

WEST VIRGINIA LEGISLATURE

2025 REGULAR SESSION

ENROLLED

Committee Substitute

for

Committee Substitute

for

House Bill 2889

BY DELEGATES CRISS, BARNHART, AND HOTT

[Passed April 10, 2025; in effect from passage]

1 AN ACT to amend and reenact §32- 4-402 of the Code of West Virginia, 1931, as amended; and
2 to amend said code by adding thereto a new section, designated §32-4-402a, all relating
3 to authorizing the Commissioner of Securities or his or her designee to conduct a fairness
4 hearing for transactions involving the exchange of a security for one or more outstanding
5 securities, claims, or property interests, or partly for cash; expressly authorizing
6 commissioner or designee to conclude whether conditions of exchange are fair; providing
7 exemption from registration and filing requirements; defining terms; providing for fairness
8 hearing application process; providing deadlines and notice requirements; authorizing
9 filing fee; correcting citations; authorizing rules and orders by commissioner; authorizing
10 commissioner to conduct fairness hearings; and authorizing commissioner to recover
11 costs associated with fairness hearing and issuance of findings.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. GENERAL PROVISIONS.

§32-4-402. Exemptions.

1 (a) The following securities are exempt from §32-3-301 and §32-4-403 of this code:
2 (1) Any security (including a revenue obligation) issued or guaranteed by the United
3 States, any state, any political subdivision of a state, or any agency or corporate or other
4 instrumentality of one or more of the foregoing; or any certificate of deposit for any of the
5 foregoing;
6 (2) Any security issued or guaranteed by Canada, any Canadian province, any political
7 subdivision of any such province, any agency or corporate or other instrumentality of one or more
8 of the foregoing, or any other foreign government with which the United States currently maintains
9 diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;
10 (3) Any security issued by and representing an interest in or a debt of, or guaranteed by,
11 any bank organized under the laws of the United States, or any bank, savings institution or trust
12 company organized and supervised under the laws of any state;

13 (4) Any security issued by and representing an interest in or a debt of, or guaranteed by,
14 any federal savings and loan association, or any building and loan or similar association organized
15 under the laws of any state and authorized to do business in this state;

16 (5) Any security issued by and representing an interest in or a debt of, or guaranteed by,
17 any insurance company organized under the laws of any state and authorized to do business in
18 this state;

19 (6) Any security issued or guaranteed by any federal credit union or any credit union,
20 industrial loan association or similar association organized and supervised under the laws of this
21 state;

22 (7) Any security issued or guaranteed by any railroad, other common carrier, public utility
23 or holding company which is: (A) Subject to the jurisdiction of the interstate commerce
24 commission; (B) a registered holding company under the Public Utility Holding Company Act of
25 1935, or a subsidiary of such a company within the meaning of that act; (C) regulated in respect
26 of its rates and charges by a governmental authority of the United States or any state; or (D)
27 regulated in respect of the issuance or guarantee of the security by a governmental authority of
28 the United States, any state, Canada, or any Canadian province;

29 (8) Any security listed or approved for listing upon notice of issuance on the New York
30 Stock Exchange, the American Stock Exchange, or the Midwest Stock Exchange, any other stock
31 exchange approved by the commissioner, the National Association of Securities Dealers
32 Automated Quotation/National Market System (NASDAQ/NMS), or any other market system
33 approved by the commissioner, any other security of the same issuer which is of senior or
34 substantially equal rank, any security called for by subscription rights or warrants so listed or
35 approved, or any warrant or right to purchase or subscribe to any of the foregoing, except that the
36 commissioner may adopt and promulgate rules pursuant to chapter 29A of this code which, after
37 notice to such exchange or market system and an opportunity to be heard, remove any such
38 exchange or market system from this exemption if the commissioner finds that the listing

requirements or market surveillance of such exchange or market system are such that the continued availability of such exemption for such exchange or market system is not in the public interest and that removal is necessary for the protection of investors;

(9) Any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association, and no part of the net earnings of which inures to the benefit of any person, private stockholder or individual;

(10) Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within 12 months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal;

(11) Any investment contract issued in connection with an employees' stock purchase, savings, pension, profit-sharing, or similar benefit plan if the commissioner is notified in writing 30 days before the inception of the plan or, with respect to plans which are in effect on the effective date of this chapter, within 60 days thereafter (or within 30 days before they are reopened if they are closed on the effective date of this chapter);

(12) Any security issued by an agricultural cooperative association operating in this state and organized under §19-4-1 *et seq.* of this code, or by a foreign cooperative association organized under the laws of another state and duly qualified to transact business in this state.

(b) The following transactions are exempt from §32-3-301 and §32-4-403 of this code:

(1) Any isolated nonissuer transaction, whether effected through a broker-dealer or not;

(2) Any nonissuer distribution of an outstanding security if: (A) A recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations; or (B) the security has a fixed maturity or a fixed

65 interest or dividend provision and there has been no default during the current fiscal year or within
66 the three preceding fiscal years, or during the existence of the issuer and any predecessors if less
67 than three years, in the payment of principal, interest or dividends on the security;

68 (3) Any nonissuer transaction effected by or through a registered broker-dealer pursuant
69 to an unsolicited order or offer to buy; but the commissioner may by rule require that the customer
70 acknowledge upon a specified form that the sale was unsolicited, and that a signed copy of each
71 such form be preserved by the broker-dealer for a specified period;

72 (4) Any transaction between the issuer or other person on whose behalf the offering is
73 made and an underwriter, or among underwriters;

74 (5) Any transaction in a bond or other evidence of indebtedness secured by a real or
75 chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the
76 entire mortgage, deed of trust, or agreement, together with all the bonds or other evidence of
77 indebtedness secured thereby, is offered and sold as a unit;

78 (6) Any transaction by an executor, administrator, sheriff, marshal, constable, receiver,
79 trustee in bankruptcy, guardian, or conservator, and any transaction constituting a judicial sale;

80 (7) Any transaction executed by a bona fide pledgee without any purpose of evading this
81 chapter;

82 (8) Any offer or sale to a bank, savings institution, trust company, insurance company,
83 investment company as defined in the Investment Company Act of 1940, pension or profit-sharing
84 trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the
85 purchaser is acting for itself or in some fiduciary capacity;

86 (9) Any transaction pursuant to an offer directed by the offeror to not more than 10 persons
87 (other than those designated in subdivision (8) of this subsection) in this state during any period
88 of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this
89 state, if: (A) The seller reasonably believes that all the buyers in this state (other than those
90 designated in subdivision (8) of this subsection) are purchasing for investment; and (B) no

91 commission or other remuneration is paid or given, directly or indirectly, for soliciting any
92 prospective buyer in this state (other than those designated in subdivision (8) of this subsection),
93 but the commissioner may by rule or order, as to any security or transaction or any type of security
94 or transaction, withdraw or further condition this exemption, or increase or decrease the number
95 of offerees permitted, or waive the conditions in clauses (A) and (B) with or without the substitution
96 of a limitation on remuneration;

97 (10) Any offer or sale of a preorganization certificate or subscription if: (A) No commission
98 or other remuneration is paid or given, directly or indirectly, for soliciting any prospective
99 subscriber; (B) the number of subscribers does not exceed 10; and (C) no payment is made by
100 any subscriber;

101 (11) Any transaction pursuant to an offer to existing security holders of the issuer, including
102 persons who at the time of the transaction are holders of convertible securities, nontransferable
103 warrants or transferable warrants exercisable within not more than 90 days of their issuance, if:
104 (A) No commission or other remuneration (other than a standby commission) is paid or given,
105 directly or indirectly, for soliciting any security holder in this state; or (B) the issuer first files a
106 notice specifying the terms of the offer and the commissioner does not by order disallow the
107 exemption within the next five full business days;

108 (12) Any offer (but not a sale) of a security for which registration statements have been
109 filed under both this chapter and the Securities Act of 1933 if no stop order or refusal order is in
110 effect and no public proceeding or examination looking toward such an order is pending under
111 either chapter;

112 (13) A transaction in a security, whether or not the security or transaction is otherwise
113 exempt, in exchange for one or more bona fide outstanding securities, claims, or property
114 interests, or partly in exchange and partly for cash, if the terms and conditions of the issuance
115 and exchange or delivery and exchange and the fairness of the terms and conditions have been
116 approved by the commissioner at a hearing as provided in §32-4-402a of this code.

(c) The commissioner may by order deny or revoke any exemption specified in subdivision (9) or (11) of subsection (a) or in subsection (b) of this section with respect to a specific security or transaction. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law, except that the commissioner may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceeding under this subsection. Upon the entry of a summary order, the commissioner shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within 15 days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to all interested persons, may modify or vacate the order or extend it until final determination. No order under this subsection may operate retroactively. No person may be considered to have violated §32-3-301 and §32-4-403 of this code by reasons of any offer or sale effected after the entry of an order under this subsection if he or she sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the order.

(d) In any proceeding under this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

§32-4-402a. Fairness Hearing on issuance of securities involved in a reorganization, recapitalization, or refinancing.

(a) For the purposes of this section, the terms "reorganization," "recapitalization," and "refinancing" shall mean:

- (1) A readjustment by modification of the terms of securities by agreement;
- (2) A readjustment by the exchange of securities by the issuer for others of its securities;
- (3) The exchange of securities by the issuer for securities of another issuer;

6 (4) The acquisition of assets of a person, directly or indirectly, partly or wholly in
7 consideration for securities distributed or to be distributed as part of the same transaction, directly
8 or indirectly, to holders of securities issued by such person or secured by the assets of such
9 person; or

10 (5) A merger or consolidation.

11 (b) The commissioner, or his or her designee, is authorized to consider and conduct a
12 fairness hearing upon any plan of reorganization, recapitalization, or refinancing of a corporation
13 or limited liability company organized under the laws of this state, or having its principal place of
14 business within this state, when the plan is proposed by the corporation, limited liability company,
15 or by any of its shareholders, members, or creditors and contains a proposal to issue securities
16 in exchange for one or more bona fide outstanding securities, claims, or property interests, or
17 partly in such exchange, or partly for cash: *Provided*, That this section does not apply to plans of
18 reorganization, recapitalization, or refinancing of a corporation or limited liability company wherein
19 there are no proposed issuance of securities.

20 (c) Prior to any fairness hearing authorized by this section, a corporation or limited liability
21 company, shareholder, member, or creditor shall apply to the commissioner to approve the
22 issuance of securities or to the delivery of other consideration pursuant to a plan of reorganization,
23 recapitalization, or refinancing. The application shall be on a form and be accompanied by such
24 documents and filing fees as shall be required by rule or order of the commissioner: *Provided*,
25 That the filing fees may not exceed \$500. The applicant shall provide sufficient information to the
26 commissioner regarding the value of the securities, claims, or interests to be exchanged and the
27 securities to be issued in the transaction. The commissioner shall inform the applicant of any
28 deficiencies in the application or of any additional information or documents required. The
29 commissioner may require the applicant to amend or resubmit the application to comply with any
30 rule or order of the commissioner prior to setting a date for the fairness hearing. The
31 commissioner, or his or her designee, is required to hold a fairness hearing on any application for

32 approval within 30 days after the filing of a complete application and supporting documents
33 required by any rule or order of the commissioner.

34 (d) All persons to whom it is proposed securities be issued or other consideration be
35 delivered by the applicant shall have the right to appear at the fairness hearing. Holders of a
36 majority of the applicant's debts or holders of a majority of any outstanding class of securities
37 issued by the applicant shall have the right to appear. The applicant shall provide notice in person
38 or by United States mail, postage prepaid, providing the time and place of the fairness hearing to
39 all persons to whom it is proposed securities be issued or other consideration be delivered in such
40 exchange, not less than 10 days prior to such hearing. The applicant shall file evidence of notice
41 required by this subsection with the commissioner, or his or her designee, prior to the fairness
42 hearing.

43 (e) Any fairness hearing conducted by the commissioner, or his or her designee, under
44 this section may be conducted in person, by video conference, by telephone conference, or by
45 any other mode deemed appropriate by any rule or order of the commissioner.

46 (f) Within 10 business days after holding the fairness hearing, the commissioner, or his or
47 her designee, shall issue a statement of findings of fairness and his or her approval or a statement
48 that his or her approval will not be forthcoming.

49 (g) Securities issued in accordance with a plan approved by the commissioner, or his or
50 her designee, pursuant to this section are exempt from the registration requirement provided in
51 the provisions of §32-3-301, *et seq.* of this code.

52 (h) The commissioner is authorized to invoice the applicant for the costs of conducting the
53 fairness hearing and the preparation of the statement of findings.

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

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Clerk of the House of Delegates

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Clerk of the Senate

Originated in the House of Delegates.

In effect from passage.

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Speaker of the House of Delegates

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President of the Senate

The within is this the.....
Day of, 2025.

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Governor