

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Committee Substitute

for

House Bill 2004

By Delegates Phillips, Kimble, Nestor, Cannon,
Holstein, Willis, Espinosa, Miller, A. Hall, Sheedy, and
Martin

[Introduced January 12, 2023; Referred to the
Committee on the Judiciary]

1 A BILL to amend and reenact §31A-2A-4 of the Code of West Virginia, 1931, as amended; and to
2 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 certain constitutionally protected activity; providing a short title; setting forth legislative
8 findings and intent; defining terms; prohibiting disclosure of protected financial information
9 except in limited circumstances; allowing for written authorization for disclosure of
10 protected financial information; establishing requirements for subpoenas of protected
11 financial information; prohibiting use of protected financial information for certain
12 discriminatory conduct; providing civil remedies for violation of new article with liquidated
13 or compensatory damages; allowing an aggrieved party in a civil action to recover
14 attorney's fees and injunctive relief for violations; limiting defenses available to civil
15 remedies; establishing a statute of limitations for civil remedies; providing that civil
16 remedies are exclusive for violations; authorizing the Commissioner of Financial
17 Institutions to enforce requirements subject to certain limitations; authorizing the State
18 Treasurer to disqualify financial institutions from certain state contracts if violations have
19 occurred; establishing the scope of new requirements; 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 and
6 regulation of the financial institution: Provided, That nothing in this subdivision permits disclosure
7 of protected financial information in violation of §31A-2B-1 et seq. of this code;

8 (2) The lawful authority or ability of the ~~Commissioner of Insurance~~ Commissioner or the
9 State Auditor to obtain any records from a financial institution relating to the financial institution's
10 sale of insurance 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 any
14 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 than
23 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, in

27 the regular course of business, of information on a mortgage or deed of trust on a subject property
28 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 accounts
36 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 or
39 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 presentation
45 and utterance in connection with any criminal action for obtaining property or services by a
46 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 to
59 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 by
75 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 ~~section seven of this article~~ §31A-2A-7 of
87 this code.

88 (d) Notwithstanding the exceptions set forth in this section, a financial institution may not
89 disclose financial records and a state or local government entity may not compel disclosure of
90 financial records in a manner that singles out or discriminates against any person based on activity
91 protected by the Second Amendment to the United States Constitution or Section 22, Article III of
92 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 world's three largest payment card networks publicly
8 announced they would assign a unique Merchant Category Code to firearms retailers accepting
9 payment cards for purchases, after 28 members of Congress sent a public letter to networks,
10 pressuring them to adopt the new code;

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

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

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

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

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

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

36 (b) Based on the above-stated findings, it is the intent of the Legislature to prohibit the
37 misuse of payment card processing systems to surveil, report, or otherwise discourage
38 constitutionally protected firearm, firearm accessories or components, and ammunition purchases
39 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 or
27 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; and

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

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

38 (10) "Firearms code" means any code or other indicator a financial institution assigns to a
39 merchant or to a payment card transaction that identifies whether a merchant is a firearms retailer
40 or whether the payment card transaction involves the purchase of a firearm, firearm accessories or

41 components, or ammunition. The term includes, but is not limited to, a Merchant Category Code
42 assigned to a retailer by a payment card network or other financial institution.

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

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

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

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

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

1 A financial institution is prohibited from disclosing a customer's protected financial
2 information and a governmental entity is prohibited from accessing or obtaining said information
3 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; or

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 of
14 this code.

§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 if the customer provides the financial institution with
3 written authorization for said disclosure. The written authorization described by this section must
4 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 of
15 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.

2 (a) If a subpoena issued by a government entity requires disclosure of a customer's
3 protected financial information, a financial institution may only disclose said information if the
4 subpoena meets the requirements of §31A-2A-5 of this code and this section.

5 (b) A subpoena issued by a government entity that specifically requires disclosure of
6 protected financial information must meet the following requirements:

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

9 (2) A copy of the subpoena must be served upon the customer according to the procedure
10 provided in §31A-2A-5 of this code and the subpoena must contain a certification that said service
11 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 customer,
7 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.

2 (a) A customer may bring a civil action for damages against any financial institution or
3 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) A customer or merchant aggrieved by a violation of §31A-2B-7 of this code may bring a
10 civil action for damages. Said person may recover liquidated damages of \$50,000 or actual
11 damages, whichever is greater.

12 (c) If a court finds that a violation of this article has occurred as the result of a civil action
13 filed pursuant to subsection (a) or subsection (b) of this section, the court shall award reasonable
14 attorney's fees to the aggrieved party. A court may order such other relief, including an injunction,
15 as the court may consider appropriate.

16 (d) Any action under this article is barred unless the action is commenced within five years
17 after actual knowledge by the aggrieved party of the violation.

18 (e) The remedies provided in this article are the exclusive remedies for violations of this
19 article.

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

1 (a) Notwithstanding any other provisions of this chapter, the Commissioner is authorized to
2 conduct investigations and enforce the requirements of this article: *Provided*, That with regard to a
3 national bank, the Commissioner is authorized to conduct investigations and take judicial
4 enforcement actions only to the extent permitted by 12 U.S.C §25b(i).

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

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

10 (2) During the past five years, the Commissioner has determined that a financial institution
11 has violated this article;

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

14 (4) The financial institution has publicly stated that it has adopted or intends to adopt
15 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.

NOTE: The purpose of this bill is to prevent the use of payment card processing systems for surveillance of Second Amendment activity and discriminatory conduct.

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