

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

### **ENGROSSED**

#### **Committee Substitute**

#### **House Bill 2615**

(BY LANE, FAIRCLOTH, MILLER, FRICH AND E. NELSON)

[Originated in the Committee on Finance,

February 9, 2016.]



1 A BILL to amend and reenact §32-3-301 of the Code of West Virginia, 1931, as amended; and to  
 2 amend said code by adding thereto a new article, designated §32-5-501, §32-5-502, 32-  
 3 5-503, §32-5-504, and §32-5-505, all relating to creation of a new exemption to the  
 4 securities registration rule with the commissioner for intrastate securities offerings under  
 5 the West Virginia Small Business Capital Act.

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

1 That §32-3-301 of the Code of West Virginia, 1931, as amended, be amended and  
 2 reenacted; and that chapter thirty-two of said code be amended by adding thereto a new article,  
 3 designated §32-5-501, §32-5-502, 32-5-503, §32-5-504, and §32-5-505, all to read as follows:

### **ARTICLE 3. REGISTRATION OF SECURITIES**

#### **§32-3-301. Registration requirement.**

1 It is unlawful for any person to offer or sell any security in this state unless: (1) It is  
 2 registered under this chapter; or (2) the security or transaction is exempted under section four  
 3 hundred two of ~~this article~~ four of this chapter or under article five of this chapter; or (3) the security  
 4 is a federal covered security.

### **ARTICLE 5. WEST VIRGINIA SMALL BUSINESS CAPITAL ACT**

#### **§32-5-501. Short title.**

1 This article shall be known as the West Virginia Small Business Capital Act.

#### **§32-5-502. Offers or sale of Small Business Securities.**

1 Notwithstanding any other provision of law to the contrary, certain offerings are exempt  
 2 from the securities registration requirements of articles two and three of this chapter if the offer,  
 3 sale, issuer and purchaser meet the requirements of this article.

#### **§32-5-503. Qualifications of issuer and purchaser.**

1 (a) In order to qualify for exemption under this article, the issuer must be a for-profit entity  
 2 organized under the laws of West Virginia with its principal place of business in West Virginia.

3 (b) In order to qualify for the exemption under this article, the purchaser must be a resident  
4 of West Virginia or be an entity organized under the laws of West Virginia with its principal place  
5 of business in West Virginia.

6 (c) The exemption is not available to any of the following:

7 (1) An investment company, as defined in the Federal Investment Company Act of 1940;

8 (2) A development stage company that either has no specific business plan or purpose or  
9 has indicated that the company's business plan is to engage in a merger or acquisition with an  
10 unidentified company or companies, or entity or person or without an allocation of proceeds for  
11 sufficiently identifiable properties or objectives; and

12 (3) Any person who is subject to a disqualifying event described in subsection (d) of this  
13 section.

14 (d) The exemption is not available if the issuer or the executive directors, directors or  
15 managers of the issuer or any individual or entity holding more than twenty percent of the  
16 outstanding equity of the issuer:

17 (1) Within the last five years, has filed a registration statement which is the subject of a  
18 currently effective registration stop order or cease and desist order entered by any state securities  
19 administrator or the United States Securities and Exchange Commission;

20 (2) Within the last five years, has been convicted of any criminal offense in connection  
21 with the offer, purchase or sale of any security, or involved fraud or deceit;

22 (3) Is currently subject to any state or federal administrative enforcement order or  
23 judgment, entered within the last five years, finding fraud or deceit in connection with the purchase  
24 or sale of any security; or

25 (4) Is currently subject to any order, judgment, or decree of any court of competent  
26 jurisdiction, entered within the last five years, temporarily, preliminarily, or permanently restraining  
27 or enjoining such party from engaging in or continuing to engage in any conduct or practice  
28 involving fraud or deceit in connection with the purchase or sale of any security.

**§32-5-504. Qualifications of offers, sales and transactions.**

1           (a) The transaction must meet the requirements of the federal exemption for intrastate  
2 offerings in section 3(a)(11) of the Securities Act of 1933, 15 U.S.C. section 77c(a)(11) and SEC  
3 rule 147, 17 CFR 230.147.

4           (b) The sum of all cash and other consideration received from the issue of securities under  
5 this exemption may not exceed \$1 million per annum unless the issuer prepares and produces  
6 audited financial statements on a quarterly basis to the commissioner. If audited financial  
7 statements are prepared and produced to the commissioner, the sum of all cash and other  
8 consideration received from the issue of securities shall not exceed \$2 million per annum.

9           (c) The issuer may not issue more than \$10,000 per annum to any single purchaser unless  
10 the purchaser is an accredited investor as defined under rule 501 of SEC Reg D, 17 CFR 230.501.

11           (d) All funds received by the issuer from purchasers under this article shall be held in  
12 escrow by an attorney licensed to practice law in West Virginia who shall deposit the funds in a  
13 depository institution authorized to do business in West Virginia until such time as the offering  
14 amount sought is attained or the time period for the offering has elapsed: *Provided*, That upon  
15 the escrowed funds attaining a balance of at least ten percent of the offering amount sought, the  
16 attorney holding the money in escrow shall, upon written request of the issuer, withdraw a portion  
17 of the money in escrow and deliver such portion of money to the issuer.

18           (e) All funds received by the issuer from purchasers under this article shall be used by the  
19 issuer in accordance with the representations by the issuer to purchasers.

20           (f) The duration of the offering will not exceed twelve months unless the issuer applies to  
21 extend the offering for a period not to exceed twelve additional months. An issuer may apply to  
22 extend the offering by submitting an amended filing with the commissioner in conformance with  
23 these provisions and the rules and orders of the commissioner.

**§32-5-505. West Virginia Crowdfunding Portal Requirements**

1           (a) The offering must be made exclusively through an internet-based crowdfunding portal  
2 that is incorporated or organized under the laws of West Virginia and authorized to do business  
3 in West Virginia and registered with the commissioner.

4           (b) The crowdfunding portal must contain a conspicuous disclaimer that reflects that  
5 access to securities offerings on the website is limited to West Virginia residents and offers and  
6 sales of the securities on the website are limited to persons that are West Virginia residents.

7           (c) There must be an affirmative representation by a visitor to the crowdfunding portal that  
8 the visitor is a resident of West Virginia before the visitor can view securities-related offering  
9 materials on the crowdfunding portal website.

10           (d) The crowdfunding portal must take reasonable steps to verify that all prospective  
11 purchasers are West Virginia residents.

12           (e) At least ten days prior to an offering that qualifies for the exemption described in this  
13 article of the code, the crowdfunding portal shall give the commissioner access to its website and  
14 the following:

15           (1) A copy of the disclosure statement required by subsection (f) of this section;

16           (2) A summary of the offering including:

17           (A) A description of the entity, its form of business, principal office, history, business plan,  
18 and the intended use of the offering proceeds, including compensation paid to any owner,  
19 executive officer, director or manager;

20           (B) The identity of the executive officers, directors and managers, including their titles and  
21 their prior experience and identity of all persons owning more than 20 percent of the ownership  
22 interests of any class of securities of the company; and

23           (C) A description of the securities being offered and any outstanding securities of the  
24 company, the amount of the offering , and the percentage ownership of the company represented  
25 by the offered securities.

26 (f) A disclosure statement must be made readily available and accessible to each  
27 prospective purchaser at the time the offer of securities is made to the prospective purchaser on  
28 the crowdfunding portal. The disclosure statement must contain at a minimum all of the following:

29 (1) A statement that there is no ready market for the sale of the securities acquired from  
30 this offering, that it may difficult or impossible for an investor to sell or otherwise dispose of this  
31 investment, and that a purchaser may be required to hold and bear financial risks of this  
32 investment indefinitely;

33 (2) A statement that the securities that are the subject of the offer have not been registered  
34 under federal or state securities law or regulation, and therefore cannot be resold unless the  
35 securities are registered or qualify for an exemption from registration under federal or state law;

36 (3) A statement that in making an investment decisions, purchasers must rely on their own  
37 examination of the issuer and the terms of the offering, including the merits and risks involved;

38 (4) A statement that no federal or state securities commission or regulatory authority has  
39 confirmed the accuracy or determined the adequacy of the disclosure statement or any other  
40 information on the crowdfunding portal; and

41 (5) All information material to the offering, including, where appropriate, a discussion of  
42 significant factors that make the offering risky or speculative, including, but not limited to:

43 (A) A description of the issuer's business;

44 (B) The history of the issuer's operations and organization;

45 (C) A list of executive directors, directors or managers of the issuer and any individual or  
46 entity holding more than twenty percent of the outstanding equity of the issuer;

47 (D) A description of how the proceeds from the offering will be used;

48 (E) Financial information about the issuer;

49 (F) A detailed description of securities offered; and

50 (G) A complete list of any legal proceedings or litigation affecting the offering.

51 (g) Prior to the offering of securities to residents of West Virginia under this article, the  
52 crowdfunding portal shall conduct a reasonable investigation of the background of each issuer  
53 whose securities are offered on the crowdfunding portal's website, and of each of the issuer's  
54 executive officers, directors or managers or any individual or entity holding more than twenty  
55 percent of the outstanding equity of the issuer. The crowdfunding portal shall deny an issuer  
56 access to its internet website if the crowdfunding portal has a reasonable belief that the issuer or  
57 its executive officers, directors or managers or any individual or entity holding more than twenty  
58 percent of the outstanding equity of the issuer are precluded from the exemption under this article.

59 (h) The crowdfunding portal shall not:

60 (1) Offer investment advice or recommendations;

61 (2) Compensate employees, agents or other persons not registered with the commissioner  
62 for soliciting offers or sales of securities displayed or referenced on the website;

63 (3) Hold, manage, possess or otherwise handle investor funds or securities;

64 (4) Be under common control with an issuer whose securities appear on the crowdfunding  
65 portal's internet website;

66 (5) Sell a financial interest in any issuer offering securities on the crowdfunding portal's  
67 internet website; or

68 (6) Receive more than a five percent financial interest in an issuer as compensation for  
69 services provided to or on behalf of an issuer.