

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**ENROLLED**

**Committee Substitute**

**for**

**House Bill 2004**

BY DELEGATES PHILLIPS, KIMBLE, NESTOR, CANNON,  
HOLSTEIN, WILLIS, ESPINOSA, MILLER, A. HALL, SHEEDY,  
AND MARTIN

[Passed March 10, 2023; in effect ninety days from passage.]



1 AN ACT to amend and reenact §31A-2A-4 of the Code of West Virginia, 1931, as amended; and  
2 to amend said code by adding thereto a new article, designated §31A-2B-1, §31A-2B-2,  
3 §31A-2B-3, §31A-2B-4, §31A-2B-5, §31A-2B-6, §31A-2B-7, §31A-2B-8, §31A-2B-9, and  
4 §31A-2B-10, all relating generally to payment card transactions involving firearm, firearm  
5 accessory or component, and ammunition retailers; clarifying that financial records may  
6 not be disclosed or compelled to be disclosed in a manner that discriminates against  
7 constitutionally protected activities; providing a short title; setting forth legislative findings  
8 and intent; defining terms; prohibiting disclosure of protected financial information except  
9 in limited circumstances; establishing requirements for written authorization for disclosure  
10 of protected financial information; establishing requirements for subpoenas of protected  
11 financial information; prohibiting use of protected financial information for discriminatory  
12 conduct; providing civil remedies for violations of new article with liquidated or  
13 compensatory damages; providing injunctive relief for violations of new article; providing  
14 defendants in a civil action with a right to cure; allowing the aggrieved party in a civil action  
15 to recover attorney's fees; establishing a statute of limitations for civil remedies; providing  
16 that civil remedies are exclusive for violations of new article; authorizing the Commissioner  
17 of Financial Institutions to administer requirements of new article; authorizing the Attorney  
18 General to investigate and judicially enforce new article subject to certain limitations;  
19 allowing the Attorney General to recover attorney's fees in action for injunctive relief;  
20 authorizing the State Treasurer to disqualify financial institutions from certain state  
21 contracts if violations of new article have occurred; establishing the scope of new article;  
22 and providing a severability clause.

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

**ARTICLE 2A. MAXWELL GOVERNMENTAL ACCESS TO FINANCIAL RECORDS  
ACT.**

**§31A-2A-4. Exceptions.**

1 (a) Nothing in this article is intended to, or shall prohibit, apply to, or interfere with:

2 (1) The lawful authority or ability of the commissioner of banking or any other state or  
3 federal regulatory agency of a bank, savings and loan association, trust company, or credit union  
4 to obtain or to share between such regulatory agencies any records which the commissioner of  
5 banking or such state or federal regulatory agency may deem appropriate for the examination  
6 and regulation of the financial institution: *Provided*, That nothing in this subdivision permits  
7 disclosure of protected financial information in violation of §31A-2B-1 *et seq.* of this code;

8 (2) The lawful authority or ability of the Insurance Commissioner or the State Auditor to  
9 obtain any records from a financial institution relating to the financial institution's sale of insurance  
10 or securities;

11 (3) The dissemination or publication of information derived from financial records if the  
12 information cannot be identified to any particular customer, deposit, or account, or if the  
13 information is in composite form and is not disseminated or published in a way which identifies  
14 any particular customer, deposit, or account;

15 (4) The making of reports or returns specifically required or permitted by federal or state  
16 law, including applicable tax law or regulations;

17 (5) The disclosure of any information under the provisions of the uniform commercial code  
18 governing the dishonor of a negotiable instrument, or the disclosure to any purported state entity  
19 payee or to any purported state entity holder of a check, draft, order, or other item, whether or not  
20 such instrument has been accepted by such payee or holder as payment, as to whether or not  
21 such instrument would be honored if presented at the time of such disclosure;

22 (6) A state entity obtaining a credit report or consumer credit report from anyone other  
23 than a financial institution;

24 (7) The exchange, in the regular course of business, of information showing the  
25 outstanding balance of a mortgage loan account in connection with a sale, refinancing, or

26 foreclosure of real property in a transaction to which the state entity is a party; or the disclosure,  
27 in the regular course of business, of information on a mortgage or deed of trust on a subject  
28 property to a state entity as holder of any subordinate mortgage, deed of trust or security interest;

29 (8) The disclosure to the Department of Health and Human Resources, upon written  
30 request, of an individual's financial records which the department determines are necessary to  
31 verify or confirm the individual's eligibility or ineligibility for public assistance;

32 (9) The disclosure of an individual's financial records in response to a written request by  
33 the Department of Health and Human Resources, as authorized by the federal parent locator  
34 service of the United States Department of Health and Human Services;

35 (10) The examination or audit of financial records relating to preneed funeral trust  
36 accounts pursuant to §47-14-1 *et seq.* of this code;

37 (11) The disclosure of financial records relating to unclaimed property pursuant to §36-8-1  
38 *et seq.* of this code, including the examination of financial records by the State Treasurer or his  
39 or her agent to determine compliance with the handling and reporting of unclaimed property as  
40 provided by, and subject to, the limitations set forth in §36-8-20 of this code;

41 (12) The presentation to appropriate local, state, or federal law-enforcement authorities of  
42 a certificate under oath by an authorized representative of a financial institution drawee that  
43 declares the dishonor of the check, draft, or order by the drawee, the lack of an account with the  
44 drawee at the time of utterance or the insufficiency of the drawer's funds at the time of  
45 presentation and utterance in connection with any criminal action for obtaining property or  
46 services by a worthless check, draft, or order;

47 (13) The notification to appropriate local, state, or federal law-enforcement authorities or  
48 regulatory agencies that the financial institution, its officers, employees or agents thereof have  
49 information which may be relevant to a possible violation of any statute or regulation: *Provided,*  
50 That nothing in this subdivision permits disclosure of protected financial information in violation of  
51 §31A-2B-1 *et seq.* of this code. The disclosure of any information pursuant to this subdivision may

52 only include the name or other identifying information concerning any individual, corporation, or  
53 account involved in and the nature of any suspected illegal activity;

54 (14) The disclosure of information or records by a financial institution to any court or other  
55 appropriate state entity which is incidental to recording a lien, perfecting a security interest,  
56 proving a claim in bankruptcy, or otherwise collecting on a debt owing either to the financial  
57 institution itself or in its role as a fiduciary;

58 (15) The disclosure of information or records by a financial institution which is incidental  
59 to processing an application for assistance to a customer in the form of a government loan, loan  
60 guaranty, or loan insurance agreement, or which is incidental to processing a default on, or  
61 administering, a government guaranteed or insured loan or to initiating contact with an appropriate  
62 state entity for the purpose of providing any financial record necessary to permit such authority to  
63 carry out its responsibilities under a loan, loan guaranty, or loan insurance agreement;

64 (16) The disclosure of information incidental to a transaction in the normal course of  
65 business of the financial institution where there is no reasonable cause to believe that the  
66 information is intended to be used by the state entity in connection with an investigation of the  
67 customer;

68 (17) The preparation, review, handling, or maintenance of financial records in the ordinary  
69 course of business by any officer, employee, or agent of a financial institution having custody of  
70 the records; or

71 (18) The disclosure to appropriate law-enforcement officials of the financial records of any  
72 officer, director, employee, or controlling shareholder of a financial institution by a financial  
73 institution or by any state or federal regulatory agency having authority to regulate the financial  
74 institution, if there is reason to believe that the financial record is relevant to a possible violation  
75 by such person of any law relating to a crime against the financial institution or any such state or  
76 federal regulatory agency. No state or federal regulatory agency which discloses any information

77 pursuant to this subdivision shall be deemed to have waived any privilege applicable to that record  
78 under law.

79 (b) Nothing in this article shall preclude a state entity from obtaining information that is  
80 public record without regard to this article although the information may have been derived from  
81 financial records.

82 (c) Nothing in this article shall preclude a state entity from obtaining information or financial  
83 records voluntarily submitted to it by others in an attempt to seek governmental assistance or  
84 redress of a grievance, including legislative change: *Provided*, That the financial record or  
85 information was not solicited by the state entity in an effort to evade the requirements of this article  
86 or submitted by a financial institution in contravention of §31A-2A-7 of this code.

87 (d) Notwithstanding the exceptions set forth in this section, a financial institution may not  
88 disclose financial records to a state entity and a state entity may not compel disclosure of financial  
89 records in a manner that singles out or discriminates against any person based on activity  
90 protected by the Second Amendment to the United States Constitution or Section 22, Article III of  
91 the West Virginia Constitution.

## **ARTICLE 2B. THE SECOND AMENDMENT FINANCIAL PRIVACY ACT.**

### **§31A-2B-1. Short title.**

1 This article shall be known and may be cited as the "Second Amendment Financial Privacy  
2 Act."

### **§31A-2B-2. Findings and intent.**

1 (a) The Legislature finds that:

2 (1) The Second Amendment to the United States Constitution guarantees the people the  
3 right to keep and bear arms;

4 (2) Section 22, Article III of the West Virginia Constitution provides that "[a] person has the  
5 right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting  
6 and recreational use";

7 (3) In September of 2022, the International Organization for Standardization, based in  
8 Switzerland, approved a unique Merchant Category Code for firearm and ammunition retailers;

9 (4) Later in September of 2022, the world's three largest payment card networks publicly  
10 announced they would assign the new Merchant Category Code to firearms retailers accepting  
11 payment cards for purchases, after 28 members of Congress sent a public letter to networks,  
12 pressuring them to adopt the new code;

13 (5) In the letter to payment card networks, federal lawmakers stated that the new Merchant  
14 Category Code for firearms retailers would be "[. . .] the first step towards facilitating the collection  
15 of valuable financial data that could help law enforcement in countering the financing of terrorism  
16 efforts", expressing a clear government expectation that networks will utilize the new Merchant  
17 Category Code to conduct mass surveillance of constitutionally protected firearms, firearm  
18 accessories or components, and ammunition purchases in cooperation with law enforcement;

19 (6) The new Merchant Category Code will allow the banks, payment card networks,  
20 acquirers, and other entities involved in payment card processing to identify and separately track  
21 lawful payment card purchases at firearms retailers in West Virginia, paving the way for both  
22 unprecedented surveillance of Second Amendment activity and unprecedented information  
23 sharing between financial institutions and the government;

24 (7) This potential for cooperative surveillance and tracking of lawful firearms, firearm  
25 accessories or components, and ammunition purchases will have a significant chilling effect on  
26 citizens wishing to exercise their federal and state constitutional rights to keep and bear arms in  
27 West Virginia;

28 (8) While federal law requires some financial institutions to report transactions that are  
29 highly indicative of money laundering or other unlawful activities, there is no federal or state law  
30 authorizing financial institutions to surveil and track lawful activities by customers in cooperation  
31 with law enforcement; in fact, both the federal Right to Financial Privacy Act and West Virginia's



32 Maxwell Governmental Access to Financial Records Act prohibit financial institutions from  
33 disclosing a customer's financial records except in limited circumstances; and

34 (9) This article should be construed as a generally applicable consumer financial  
35 protection law that does not prevent or significantly interfere with the duly authorized powers of  
36 any bank, nor does this article directly or indirectly discriminate against any bank based on its  
37 charter or structure.

38 (b) Based on the above-stated findings, it is the intent of the Legislature to prohibit the  
39 misuse of payment card processing systems to surveil, report, or otherwise discourage  
40 constitutionally protected firearm, firearm accessories or components, and ammunition purchases  
41 and sales within West Virginia's jurisdiction.

**§31A-2B-3. Definitions.**

1 (a) The terms used in this article shall have the same meaning provided in §31A-2A-1 of  
2 this code, unless otherwise specified in this section.

3 (b) For the purposes of this article, the following terms have the following meanings:

4 (1) "Ammunition" means ammunition or cartridge cases, primers, bullets, or propellant  
5 powder designed for use in any firearm.

6 (2) "Assign" or "assignment" refers to a financial institution policy, process, or practice that  
7 labels, links, or otherwise associates a firearms code with a merchant or payment card transaction  
8 in a manner that allows the financial institution or any other entity facilitating or processing the  
9 payment card transaction to identify whether a merchant is a firearms retailer or whether a  
10 transaction involves the sale of firearms, firearm accessories or components, or ammunition.

11 (3) "Customer", in addition to the definition provided in §31A-2A-1(a) of this code, includes  
12 any person who presents a payment card to a merchant for the purchase of goods or services.

13 (4) "Disclosure" means the transfer, publication, or distribution of protected financial  
14 information to another person for any purpose other than to process or facilitate a payment card  
15 transaction.

16 (5) "Financial institution", in addition to the definition provided in §31A-2A-1(b) of this code,  
17 includes an entity other than a merchant involved in facilitating or processing a payment card  
18 transaction, including, but not limited to, a bank, acquirer, gateway, payment card network, or  
19 payment card issuer.

20 (6) "Financial record", in addition to the definition provided in §31A-2A-1(c) of this code,  
21 includes a financial record held by a financial institution related to a payment card transaction that  
22 the financial institution has processed or facilitated.

23 (7) "Firearm" has the same meaning as that term is defined in §61-7-2 of this code and  
24 includes antique firearms.

25 (8) "Firearm accessories or components" means:

26 (A) Any device specifically adapted to enable the wearing or carrying about one's person  
27 or the storage or mounting in or on any conveyance of a firearm and any attachment or device  
28 specifically adapted to be inserted into or affixed onto any firearm to enable, alter, or improve the  
29 functioning or capabilities of the firearm;

30 (B) Any item that is used in conjunction with or mounted upon a firearm, including but not  
31 limited to telescopic or laser sights, magazines, flash or sound suppressors, folding or aftermarket  
32 stocks and grips, speedloaders, braces, ammunition carriers, and lights for target illumination;  
33 and

34 (C) Any component for making ammunition, reloading materials and equipment,  
35 machinery, and tools for manufacturing ammunition.

36 (9) "Firearms code" means any code or other indicator a financial institution assigns to a  
37 merchant or to a payment card transaction that identifies whether a merchant is a firearms retailer  
38 or whether the payment card transaction involves the purchase of a firearm, firearm accessories  
39 or components, or ammunition. The term includes, but is not limited to, a Merchant Category Code  
40 assigned to a retailer by a payment card network or other financial institution.

41 (10) "Firearms retailer" means any person engaged in the lawful business of selling or  
42 trading firearms or antique firearms, as those terms are defined in §61-7-2 of this code, firearm  
43 accessories or components, or ammunition to be used in firearms or antique firearms.

44 (11) "Government entity" means any state or local government agency or instrumentality  
45 thereof, located in West Virginia.

46 (12) "Merchant" means a person or entity that accepts payment cards from customers for  
47 the purchase of goods or services. The term includes a firearms retailer that accepts payment  
48 cards for the lawful purchase of firearms, firearm accessories or components, or ammunition.

49 (13) "Payment card" means a credit card, charge card, debit card, or any other card that  
50 is issued to an authorized card user and that allows the user to purchase goods or services from  
51 a merchant.

52 (14) "Protected financial information" means any record of a sale, purchase, return, or  
53 refund involving a payment card that is retrieved, characterized, generated, labeled, sorted, or  
54 grouped based on the assignment of a firearms code. A "customer's protected financial  
55 information" refers to protected financial information appearing in a financial institution's records  
56 pertaining to a customer.

**§31A-2B-4. Protected financial information.**

1 A financial institution is prohibited from disclosing a customer's protected financial  
2 information to a government entity and a government entity is prohibited from accessing or  
3 obtaining said information unless:

4 (1) Disclosure is expressly permitted by §31A-2A-4 of this code and the protected financial  
5 information is not singled out, segregated, or disclosed based on the assignment of a firearms  
6 code;

7 (2) Disclosure is made pursuant to a valid warrant issued in a criminal investigation, stating  
8 the grounds or probable cause for its issuance, and otherwise meeting the requirements of  
9 §62-1A-3 of this code;

10 (3) The customer has provided written authorization for disclosure, according to the  
11 requirements of §31A-2B-5 of this code;

12 (4) Disclosure is made pursuant to a subpoena meeting the requirements of §31A-2A-5  
13 and §31A-2B-6 of this code or to a grand jury subpoena meeting the requirements of §31A-2A-6  
14 of this code; or

15 (5) The financial institution discloses only the following information:

16 (A) That the financial institution is not in possession of the protected financial information;  
17 and

18 (B) The identity of the entity that is in possession of the requested protected financial  
19 information.

**§31A-2B-5. Written authorization for disclosure.**

1 (a) Notwithstanding §31A-2B-4 of this code, a financial institution may disclose a  
2 customer's protected financial information to a government entity if the customer provides the  
3 financial institution with written authorization for said disclosure. The written authorization  
4 described by this section must contain the following:

5 (1) A statement that the customer consents to the disclosure of the protected financial  
6 information, along with the definition provided in §31A-2B-3(14) of this code, for a specific period;

7 (2) A statement that the customer has the right to refuse to consent to disclosure;

8 (3) A statement that the customer understands his or her right to revoke said consent at  
9 any time before the protected financial information is disclosed;

10 (4) A description of the financial records authorized to be disclosed;

11 (5) The purpose for which disclosure of the protected financial information is authorized;

12 (6) The recipient or recipients of the disclosure; and

13 (7) The customer's signature.

14 (b) The written authorization described in this section may not be required as a condition  
15 of doing business or transacting with any financial institution.

16 (c) The written authorization required by this section must be executed distinctly and  
17 separately from other agreements or instruments entered into between the customer and financial  
18 institution.

**§31A-2B-6. Additional requirements for subpoenas.**

1 A subpoena issued by a government entity that specifically requires disclosure of  
2 protected financial information must meet the following requirements, in addition to the  
3 requirements of §31A-2A-5 of this code:

4 (1) The subpoena must state that protected financial information is being sought, along  
5 with the definition provided in §31A-2B-3(14) of this code;

6 (2) A copy of the subpoena must be served upon the customer according to the procedure  
7 provided in §31A-2A-5 of this code and the subpoena must contain a certification that said service  
8 was executed; and

9 (3) A copy of the subpoena must be served by the government entity upon the Consumer  
10 Protection Division of the West Virginia Attorney General's Office on the same day the subpoena  
11 is served upon the customer whose protected financial data is being sought and the subpoena  
12 must contain a certification that said service was executed.

**§31A-2B-7. Use of protected financial information for discriminatory purpose.**

1 A financial institution may not use a firearms code to engage in the following discriminatory  
2 conduct:

3 (1) Declining a lawful payment card transaction based on the assignment of a firearms  
4 code to the merchant or transaction;

5 (2) Limiting or declining to do business with a customer, potential customer, or merchant  
6 based on the assignment of a firearms code to previous lawful transactions involving the  
7 customer, potential customer, or merchant;

8           (3) Charging a higher transaction or interchange fee to any merchant or for a lawful  
9 transaction, as compared to the fee charged to a similarly situated merchant or for a similar  
10 transaction, based on the assignment of a firearms code; or

11           (4) Otherwise taking any action against a customer or merchant that is intended to  
12 suppress lawful commerce involving firearms, firearm accessories or components, or ammunition.

**§31A-2B-8. Civil remedies.**

1           (a) Subject to subsection (c) of this section, a customer may bring a civil action for  
2 damages, injunctive relief, or both damages and injunctive relief against any financial institution  
3 or government entity that causes the customer's protected financial information to be disclosed in  
4 violation of this article. For each violation, the individual may recover:

5           (1) Against any person who negligently or recklessly violates this article, liquidated  
6 damages of \$10,000 or actual damages, whichever is greater; or

7           (2) Against any person who intentionally violates this article, liquidated damages of  
8 \$25,000 for each or actual damages, whichever is greater.

9           (b) Subject to subsection (c) of this section, a customer or merchant aggrieved by a  
10 violation of §31A-2B-7 of this code may bring a civil action for damages, injunctive relief, or both  
11 damages and injunctive relief. Said person may recover liquidated damages of \$50,000 or actual  
12 damages, whichever is greater.

13           (c) Right to cure. – Prior to an aggrieved party bringing a civil action pursuant to this  
14 section, a financial institution shall have the right to cure an alleged violation of this section,  
15 according to the procedures, restrictions, and requirements set forth in §46A-5-108(a) of this  
16 code: *Provided*, That both parties must follow the procedures set forth therein.

17           (d) Attorney's fees. – If a court finds that a violation of this article has occurred as the result  
18 of a civil action brought pursuant to subsection (a) or subsection (b) of this section, the court shall  
19 award reasonable attorney's fees to the aggrieved party. An award of attorney's fees is subject to  
20 the same limitations set forth in §46A-5-108(f) of this code.

21 (e) Statute of Limitations. – Any action under this article is barred unless the action is  
22 commenced within five years after the aggrieved party knows or reasonably should know of the  
23 violation. The statute of limitations provided herein is tolled for the 45-day period set forth in §46A-  
24 5-108(a) of this code or for the period the effectuation of the cure offer is being performed,  
25 whichever is longer.

26 (f) The remedies provided in this article are the exclusive civil remedies available to an  
27 aggrieved party for violations of this article.

**§31A-2B-9. Enforcement; contractual authority of the State.**

1 (a) Notwithstanding any other provisions of this chapter, the Commissioner of Banking is  
2 authorized to administratively enforce the requirements of this article consistent with §31A-2-4 of  
3 this code.

4 (b) The Attorney General is authorized to investigate compliance with this article and may  
5 bring a civil action for injunctive relief to judicially enforce this article: *Provided*, That with regard  
6 to a national bank, the Attorney General is authorized to conduct investigations and take judicial  
7 enforcement action only to the extent permitted by 12 U.S.C. §25b(i). Upon awarding an injunction  
8 against a financial institution as the result of a judicial enforcement action pursuant to this  
9 subsection, a court may award the Attorney General reasonable attorney's fees.

10 (c) In selecting a financial institution to provide a financial service or product to the state  
11 related to payment card processing, the State Treasurer may disqualify a financial institution from  
12 the competitive bidding process or from any other official selection process if:

13 (1) During the past five years, a court of competent jurisdiction has entered an order or  
14 opinion finding that the financial institution violated this article;

15 (2) During the past five years, the Commissioner of Banking or the Attorney General, as  
16 the result of an investigation, has determined that a financial institution has violated this article;

17 (3) During the past five years, the financial institution has admitted to violating this article  
18 in the records of a court or other official proceeding; or

19           (4) The financial institution has publicly stated that it has adopted or intends to adopt  
20 policies or practices that violate this article.

**§31A-2B-10. Scope and Severability.**

1           (a) Nothing in this article may be construed or applied in a manner that violates or conflicts  
2 with superseding federal law.

3           (b) The sections and provisions of this article are severable. If any section or provision of  
4 this article is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect  
5 the other sections and provisions of this article, which shall remain in full force and effect.



The Clerk of the House of Delegates and the Clerk of the Senate hereby certify that the foregoing bill is correctly enrolled.

.....  
*Clerk of the House of Delegates*

.....  
*Clerk of the Senate*

Originated in the House of Delegates.

In effect ninety days from passage.

.....  
*Speaker of the House of Delegates*

.....  
*President of the Senate*

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The within is ..... this the.....  
Day of ....., 2023.

.....  
*Governor*