article fifteen-a of  
22 this chapter on sales and leases of tangible personal prop-  
23 erty and sales of taxable services from the vendors thereof  
24 of the personal property or services shall be made directly  
25 to the tax commissioner by the permit holder.

26 (b) On or before the fifteenth day of each month,  
27 every permit holder shall make and file with the tax com-  
28 missioner a consumers sales and use tax direct pay permit  
29 return for the preceding month in the form prescribed by  
30 the tax commissioner showing the total value of the tangi-  
31 ble personal property used, the amount of taxable services  
32 purchased, the amount of consumers sales and use taxes  
33 due from the permit holder, which shall be paid to the tax  
34 commissioner with the return, and such other information  
35 as the tax commissioner considers necessary: *Provided,*  
36 That if the amount of consumers sales and use taxes due  
37 averages less than one hundred dollars per month, the tax  
38 commissioner may permit the filing of quarterly returns in  
39 lieu of monthly returns and the amount of tax shown on  
40 the returns to be due shall be remitted on or before the  
41 fifteenth day following the close of the calendar quarter;  
42 and if the amount due averages less than fifty dollars per  
43 calendar quarter, the tax commissioner may permit the  
44 filing of an annual direct pay permit return and the  
45 amount of tax shown on the return to be due shall be  
46 remitted on or before the last day of January each year.  
47 The tax commissioner, upon written request by the permit  
48 holder, may grant a reasonable extension of time, upon  
49 such terms as the tax commissioner may require, for the  
50 making and filing of direct pay permit returns and paying  
51 the tax due. Interest on the tax shall be chargeable on

52 every such extended payment at the rate specified in sec-  
53 tion seventeen, article ten of this chapter.

54 (c) A permit issued pursuant to this section is valid  
55 until expiration of the taxpayers registration year under  
56 article twelve of this chapter. This permit shall automati-  
57 cally be renewed when the taxpayers business registration  
58 certificate is issued for the next succeeding fiscal year,  
59 unless the permit is surrendered by the holder or canceled  
60 for cause by the tax commissioner.

61 (d) Persons who hold a direct payment permit which  
62 has not been canceled are not required to pay the tax to  
63 the vendor as otherwise provided in this article or article  
64 fifteen-a of this chapter. They shall notify each vendor  
65 from whom tangible personal property is purchased or  
66 leased or from whom services are purchased of their direct  
67 payment permit number and that the tax is being paid  
68 directly to the tax commissioner. Upon receipt of the  
69 notice, the vendor is absolved from all duties and liabilities  
70 imposed by this chapter for the collection and remittance  
71 of the tax with respect to sales of tangible personal prop-  
72 erty and sales of services to the permit holder. Vendors who  
73 make sales upon which the tax is not collected by reason  
74 of the provisions of this section shall maintain records in  
75 such manner that the amount involved and identity of  
76 each purchaser may be ascertained.

77 (e) Upon the expiration, cancellation or surrender of a  
78 direct payment permit, the provisions of this chapter, with-  
79 out regard to this section, shall thereafter apply to the  
80 person who previously held the permit, and that person  
81 shall promptly notify in writing vendors from whom tan-  
82 gible personal property or services are purchased or leased  
83 of the cancellation or surrender. Upon receipt of the  
84 notice, the vendor is subject to the provisions of this chap-  
85 ter, without regard to this section, with respect to all sales,  
86 distributions, leases or storage of tangible personal prop-  
87 erty, thereafter made to or for that person.

# RESOLUTIONS

(Only resolutions of general interest are included herein.)

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## HOUSE CONCURRENT RESOLUTION 1

(By Mr. Speaker, Mr. Chambers, and Delegates J. Martin, Ashley, Douglas, Mezzatesta, Rowe, Michael, Kiss, Staton, Prezioso, Faircloth, Miller, Riggs, Border, Anderson, Azinger, Kime and Beane)

[Adopted July 16, 1996]

Changing the name of the Legislative Services Graduate Student Intern Program to the Robert W. Burk, Jr., Student Intern Program in honor of the late Minority Leader of the West Virginia House of Delegates.

WHEREAS, The Legislative Services Graduate Student Intern Program was created by the Joint Committee on Government and Finance in 1966 to provide an exceptional learning experience to qualified graduate students in West Virginia; and

WHEREAS, Over the past thirty years, nearly 100 students have participated in the program, learning the art of bill drafting, acquiring legal research skills, assisting legislators, staffing committees, analyzing issues, observing the making of public policy, studying the legislative process, and gaining insight into the inner workings of politics; and

WHEREAS, Following the successful completion of the internship program, many former interns have gone on to build careers in public service as legislators or other government officials; and

WHEREAS, The Honorable Robert W. Burk, Jr., was elected to the House of Delegates in 1966, re-elected in 1968, appointed to the State Senate in 1969, and after a voluntary hiatus from legislative service was appointed to the House in 1986 and re-elected to four consecutive terms; and

WHEREAS, In 1988 Bob Burk was elected as the House of Delegates' Minority Leader, a position he held until his untimely passing in 1994; and

WHEREAS, Bob Burk loved the Legislature and the legislative process, and was known as a gentleman willing to work with all members, regardless of political party, to develop remedies to the problems facing our State, and

WHEREAS, Bob Burk was considerate, articulate, well-liked by his peers, respected by those in the political community, and is remembered by all as a true statesman; and

WHEREAS, Recognizing legislative internships as vital to the complete educational experience of West Virginia students, during his tenure as House Republican Leader, Bob Burk hosted several legislative interns during the sessions where he offered support, guidance and direction; therefore be it

*Resolved by the Legislature of West Virginia:*

That the memory and public service of the late Bob Burk be honored by renaming the Legislative Services Graduate Student Intern Program as the Robert W. Burk, Jr., Student Intern Program; and be it

*Further Resolved,* That the Clerk of the House of Delegates hereby be directed to forward copies of this resolution to the members of his family.

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### HOUSE RESOLUTION 3

(By Delegates Trump, Douglas, Faircloth, Overington,  
Doyle and Manuel)

[Adopted July 16, 1996]

In memory of the Honorable Terry Harden, public servant and former member of the House of Delegates.

WHEREAS, Terry Thomas Harden passed away on Wednesday, April 3, 1996, at Winchester, Va. Medical Center.

Terry Harden was born January 17, 1937, in Morgan County, to the late Thomas Hunton and Mary Alma (Everett) Harden. He attended the public schools and was a graduate of Shepherd College and a veteran of the United States Air Force.

Terry Harden was a former member of the West Virginia House of Delegates, where he served with pride and dedication

for three terms from 1977 to 1982. In the private sector, he also operated a life insurance agency and was a real estate developer.

Mr. Harden was civic-minded and was active with the American Red Cross, and held membership in the Kentucky Colonels and the National Rifle Association.

Mr. Harden is survived by his two sons, Tom H. II and John W. Harden, and daughter Eloise Hall. He was also the loving grandfather of one granddaughter and one step-granddaughter; therefore, be it

*Resolved by the House of Delegates:*

That sincere regret is hereby expressed concerning the death of Terry T. Harden and his House of Delegates laments his passing and extends heartfelt sympathy to his survivors; and, be it

*Further Resolved,* That the Clerk of the House of Delegates be hereby directed to forward appropriate copies of this resolution to Tom H., II, and John W. Harden, sons, and to Eloise Hall daughter of the deceased.

## DISPOSITION OF BILLS ENACTED

The first column gives the number of the bill and the second column gives the chapter assigned to it.

**Regular Session, 1996**

### HOUSE BILLS

Bill No.	Chapter	Bill No.	Chapter	Bill No.	Chapter
2261	137	4213	124	4659	248
2341	121	4223	50	4660	87
2353	79	4224	163	4661	85
2354	233	4225	165	4662	18
2458	106	4229	164	4663	115
2489	201	4268	170	4664	10
2500	82	4310	171	4665	39
2611	210	4344	2	4669	254
2615	189	4371	160	4718	156
2748	155	4387	145	4735	94
4064	116	4388	147	4737	200
4065	113	4391	89	4739	217
4070	264	4395	90	4740	36
4072	136	4420	198	4741	35
4077	104	4472	4	4742	9
4078	181	4474	84	4743	14
4079	229	4479	77	4744	19
4081	220	4481	195	4745	219
4082	230	4490	183	4746	161
4084	227	4497	199	4751	5
4096	267	4511	151	4771	108
4100	129	4515	197	4795	179
4103	134	4519	203	4798	130
4106	3	4523	202	4822	265
4108	250	4527	98	4834	235
4110	103	4529	120	4836	24
4112	149	4530	238	4841	41
4119	6	4544	13	4842	52
4132	258	4545	45	4843	25
4133	99	4546	46	4844	88
4136	207	4547	47	4845	66
4137	132	4548	48	4846	53
4138	83	4549	27	4847	16
4141	1	4567	122	4848	15
4144	175	4580	240	4849	23
4151	251	4585	190	4851	173
4152	162	4591	206	4852	263
4159	216	4602	91	4853	150
4160	95	4603	33	4855	180
4168	31	4605	92	4858	249
4169	218	4608	260	4860	257
4170	80	4624	71	4862	252
4171	123	4635	20	4863	37
4181	139	4636	60	4864	21
4187	32	4637	215	4866	154
4198	135	4644	75	4868	54
4200	208	4649	26	4869	40
4204	211	4657	74	4870	43
4207	152			4871	29

## DISPOSITION OF BILLS ENACTED

The first column gives the number of the bill and the second column gives the chapter assigned to it.

## Regular Session, 1996

## SENATE BILLS

Bill No.	Chapter	Bill No.	Chapter	Bill No.	Chapter
17	242	162	169	452	93
19	157	171	167	465	144
25	8	196	166	469	178
30	186	201	168	473	143
36	261	249	192	501	193
37	239	255	177	505	243
40	247	261	176	529	140
42	118	262	133	543	266
62	142	274	128	559	212
78	236	280	72	562	81
88	253	285	214	567	86
89	76	294	127	568	213
92	245	300	112	569	12
93	241	302	65	570	11
94	209	303	146	571	44
98	141	306	69	572	49
100	105	312	148	573	64
104	114	320	68	574	55
109	228	325	174	575	56
110	222	326	70	576	57
113	185	332	153	577	30
114	224	338	256	578	62
116	231	347	126	579	51
118	194	357	187	580	28
119	232	358	204	581	67
120	223	359	110	582	61
122	221	363	234	584	117
127	225	366	73	585	7
128	226	380	188	586	158
129	244	381	182	589	159
130	107	382	96	590	111
133	205	383	34	591	119
137	138	384	101	592	59
140	259	388	246	593	17
143	191	389	196	595	172
144	184	400	102	602	22
153	237	409	262	603	38
154	109	415	125	604	58
156	100	416	131	605	42
157	255	422	97	606	63
		449	78		



## DISPOSITION OF BILLS ENACTED

The first column gives the chapter assigned and the second column gives the bill number.

## Regular Session, 1996

House Bills = 4 Digits

Senate Bills = 1,2,3 Digits

Chapter	Bill No.	Chapter	Bill No.	Chapter	Bill No.
1	4141	51	579	101	384
2	4344	52	4842	102	400
3	4106	53	4846	103	4110
4	4472	54	4868	104	4077
5	4751	55	574	105	100
6	4119	56	575	106	2458
7	585	57	576	107	130
8	25	58	604	108	4771
9	4742	59	592	109	154
10	4664	60	4636	110	359
11	570	61	582	111	590
12	569	62	578	112	300
13	4544	63	606	113	4065
14	4743	64	573	114	104
15	4848	65	302	115	4663
16	4847	66	4845	116	4064
17	593	67	581	117	584
18	4662	68	320	118	42
19	4744	69	306	119	591
20	4635	70	326	120	4529
21	4864	71	4624	121	2341
22	602	72	280	122	4567
23	4849	73	366	123	4171
24	4836	74	4657	124	4213
25	4843	75	4644	125	415
26	4649	76	89	126	347
27	4549	77	4479	127	294
28	580	78	449	128	274
29	4871	79	2353	129	4100
30	577	80	4170	130	4798
31	4168	81	562	131	416
32	4187	82	2500	132	4137
33	4603	83	4138	133	262
34	383	84	4474	134	4103
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