

WEST VIRGINIA LEGISLATURE

2025 REGULAR SESSION

Committee Substitute

for

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for

House Bill 2889

By Delegates Criss, Barnhart, and Hott

[Reported from the Committee on Finance, March 20,
2025]

1 A BILL to amend and reenact §32-4-402 of the Code of West Virginia, 1931, as amended; and to
2 amend said code by adding thereto a new section, designated §32-4-402a, all relating to
3 authorizing the Commissioner of the State Auditor of West Virginia, or his or her designee,
4 to conduct a fairness hearing for transactions involving the exchange of a security for one
5 or more outstanding securities, claims or property interests, or partly for cash; expressly
6 authorizing the Commissioner, or his or her designee, to conclude whether the conditions
7 of the exchange are fair to all security holders participating in the exchange; providing an
8 exemption for successful applicants from the registration requirements proscribed under
9 Section 3(a)(1) of the Securities Act, 15 U.S.C. § 77c(a)(10) and §32-3-301 of this code;
10 providing definitions; providing for an application process to set fairness hearings;
11 proscribing timelines for the Commissioner, or his or her designee, to set fairness hearings
12 and issue decisions; proscribing notice requirements; proscribing a filing fee and hearing
13 fee caps; and authorizing the Commissioner to conduct fairness hearings via telephone
14 conference, video conference, or any mode authorized by any rule or order of the
15 Commissioner.

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 section three hundred one, article three of this
2 chapter and section four hundred three of this article:

3 (1) Any security (including a revenue obligation) issued or guaranteed by the United
4 States, any state, any political subdivision of a state, or any agency or corporate or other
5 instrumentality of one or more of the foregoing; or any certificate of deposit for any of the 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 of
26 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 the
28 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 twenty-nine-a of this code
37 which, after notice to such exchange or market system and an opportunity to be heard, remove
38 any such exchange or market system from this exemption if the commissioner finds that the listing
39 requirements or market surveillance of such exchange or market system are such that the
40 continued availability of such exemption for such exchange or market system is not in the public
41 interest and that removal is necessary for the protection of investors;

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

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

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

56 (12) Any security issued by an agricultural cooperative association operating in this state
57 and organized under article four, chapter nineteen of this code, or by a foreign cooperative
58 association organized under the laws of another state and duly qualified to transact business in
59 this state.

60 (b) The following transactions are exempt from sections 301 and 403:

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

62 (2) Any nonissuer distribution of an outstanding security if: (A) A recognized securities
63 manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as
64 of a date within eighteen months, and a profit and loss statement for either the fiscal year
65 preceding that date or the most recent year of operations; or (B) the security has a fixed maturity or
66 a fixed interest or dividend provision and there has been no default during the current fiscal year or
67 within the three preceding fiscal years, or during the existence of the issuer and any predecessors
68 if less than three years, in the payment of principal, interest or dividends on the security;

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

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

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

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

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

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

(9) Any transaction pursuant to an offer directed by the offeror to not more than ten persons (other than those designated in subdivision (8) above) in this state during any period of twelve consecutive months, whether or not the offeror or any of the offerees is then present in this state, if:

(A) The seller reasonably believes that all the buyers in this state (other than those designated in subdivision (8) above) are purchasing for investment; and (B) no commission or other remuneration is paid or given, directly or indirectly, for soliciting any prospective buyer in this state (other than those designated in subdivision (8) above), but the commissioner may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption, or increase or decrease the number of offerees permitted, or waive the conditions in clauses (A) and (B) with or without the substitution of a limitation on remuneration;

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

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

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

(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 and
115 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.

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

133 (d) In any proceeding under this chapter, the burden of proving an exemption or an
134 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.**

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

3 (1) A readjustment by modification of the terms of securities by agreement;

4 (2) A readjustment by the exchange of securities by the issuer for others of its securities;

5 (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 or
15 by any of its shareholders, members or creditors and contains a proposal to issue securities in
16 exchange for one or more bona fide outstanding securities, claims, or property interests, or partly
17 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; and may

29 require the applicant to amend or resubmit the application to comply with any rule or order of the
30 Commissioner prior to setting a date for the fairness hearing. The Commissioner, or his or her
31 designee, shall be required to hold a fairness hearing on any application for approval within 30
32 days after the filing of a complete application and supporting documents required by any rule or
33 order of the Commissioner.

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

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

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

48 (g) Securities issued in accordance with a plan so approved by the Commissioner, or his or
49 her designee, are exempt from the registration requirement provided in the provisions of §32-3-
50 301, et seq.

51 (h) The Commissioner is authorized to invoice the applicant for the costs of conducting the
52 fairness hearing and the preparation of the statement of findings: Provided, That the costs
53 invoiced may not exceed \$5000.