

# **WEST VIRGINIA LEGISLATURE**

**2016 REGULAR SESSION**

**Introduced**

## **Senate Bill 613**

BY SENATORS GAUNCH, ASHLEY AND PLYMALE

[Introduced February 17, 2016;

Referred to the Committee on Banking and Insurance.]

1 A BILL to amend and reenact §31A-4-26 of the Code of West Virginia, 1931, as amended, relating  
2 to defining “unimpaired capital” and “unimpaired surplus” for purposes of calculating the  
3 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 ~~Banking~~ Financial Institutions; the terms also include any liability of a  
19 state-chartered banking institution to advance funds to or on behalf of a person pursuant to a  
20 contractual 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 ~~total~~  
27 ~~equity tier 1 (core) capital, as defined in federal regulations, that is~~ outstanding as indicated in the  
28 bank's most recent quarterly report of condition and income as filed with the Commissioner of  
29 Banking Financial Institutions pursuant to section nineteen of this article, plus the amount of the  
30 allowance for loan losses; ~~minus the amount of goodwill or other nonmarketable intangible assets~~  
31 ~~included in the quarterly report pursuant to generally accepted accounting principles. Unrealized~~  
32 ~~gains and losses on the bank's securities and loan portfolios shall be included in the calculation~~  
33 ~~of total equity capital to the extent required by generally accepted accounting principles and~~  
34 ~~applicable federal or state law, rule or regulation; and~~

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

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

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

42 (B) The purchase of bankers' acceptances of the kind described in Section 13 of the

43 Federal Reserve Act and issued by other banks are not subject to any limitation based on capital  
44 and surplus;

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

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

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

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

69 (G) Loans or extensions of credit to any banking institution or to any receiver, conservator  
70 or other agent in charge of the business and property of such banking institution or other federally  
71 insured depository institution, when the loans or extensions of credit are approved by the  
72 Commissioner of ~~Banking~~ Financial Institutions, are not subject to any limitation based on capital  
73 and surplus;

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

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

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

92 (ii) Loans and extensions of credit which arise from the discount by dealers in livestock of  
93 paper given in payment for livestock, which paper carries a full recourse endorsement or  
94 unconditional guarantee of the seller and which are secured by the livestock being sold, are

95 subject under this section to a limitation of twenty-five percent of the unimpaired capital and  
96 unimpaired surplus, notwithstanding the collateral requirements set forth in subdivision (2) of this  
97 subsection;

98 (iii) If collateral values of the livestock documents, instruments or discount paper fall below  
99 the levels required herein, to the extent that the loan is no longer in conformance with its collateral  
100 requirements and exceeds the general fifteen percent limitation, the loan must be brought into  
101 conformance within thirty business days, except where judicial proceedings, regulatory actions or  
102 other extraordinary occurrences prevent the bank from taking action;

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

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

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

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

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

120 (b) (1) Except as hereinafter provided or otherwise permitted by law, nothing herein

121 contained authorizes the purchase by a state-chartered banking institution for its own account of  
122 any shares of stock of any corporation: *Provided*, That a state-chartered banking institution may  
123 purchase and sell securities and stock without recourse, solely upon the order and for the account  
124 of customers.

125 (2) The total amount of investment securities of any one obligor or maker held by a state-  
126 chartered banking institution for its own account may not exceed that percentage of the  
127 unimpaired capital and unimpaired surplus of that state-chartered banking institution as is  
128 permitted for investment by national banks or for any federally insured depository institution.

129 (3) For purposes of this subsection:

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

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

143 (C) The term "unimpaired capital and unimpaired surplus" has the same meaning as set  
144 forth in subsection (a) of this section.

145 (4) Notwithstanding any other provision of this subsection, a state-chartered banking  
146 institution may invest its funds in any investment authorized for national banking associations or

147 for any other federally insured depository institution. The investments by state-chartered banking  
148 institutions shall be on the same terms and conditions applicable to national banking associations  
149 or any other federally insured depository institution: *Provided, That:* (i) The purchase of  
150 investment securities under this subdivision may be made only when in the bank's prudent  
151 judgment, which judgment may be based in part on estimates which it believes to be reliable,  
152 there is adequate evidence that the obligor will be able to perform all it undertakes to perform in  
153 connection with the securities, including all debt service requirements, and that the securities may  
154 be sold with reasonable promptness at a price that corresponds to their fair value; and (ii) the  
155 purchase conforms to the requirement of subdivision (5) of this subsection. The Commissioner of  
156 ~~Banking~~ Financial Institutions may, from time to time, provide notice to state-chartered banking  
157 institutions of authorized investments under this paragraph.

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

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

167 (c) If there is a material decline of unimpaired capital and unimpaired surplus of a state-  
168 chartered bank during any quarterly reporting period of more than twenty percent from that  
169 amount reported in the bank's most recent report of income and condition, or where there is a  
170 decrease of more than thirty percent in any twelve-month period, the bank shall review its  
171 outstanding loans, extensions of credit and investments and report to the Commissioner of  
172 ~~Banking~~ Financial Institutions those loans, extensions and investments that exceed the limitations



173 of this section using the bank's current reevaluated unimpaired capital and unimpaired surplus.  
174 The report shall detail the bank's position in each such loan, extension of credit and investment.  
175 The commissioner may, within his or her discretion, require that such loans, extensions of credit  
176 and investments be brought into conformity with the bank's current reevaluated legal lending and  
177 investment limitation.

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

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

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

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

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

196 (A) A person who participates or has authority to participate, other than in the capacity of  
197 a director, in major policy-making functions of the company or bank, regardless of any official title,  
198 salary or other compensation. The chairman of the board, the president, every vice president, the

199 cashier, the secretary and the treasurer of a company or bank are considered executive officers  
200 unless the officer is excluded, by resolution of the board of directors or by the bylaws of the bank  
201 or company from participation, other than in the capacity of director, in major policy-making  
202 functions of the bank or company and the officer does not actually participate therein.

203 (B) An executive officer of a company of which the bank is a subsidiary, and any other  
204 subsidiary of that company, unless the executive officer of the subsidiary is excluded, by name or  
205 by title, from participation in major policy-making functions of the bank by resolutions of the boards  
206 of directors of both the subsidiary and the bank and does not actually participate in such major  
207 policy-making functions.

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

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

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

217 (f) An employee of the Division of ~~Banking~~ Financial Institutions whose regulatory activities  
218 involve participation in an examination, audit, visitation, review, investigation or any other  
219 particular matter involving depository institutions chartered by the division may not borrow, directly  
220 or indirectly, any sum of money from a state-chartered bank or state-chartered credit union. An  
221 employee of the Division of ~~Banking~~ Financial Institutions whose regulatory activities involve  
222 participation in an examination, audit, visitation, review, investigation or any other particular matter  
223 involving nondepository institutions licensed by the division may not borrow, directly or indirectly,  
224 any sum of money from a nondepository entity that is licensed by the division. The commissioner,

225 deputy commissioner and in-house legal counsel of the Division of ~~Banking~~ Financial Institutions  
226 may not borrow, directly or indirectly, any sum of money from any entity that is under the  
227 jurisdiction of the division.

228 (g) Securities purchased by a state-chartered banking institution shall be entered upon the  
229 books of the bank at actual cost. For the purpose of calculating the undivided profits applicable to  
230 the payment of dividends, securities may not be valued at a valuation exceeding their present  
231 cost as determined by amortization of premiums and accretion of discounts pursuant to generally  
232 accepted accounting principles, that is, by charging to profit and loss a sum sufficient to bring  
233 them to par at maturity: *Provided*, That securities held for trade or permissible marketable equity  
234 securities and any other types of debt securities which pursuant to generally accepted accounting  
235 principles are to be carried on the bank's books at fair market value shall have the unrealized  
236 market appreciation and depreciation included in the income and capital as permitted by generally  
237 accepted accounting principles.

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

NOTE: The purpose of this bill is to make the definition of total capital for purposes of calculating a state-chartered bank's lending limit, consistent with the definition of total capital reported quarterly to the Commissioner of Financial Institutions.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.