

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Enrolled

Senate Bill 613

BY SENATORS GAUNCH, ASHLEY AND PLYMALE

[Passed March 10, 2016; in effect 90 days from
passage]

1 AN ACT to amend and reenact §31A-4-26 of the Code of West Virginia, 1931, as amended,
2 relating to defining “unimpaired capital” and “unimpaired surplus” for purposes of
3 calculating the lending limit of a state-chartered bank.

Be it enacted by the Legislature of West Virginia:

1 That §31A-4-26 of the Code of West Virginia, 1931, as amended, be amended and
2 reenacted to read as follows:

ARTICLE 4. BANKING INSTITUTIONS AND SERVICES GENERALLY.

**§31A-4-26. Limitation on loans and extensions of credit; limitation on investments; loans
to executive officers and directors of banks and employees of the banking
department; exceptions; valuation of securities.**

1 (a) (1) The total loans and extensions of credit made by a state-chartered banking
2 institution to any one person or common enterprise and not fully secured, as determined in a
3 manner consistent with subdivision (2) of this subsection, may not exceed fifteen percent of the
4 unimpaired capital and unimpaired surplus of that state-chartered banking institution initially
5 determined for the period such loan or extension of credit is made.

6 (2) Where the total loans and extensions of credit by a state-chartered banking institution
7 to any one person or common enterprise are fully secured by readily marketable collateral having
8 a market value, as determined by reliable and continuously available price quotations, at least
9 equal to the outstanding amount of such loans and extensions, then the bank may provide such
10 loans or extensions of up to ten percent of the unimpaired capital and unimpaired surplus of that
11 state-chartered banking institution initially determined for the period such loan or extension is
12 made. This limitation shall be separate from and in addition to the limitation contained in
13 subdivision (1) of this subsection.

14 (3) For the purposes of this subsection:

15 (A) The term “loans and extensions of credit” includes all direct or indirect advances of
16 funds to a person made on the basis of any obligation of that person to repay the funds or

17 repayable from specific property pledged by or on behalf of the person and to the extent specified
18 by the Commissioner of Financial Institutions; the terms also include any liability of a state-
19 chartered banking institution to advance funds to or on behalf of a person pursuant to a contractual
20 commitment;

21 (B) The term "person" includes an individual, partnership, sole proprietorship, society,
22 association, firm, institution, company, public or private corporation, not-for-profit corporation,
23 state, governmental agency, bureau, department, division or instrumentality, political subdivision,
24 county commission, municipality, trust, syndicate, estate or any other legal entity whatsoever,
25 formed, created or existing under the laws of this state or any other jurisdiction;

26 (C) The term "unimpaired capital and unimpaired surplus" means the amount of tier 1
27 (core) capital, as defined in federal regulations, that is outstanding as indicated in the bank's most
28 recent quarterly report of condition and income as filed with the Commissioner of Financial
29 Institutions pursuant to section nineteen of this article, plus the amount of the allowance for loan
30 losses; and

31 (D) The term "common enterprise" includes, but is not limited to, persons and entities who
32 are so related by business or otherwise that the expected source of repayment on the loan or
33 extension of credit is substantially the same for each person or entity.

34 (4) The limitations contained in this subsection are subject to the following exceptions:

35 (A) Loans or extensions of credit arising from the discount of commercial or business
36 paper evidencing an obligation to the person negotiating it with recourse are not subject to any
37 limitation based on capital and surplus;

38 (B) The purchase of bankers' acceptances of the kind described in Section 13 of the
39 Federal Reserve Act and issued by other banks are not subject to any limitation based on capital
40 and surplus;

41 (C) Loans and extensions of credit having a term of ten months or less and secured by
42 bills of lading, warehouse receipts or similar documents transferring or securing title to readily

43 marketable staples are subject to a limitation of twenty percent of unimpaired capital and
44 unimpaired surplus in addition to the general limitations set forth in subdivision (1) of this
45 subsection, provided the market value of the staples securing each additional loan or extension
46 of credit at all times equals or exceeds one hundred fifteen percent of the outstanding amount of
47 such loan or extension of credit. The staples shall be fully covered by insurance whenever it is
48 customary to insure the staples. If collateral values of the staples fall below the levels required
49 herein, to the extent that the loan is no longer in conformance with its collateral requirements and
50 exceeds the general fifteen percent limitation, the loan must be brought into conformance within
51 five business days, except where judicial proceedings, regulatory actions or other extraordinary
52 occurrences prevent the bank from taking action;

53 (D) Loans or extensions of credit secured by bonds, notes, certificates of indebtedness or
54 treasury bills of the United States or by other such obligations fully guaranteed as to principal and
55 interest by the United States or by bonds, notes, certificates of indebtedness which are general
56 obligations of the State of West Virginia or by other such obligations fully guaranteed as to
57 principal and interest by the State of West Virginia are not subject to any limitation based on
58 capital and surplus;

59 (E) Loans or extensions of credit to or secured by unconditional takeout commitments or
60 guarantees of any department, agency, bureau, board, commission or establishment of the United
61 States or of the State of West Virginia or any corporation wholly owned directly or indirectly by
62 the United States are not subject to any limitation based on capital and surplus;

63 (F) Loans or extensions of credit secured by a segregated deposit account in the lending
64 bank are not subject to any limitation based on capital and surplus;

65 (G) Loans or extensions of credit to any banking institution or to any receiver, conservator
66 or other agent in charge of the business and property of such banking institution or other federally
67 insured depository institution, when the loans or extensions of credit are approved by the
68 Commissioner of Financial Institutions, are not subject to any limitation based on capital and

69 surplus;

70 (H) (i) Loans and extensions of credit arising from the discount of negotiable or
71 nonnegotiable installment consumer paper which carries a full recourse endorsement or
72 unconditional guarantee by the person or common enterprise transferring the paper are subject
73 under this section to a maximum limitation equal to twenty-five percent of such unimpaired capital
74 and unimpaired surplus, notwithstanding the collateral requirements set forth in subdivision (2) of
75 this subsection;

76 (ii) If the bank's files or the knowledge of its officers of the financial condition of each maker
77 of consumer paper is reasonably adequate and an officer of the bank designated for that purpose
78 by the board of directors of the bank certifies in writing that the bank is relying primarily upon the
79 responsibility of each maker for payment of such loans or extensions of credit and not upon any
80 full or partial recourse endorsement or guarantee by the transferor, the limitations of this section
81 as to the loans or extensions of credit of each such maker are the sole applicable loan limitations;

82 (I) (i) Loans and extensions of credit secured by shipping documents or instruments
83 transferring or securing title covering livestock or giving a lien on livestock when the market value
84 of the livestock securing the obligation is not at any time less than one hundred fifteen percent of
85 the face amount of the note covered shall be subject under this section to a maximum limitation
86 equal to twenty-five percent of the unimpaired capital and unimpaired surplus, notwithstanding
87 the collateral requirements set forth in subdivision (2) of this subsection;

88 (ii) Loans and extensions of credit which arise from the discount by dealers in livestock of
89 paper given in payment for livestock, which paper carries a full recourse endorsement or
90 unconditional guarantee of the seller and which are secured by the livestock being sold, are
91 subject under this section to a limitation of twenty-five percent of the unimpaired capital and
92 unimpaired surplus, notwithstanding the collateral requirements set forth in subdivision (2) of this
93 subsection;

94 (iii) If collateral values of the livestock documents, instruments or discount paper fall below

95 the levels required herein, to the extent that the loan is no longer in conformance with its collateral
96 requirements and exceeds the general fifteen percent limitation, the loan must be brought into
97 conformance within thirty business days, except where judicial proceedings, regulatory actions or
98 other extraordinary occurrences prevent the bank from taking action;

99 (J) Loans or extensions of credit to the Student Loan Marketing Association are not subject
100 to any limitation based on capital and surplus; and

101 (K) Loans or extensions of credit to a corporation owning the property in which that state-
102 chartered banking institution is located, when that state-chartered banking institution has an
103 unimpaired capital and surplus of not less than \$1 million or when approved in writing by the
104 Commissioner of Financial Institutions, are not subject to any limitation based on capital and
105 surplus.

106 (5) (A) The Commissioner of Financial Institutions may prescribe rules to administer and
107 carry out the purposes of this subsection including rules to define or further define terms used in
108 this subsection and to establish limits or requirements other than those specified in this subsection
109 for particular classes or categories of loans or extensions of credit;

110 (B) The Commissioner of Financial Institutions may also prescribe rules to deal with loans
111 or extensions of credit, which were not in violation of this section prior to the effective date of this
112 article, but which will be in violation of this section upon the effective date of this article; and

113 (C) The Commissioner of Financial Institutions may also determine when a loan putatively
114 made to a person is, for purposes of this subsection, attributed to another person.

115 (b) (1) Except as hereinafter provided or otherwise permitted by law, nothing herein
116 contained authorizes the purchase by a state-chartered banking institution for its own account of
117 any shares of stock of any corporation: *Provided*, That a state-chartered banking institution may
118 purchase and sell securities and stock without recourse, solely upon the order and for the account
119 of customers.

120 (2) The total amount of investment securities of any one obligor or maker held by a state-

121 chartered banking institution for its own account may not exceed that percentage of the
122 unimpaired capital and unimpaired surplus of that state-chartered banking institution as is
123 permitted for investment by national banks or for any federally insured depository institution.

124 (3) For purposes of this subsection:

125 (A) The term “investment securities” means a marketable obligation in the form of a stock,
126 bond, note or debenture commonly regarded as an investment security and that is salable under
127 ordinary circumstances with reasonable promptness at a fair value. “Derivative security” means
128 a type of investment security involving a financial contract whose value depends on the values of
129 one or more underlying assets or indexes of asset values. The term “derivative” refers inter alia
130 to financial contracts such as collateralized mortgage obligations, forwards, futures, forward rate
131 agreements, swaps, options and caps/floors/collars whose primary purpose is to transfer price
132 risks associated with fluctuations in asset values;

133 (B) The term “person” includes any individual, partnership, sole proprietorship, society,
134 association, firm, institution, company, public or private corporation, not-for-profit corporation,
135 state, governmental agency, bureau, department, division or instrumentality, political subdivision,
136 county commission, municipality, trust, syndicate, estate or any other legal entity whatsoever,
137 formed, created or existing under the laws of this state or any other jurisdiction; and

138 (C) The term “unimpaired capital and unimpaired surplus” has the same meaning as set
139 forth in subsection (a) of this section.

140 (4) Notwithstanding any other provision of this subsection, a state-chartered banking
141 institution may invest its funds in any investment authorized for national banking associations or
142 for any other federally insured depository institution. The investments by state-chartered banking
143 institutions shall be on the same terms and conditions applicable to national banking associations
144 or any other federally insured depository institution: *Provided*, That: (i) The purchase of
145 investment securities under this subdivision may be made only when in the bank’s prudent
146 judgment, which judgment may be based in part on estimates which it believes to be reliable,

147 there is adequate evidence that the obligor will be able to perform all it undertakes to perform in
148 connection with the securities, including all debt service requirements, and that the securities may
149 be sold with reasonable promptness at a price that corresponds to their fair value; and (ii) the
150 purchase conforms to the requirement of subdivision (5) of this subsection. The Commissioner of
151 Financial Institutions may, from time to time, provide notice to state-chartered banking institutions
152 of authorized investments under this paragraph.

153 (5) The purchase of investment securities, including derivative securities, in which the
154 investment characteristics are considered distinctly or predominantly speculative, or the purchase
155 of such securities that are in default, whether as to principal or interest, is prohibited. The proper
156 management of interest rate risk through the use of derivative or other investment securities may
157 not be held a speculative purpose.

158 (6) The Commissioner of Financial Institutions may prescribe rules to administer and carry
159 out the purposes of this subsection, including rules to define or further define terms used in this
160 subsection and to establish limits or requirements other than those specified in this subsection for
161 particular classes or categories of investment securities.

162 (c) If there is a material decline of unimpaired capital and unimpaired surplus of a state-
163 chartered bank during any quarterly reporting period of more than twenty percent from that
164 amount reported in the bank's most recent report of income and condition, or where there is a
165 decrease of more than thirty percent in any twelve-month period, the bank shall review its
166 outstanding loans, extensions of credit and investments and report to the Commissioner of
167 Financial Institutions those loans, extensions and investments that exceed the limitations of this
168 section using the bank's current reevaluated unimpaired capital and unimpaired surplus. The
169 report shall detail the bank's position in each such loan, extension of credit and investment. The
170 commissioner may, within his or her discretion, require that such loans, extensions of credit and
171 investments be brought into conformity with the bank's current reevaluated legal lending and
172 investment limitation.

173 (d) Notwithstanding any other provision of this section, in order to ensure a bank's safety
174 and soundness, the Commissioner of Financial Institutions retains the authority to direct any state-
175 chartered bank to recalculate its lending and investment limits at more frequent intervals than
176 otherwise provided herein and to require all outstanding loans, extensions of credit and
177 investments be brought into conformance with the reevaluated limitations. In such cases, the
178 commissioner will provide the bank a written notice explaining briefly the specific reasons why the
179 determination was made to require the more frequent calculations.

180 (e) Loans to directors or executive officers are subject to the following limitations:

181 (1) A director or executive officer of any banking institution may not borrow, directly or
182 indirectly, from a banking institution with which he or she is connected any sum of money without
183 the prior approval of a majority of the board of directors or discount committee of the banking
184 institution, or of any duly constituted committee whose duties include those usually performed by
185 a discount committee. The approval shall be by resolution adopted by a majority vote of the board
186 or committee, exclusive of the director or executive officer to whom the loan is made.

187 (2) If any director or executive officer of any bank owns or controls a majority of the stock
188 of any corporation, or is a partner in any partnership, a loan to the corporation or partnership
189 constitutes a loan to the director or officer.

190 (3) For purposes of this subsection, an "executive officer" means:

191 (A) A person who participates or has authority to participate, other than in the capacity of
192 a director, in major policy-making functions of the company or bank, regardless of any official title,
193 salary or other compensation. The chairman of the board, the president, every vice president, the
194 cashier, the secretary and the treasurer of a company or bank are considered executive officers
195 unless the officer is excluded, by resolution of the board of directors or by the bylaws of the bank
196 or company from participation, other than in the capacity of director, in major policy-making
197 functions of the bank or company and the officer does not actually participate therein.

198 (B) An executive officer of a company of which the bank is a subsidiary, and any other

199 subsidiary of that company, unless the executive officer of the subsidiary is excluded, by name or
200 by title, from participation in major policy-making functions of the bank by resolutions of the boards
201 of directors of both the subsidiary and the bank and does not actually participate in such major
202 policy-making functions.

203 (4) Prior approval under subdivision (1) of this subsection is not required for:

204 (A) Payments of overdrafts pursuant to: (i) A written, preauthorized, interest-bearing
205 extension of credit plan that has been approved by the board of directors or an appropriate
206 committee and that specifies a method of repayment; or (ii) a written, preauthorized transfer of
207 funds from another account of the account holder at the bank; or

208 (B) Payments of inadvertent overdrafts on an account in an aggregate amount of \$1,000
209 or less: *Provided, That:* (i) The account is not overdrawn for more than five consecutive business
210 days; and (ii) the bank charges the director or executive officer the same fee charged to any other
211 customer of the bank in similar circumstances.

212 (f) An employee of the Division of Financial Institutions whose regulatory activities involve
213 participation in an examination, audit, visitation, review, investigation or any other particular matter
214 involving depository institutions chartered by the division may not borrow, directly or indirectly,
215 any sum of money from a state-chartered bank or state-chartered credit union. An employee of
216 the Division of Financial Institutions whose regulatory activities involve participation in an
217 examination, audit, visitation, review, investigation or any other particular matter involving
218 nondepository institutions licensed by the division may not borrow, directly or indirectly, any sum
219 of money from a nondepository entity that is licensed by the division. The commissioner, deputy
220 commissioner and in-house legal counsel of the Division of Financial Institutions may not borrow,
221 directly or indirectly, any sum of money from any entity that is under the jurisdiction of the division.

222 (g) Securities purchased by a state-chartered banking institution shall be entered upon the
223 books of the bank at actual cost. For the purpose of calculating the undivided profits applicable to
224 the payment of dividends, securities may not be valued at a valuation exceeding their present

225 cost as determined by amortization of premiums and accretion of discounts pursuant to generally
226 accepted accounting principles, that is, by charging to profit and loss a sum sufficient to bring
227 them to par at maturity: *Provided*, That securities held for trade or permissible marketable equity
228 securities and any other types of debt securities which pursuant to generally accepted accounting
229 principles are to be carried on the bank's books at fair market value shall have the unrealized
230 market appreciation and depreciation included in the income and capital as permitted by generally
231 accepted accounting principles.

232 (h) The market value of securities purchased and loans extended by a state-chartered
233 banking institution shall be reported in all public reports and quarterly reports to the commissioner
234 pursuant to section nineteen of this article in accordance with generally accepted accounting
235 principles and any applicable state or federal law, rule or regulation.