





## **DIVISION OF BANKING**

(304) 558-2294

Building #3, Room 311 • State Capitol Complex • 1900 Kanawha Blvd., East • Charleston, WV 25305-0240 • FAX: (304) 558-0442

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### **Proposed Amendment to Title 106, Series 9, Rule Pertaining to the Legal Lending Limit**

#### **STATEMENT OF CIRCUMSTANCES REQUIRING THIS FILING**

The West Virginia Division of Banking ("the Division") proposes amending the existing Rule Pertaining to the Legal Lending Limit. This amendment is proposed because the Division has received numerous inquiries from the banks subject to the rule inquiring as to the proper interpretation and application of the rule to various loan scenarios. It has become evident from these inquiries that the current rule is difficult to understand and administer. These amendments are designed to clarify the common areas where questions regarding legal lending limits arise, i.e. loans to non-affiliated borrowers who may be engaged in a common enterprise and loans to affiliated groups or entities.



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### Proposed Amendment to Title 106, Series 9, Rule Pertaining to the Legal Lending Limit

#### SUMMARY OF THE PROPOSED AMENDMENT

The proposed Amendment, at section 2 of the Rule, expands the definition of "person" to include limited liability companies and any other legal entity or organization. It also makes technical changes by revising the order of some definitions and by moving the definitions of "readily marketable collateral", "financial instruments", and "control" from other sections of the Rule to this section.

Section 4 of the Rule is amended to clarify that the lending limit applies to loans to non-affiliated borrowers engaged in a common enterprise if there is substantial financial interdependence between the borrowers. It also revises the definition of "common enterprise" so that it includes ownership of voting ownership interests other than securities.

Section 5 of the Rule is amended to clarify that the lending limit applies to loans to affiliated borrowers regardless of the borrower's form of business organization. It also revises the definition of "affiliated" so that it includes ownership or control of all voting ownership interests in an entity rather than only stock and requires ownership or control of a 25% interest rather than 50%. Section 6 is deleted and its treatment of loans to partnerships, joint ventures and associations is folded into Section 5.

Section 7 of the Rule (changed to Section 6) is amended to clarify that the exception to the legal lending limit at WV Code 31A-4-26(a)(4)(K) applies to loans to persons who lease all of the useable space to a bank for its main, office, branch, or locations of other operations conducted by the bank.

Section 8 of the Rule (changed to Section 7) is amended to clarify that the legal lending limit is applicable to the sale of federal funds regardless of the term of the sale. It also clarifies that a bank must have a prior written commitment to a loan participation agreement before closing on the loan and must remove the disallowed portion of the loan from its books within ten (10) days of closing.

The proposed Amendment also makes technical "clean-up" changes throughout the Rule.

**APPENDIX B**

**FISCAL NOTE FOR PROPOSED RULES**

**Rule Title:** Rule Pertaining to the Legal Lending Limit

**Type of Rule:** X Legislative      Interpretive      Procedural

**Agency** West Virginia Division of Banking

**Address** 1900 Kanawha Blvd E

Capital Complex, Building 3 Room 311

Charleston, WV 25305

**1. Effect of Proposed Rule**

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<b>ESTIMATED TOTAL COST</b>	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
<b>PERSONAL SERVICES</b>	0	0	0	0	0
<b>CURRENT EXPENSE</b>	0	0	0	0	0
<b>REPAIRS &amp; ALTERATIONS</b>	0	0	0	0	0
<b>EQUIPMENT</b>	0	0	0	0	0
<b>OTHER</b>	0	0	0	0	0

**2. Explanation of above estimates:**

The amendments, as proposed, are not expected to cause an increase in the inquiries received from banks.

**3. Objectives of these rules:**

To implement the provisions of WV Code 31A-4-26. The proposed amendments are designed to clarify the application of the legal lending limit to all legal forms of business organizations; to loans to non affiliated borrowers and affiliated borrowers; to transactions involving the sale of federal funds; and to loan participation agreements. The proposed amendments also make technical corrections.

Rule Title: Rule Pertaining to the Legal Lending Limit

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Ncne

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

State Chartered banks should find it easier to interpret and apply the rule to their activities. The safety and soundness of these institutions should be strengthened.

C. Economic Impact on Citizens/Public at Large.

The public's confidence in the safety and soundness of the state banking system should be strengthened since banks are limited in the amount of capital they can commit to one individual or closely related business interests.

Date: July 19, 2000

Signature of Agency Head or Authorized Representative

Robert J. Jamon

## SERIES 9. RULE PERTAINING TO THE LEGAL LENDING LIMIT

### § 9-1. General.

1.1. Scope. -- This rule establishes the general method for implementing W.Va. Code § 31A-4-26; it applies to all loans and extensions of credit made by state-chartered banking institutions and their domestic operating subsidiaries. This rule does not apply to loans made by a state-chartered banking institutions to its their affiliates (as that term is defined in subsection (b)(1) of Section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(1))) or operating subsidiaries. W.Va. Code § 31A-4-26 and this rule are intended to prevent one (1) individual, or a relatively small group, from borrowing an unduly large amount of the state-chartered banking institution's funds. The statute and this rule are intended to safeguard the depositors of state-chartered banking institutions by spreading the loans and extensions of credit among a relatively large number of persons engaged in different lines of business.

1.2. Authority. -- W.Va. Code § 31A-4-26(a)(5).

1.3. Filing Date. -- April 4, 1996.

1.4. Effective Date. -- May 1, 1996.

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SECRETARY OF STATE

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### § 9-2. Definitions.

For purposes of this rule:

2.1. "Loans and/or Extensions of Credit" means any direct or indirect advance of funds (including obligations of makers and endorsers arising from the discounting of commercial paper) to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of a person. "Loans and/or Extensions of Credit" also includes a "Contractual Commitment to Advance Funds" ~~as that term is defined in section 2.4 of this rule;~~

2.2. "Contractual Commitment to Advance Funds" means (a) an obligation on the part of the bank to make payments (directly or indirectly) to a designated third party contingent upon a default by the bank's customer in the performance of an obligation under the terms of that customer's contract with the third party or (b) an obligation to guarantee or stand as surety for the benefit of a third party. The term includes, but is not limited to, "Standby Letters of Credit", guarantees, puts and other similar arrangements. For purposes of this rule, undisbursed loan funds and loan commitments not yet drawn upon but which the bank has through written agreement obligated itself to disburse upon request are contractual commitments to advance funds as defined in this subsection. The definition does not include commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer, which do not guarantee payment of a money obligation, and which do not provide for payment in the event of a default by the account party;

2.3. A "Standby Letter of Credit" is any letter of credit, or similar arrangement, however

named or described, which represents an obligation to the beneficiary on the part of the issuer (a) to repay money borrowed by or advanced to or for the account of the account party, or (b) to make payment on account of any indebtedness undertaken by the account party, or (c) to make payment on account of any default by the account party in the performance of an obligation;

~~2.2.~~ 2.4. "Person" means an individual, sole proprietorship, partnership, joint venture, association, society, firm, institution, syndicate, trust, estate, business trust, limited liability company, public or private corporation, not-for-profit corporation, sovereign government or agency, instrumentality, or political subdivision thereof, or any ~~similar entity or organization~~ other legal form of entity or organization not specifically listed herein;

~~2.3~~ 2.5. "Unimpaired Capital and Unimpaired Surplus" means the amount of total equity capital outstanding as indicated in the bank's most recent quarterly report of condition and income as filed with the Commissioner of Banking pursuant to W.Va. Code § 31A-4-19, plus the amount of the allowance for loan losses, minus the amount of goodwill or other nonmarketable intangible assets included in that quarterly report pursuant to generally accepted accounting principles. Unrealized gains and losses on the bank's securities and loan portfolios shall be included in the calculation of total equity capital to the extent required by generally accepted accounting principles and applicable federal or state law, rule or regulation;

~~2.4.~~ "Contractual Commitment to Advance Funds" means (a) ~~an obligation on the part of the bank to make payments (directly or indirectly) to a designated third party contingent upon a default by the bank's customer in the performance of an obligation under the terms of that customer's contract with the third party or~~ (b) ~~an obligation to guarantee or stand as surety for the benefit of a third party. The term includes, but is not limited to, standby letters of credit (as defined in section 2.5 of this rule), guarantees, puts and other similar arrangements. For purposes of this rule, undisbursed loan funds and loan commitments not yet drawn upon but which the bank has through written agreement obligated itself to disburse upon request are contractual commitments to advance funds as defined in this subsection. The definition does not include commercial letters of credit and similar instruments where the issuing banks expect the beneficiary to draw upon the issuer, which do not "guarantee" payment of a money obligation, and which do not provide for payment in the event of a default by the account party; and~~

~~2.5.~~ A "Standby Letter of Credit" is any letter of credit, or similar arrangement, however named or described, which represents an obligation to the beneficiary on the part of the issuer (a) to repay money borrowed by or advanced to or for the account of the account party, or (b) to make payment on account of any indebtedness undertaken by the account party, or (c) to make payment on account of any default by the account party in the performance of an obligation;

2.6. "Readily Marketable Collateral" means "Financial Instruments" and bullion which are salable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions on an auction or a similarly available daily bid and ask price market;

2.7. "Financial Instruments" include stocks, notes, bonds, and debentures traded on a national securities exchange, "OTC Margin Stocks" (as defined in Regulation U of the Federal Reserve Board), commercial paper, negotiable certificates of deposit, bankers' acceptances and shares in money market and mutual funds of the type which issue shares in which banks may

perfect a security interest. The term "Financial Instruments" does not include mortgages;

2.8. "Current Market Value" means the bid or closing price listed for an item in a regularly published listing or an electronic reporting service;

2.9. A "Readily Marketable Staple" means an article of commerce, agriculture or industry of such uses as to make it the subject of dealings in a ready market with sufficiently frequent price quotations as to make the price easily and definitely ascertainable, and the staple itself easy to sell at any time at a price determined in an organized market; and,

2.10. "Control" or "Common Control" as used throughout this rule shall be presumed to exist when:

(a) One or more persons acting in concert directly or indirectly own, control or have power to vote twenty-five percent (25%) or more of any class of voting securities or other ownership interests of another person;

(b) One or more persons, acting in concert, control, in any manner, the election of a majority of the directors, trustees or other persons exercising similar functions of another person; or,

(c) Any other circumstances exist which indicate that one or more persons acting in concert directly or indirectly exercise a controlling influence over the management or policies of another person.

### **§ 9-3. Limitations and Compliance.**

#### **3.1. General limitation.**

The total loans and extensions of credit made by a state-chartered banking institution to any one person or common enterprise (as defined in subsection 4.2 of this rule) and not fully secured, as determined in a manner consistent with subsection 3.2 of this rule, shall not exceed fifteen percent (15%) of the unimpaired capital and unimpaired surplus of that state-chartered banking institution initially determined for the period that the loan or extension of credit is made.

#### **3.2. Additional general limitation; loans fully secured by readily marketable collateral.**

Where the total loans and extensions of credit by a state-chartered banking institution to any one person or common enterprise are fully secured by readily marketable collateral having a current market value, as determined by reliable and continuously available price quotations, at least equal to the outstanding amount of those loans and extensions, then the bank may provide these loans or extensions of up to ten percent (10%) of the unimpaired capital and unimpaired surplus of that state-chartered banking institution initially determined for the period that the loan or extension is made. This limitation is separate from and in addition to the limitation contained in subsection 3.1 of this rule.

### ~~3.3. Definition of readily marketable collateral.~~

~~For purposes of this rule, "Readily Marketable Collateral" means financial instruments and bullion which are salable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions on an auction or a similarly available daily bid and ask price market. "Financial Instruments" include stocks, notes, bonds, and debentures traded on a national securities exchange, "OTC Margin Stocks" (as defined in Regulation U of the Federal Reserve Board), commercial paper, negotiable certificates of deposit, bankers' acceptances and shares in money market and mutual funds of the type which issue shares in which banks may perfect a security interest. The term "Financial Instruments" does not include mortgages.~~

### 3.4. 3.3. Compliance with W.Va. Code § 31A-4-26(a)(2).

(a) Each loan or extension of credit based on the limitation contained in W.Va. Code § 31A-4-26(a)(2) shall be secured by readily marketable collateral having a current market value of at least one hundred percent (100%) of the amount of the loan or extension of credit at all times. ~~"Current Market Value" means the bid or closing price listed for an item in a regularly published listing or an electronic reporting service.~~

(b) Each bank must institute adequate procedures to ensure that the collateral value fully secures the outstanding loan at all times.

(c) Financial instruments may be denominated in foreign currencies which are freely convertible to United States dollars. If collateral is denominated and payable in a currency other than that of the loan or extension of credit which it secures, the bank's procedures must require that the collateral be revalued at least monthly, using appropriate foreign exchange rates, in addition to being repriced at current market value.

(d) If collateral values fall below one hundred percent (100%) of the outstanding loan, to the extent that the loan is no longer in conformance with this section and exceeds the general fifteen percent (15%) limitation, the loan must be brought into conformance within five (5) business days, except where judicial proceedings, regulatory actions or other extraordinary occurrences prevent the bank from taking action.

### ~~3.5.~~ 3.4. Material decline of unimpaired capital and unimpaired surplus.

(a) Where there is a material decline in a state-chartered bank's unimpaired capital and unimpaired surplus causing it to decrease during any quarterly reporting period more than twenty percent (20%) from that amount reported in the bank's most recent report of income and condition or causing it to decrease more than thirty percent (30%) in any twelve month period, the bank shall review its outstanding loans and extensions of credit and report to the commissioner of banking those loans and extensions of credit that exceed the limitations of this section using the bank's current re-evaluated unimpaired capital and unimpaired surplus. The report shall detail the bank's position in each such loan and extension of credit. The commissioner may, within his or her discretion, require that these loans and extensions of credit be brought into conformity with the bank's current re-evaluated legal lending and investment limitation.

(b) The commissioner of banking retains the authority to direct any state-chartered bank to recalculate its lending limits at more frequent intervals than provided in this section and require all outstanding loans and extensions of credit to be brought into conformance with the re-evaluated limitation in order to ensure a bank's safety and soundness. In such cases, the commissioner will provide the bank a written notice explaining briefly the specific reasons why the determination was made to require the more frequent calculations.

#### **§ 9-4. Combining Loans to ~~Separate Borrowers.~~ Non-Affiliated Persons or Entities.**

4.1. General Rule. -- Loans or extensions of credit to one (1) person will be attributed to other persons, for purposes of this rule, when:

(a) the proceeds of the loans or extensions of credit are to be used for the direct benefit of the other person or persons, or

(b) a "Common Enterprise" is deemed to exist between the persons.

4.2. Definition of a common enterprise.

(a) Whether two (2) or more persons are engaged in a ~~"Common Enterprise"~~ will common enterprise depends upon a realistic evaluation of the facts and circumstances of particular transactions.

(b) Where the expected source of repayment for each loan or extension of credit is the same for each person and neither person has another source of income from which the loan may be fully repaid, a ~~"Common Enterprise"~~ common enterprise will be deemed to exist and the loans or extensions of credit must be combined. An employer will not be treated as a source of repayment because of wages and salaries paid to an employee, provided the employee does not exercise control over the employer.

(c) Where there is "Substantial Financial Interdependence" between the persons, a common enterprise will be deemed to exist and the loans or extensions of credit must be combined. ~~Where loans or extensions of credit are made by persons who are related through common control, including where one person is controlled by another person, a "Common Enterprise" will be deemed to exist if the persons are engaged in interdependent businesses or there is substantial financial interdependence among them. A "Common Enterprise"~~ "Substantial Financial Interdependence" will be deemed to exist when fifty percent (50%) or more of one person's gross receipts or gross expenditures (on an annual basis) are derived from transactions with one or more another persons related through common control (as defined in Section 4.3 of this rule). Gross receipts and expenditures include gross revenues/ and expenses, intercompany loans, dividends, capital contributions, and similar receipts or payments.

(d) A ~~"Common Enterprise"~~ common enterprise will also be deemed to exist when separate persons borrow from a bank for the purpose of acquiring a business enterprise of which those persons combined will own more than ~~fifty percent (50%)~~ twenty-five percent (25%) of the voting securities or other voting ownership interests of the entity.

4.3. ~~Definition of control. — For the purposes of Section 4.2(c) of this rule, "Control" shall be presumed to exist when:~~

~~(a) One or more persons acting in concert directly or indirectly own, control or have power to vote twenty five percent (25%) or more of any class of voting securities of another person;~~

~~(b) One or more persons, acting in concert, control, in any manner, the election of a majority of the directors, trustees or other persons exercising similar functions of another person; or~~

~~(c) Any other circumstances exist which indicate that one or more persons acting in concert directly or indirectly exercise a controlling influence over the management or policies of another person.~~

#### **§ 9-5. Loans to Corporations Combining Loans to Affiliated Persons or Entities.**

##### 5.1. General rules.

(a) Loans or extensions of credit to a person and its affiliates or to affiliates of one person need not be combined unless either the direct benefit or the common enterprise test is met as set forth in section 4.

(b) Loans or extensions of credit to a partnership, joint venture or association need not be combined with loans or extensions of credit to the members of the partnership, joint venture or association if the direct benefit or the common enterprise tests are not met. Similarly, loans or extensions of credit to members of a partnership, joint venture or association need not be combined with loans or extensions of credit to other members of the partnership, joint venture or association if the direct benefit or the common enterprise tests are not met with respect to the other members. The tests will be considered to have been met when loans or extensions of credit are made to members of a partnership, joint venture or association for the purpose of purchasing an interest in the partnership, joint venture or association.

##### 5.1. 5.2. Definition of subsidiary affiliated.

~~For purposes of this rule, a corporation an entity is a "Subsidiary" "Affiliated" of with any person which owns or controls or beneficially owns or controls more than fifty percent (50%) twenty-five percent (25%) of the voting stock or other voting ownership interest of the corporation entity. The ownership or control need not be direct. For example, if A owns or controls more than fifty percent (50%) twenty-five percent (25%) of the voting stock interest of Corporation Entity X which, in turn, owns more than fifty percent (50%) twenty five percent (25%) of the voting stock interest of Corporation Entity Y, Corporation Entity Y would be considered a subsidiary an affiliate of both A and of Corporation Entity X.~~

~~5.2. General rule. — Loans or extensions of credit to a person and its subsidiary or to subsidiaries of one person need not be combined where the state chartered banking institution~~

~~has determined that the person and subsidiaries involved are not engaged in a "Common Enterprise" as that term is defined in Section 4.2 of this rule.~~

### 5.3. Exceptions. --

~~(a) Notwithstanding Section 5.2 subdivision 5.1 (a) of this rule, loans or extensions of credit by a state-chartered banking institution to a "Corporate an "Affiliated Group" may not exceed fifty percent (50%) of that state-chartered banking institution's unimpaired capital and unimpaired surplus. This aggregate limitation applies only to loans made pursuant to West Virginia Code § 31A-4-26(a)(1) and (2). A "Corporate An "Affiliated Group" includes a person and all of its subsidiaries affiliates.~~

~~(b) Loans or extensions of credit to a limited partnership, joint venture or association need not be combined with loans or extensions of credit to the limited partners in a limited partnership or to members of a joint venture or association if the partners or members, by the terms of the partnership or membership agreement, are not to be held liable for the debts or actions of the partnership, joint venture or association. However, the direct benefit and common enterprise rules are applicable to these partners or members.~~

## ~~§ 9-6. Loans to Partnerships, Joint Ventures, and Associations.~~

~~6.1. General rule. — Loans or extensions of credit to a partnership, joint venture or association shall, for purposes of this rule, be considered loans or extensions of credit to each member of the partnership, joint venture or association.~~

~~6.2. Attributing. — Loans or extensions of credit to members of a partnership, joint venture or association shall, for the purpose of this rule, be attributed to the partnership, joint venture or association where one or more of the tests set forth in section 4 of this rule are satisfied with respect to one or more members. However, loans to members of a partnership, joint venture or association will not be attributed to other members of the partnership, joint venture or association under this subsection unless if one or more of the tests set forth in section 4 of this rule are satisfied with respect to the other members. The tests set forth in section 4 of this rule shall be deemed to be satisfied when loans or extensions of credit are made to members of a partnership, joint venture or association for the purpose of purchasing an interest in the partnership, joint venture or association.~~

~~6.3. Exception. — The rule set forth in Section 6.1 of this rule is not applicable to limited partners in limited partnerships or to members of joint ventures or associations if the partners or members, by the terms of the partnership or membership agreement, are not to be held liable for the debts or actions of the partnership, joint venture or association. However, the rules set forth in Section 4.1 of this rule are applicable to these partners or members.~~

## ~~§ 9-7. § 9-6. Exceptions to the Lending Limits.~~

~~7.1. 6.1. Discount of commercial or business paper. -- W.Va. Code § 31-4-26(a)(4)(A) provides that:~~

Loans or extensions of credit arising from the discount of commercial or business paper evidencing an obligation to the person negotiating it with recourse shall not be subject to any limitation based on capital and surplus.

(a) This exception applies to negotiable paper given in payment of the purchase price of commodities in domestic or export transactions purchased for resale or to be used in connection with the fabrication of a product or to be used for any other business purpose which may reasonably be expected to provide funds for payment of the paper. Loans or extensions of credit arising from the discount of paper of the kind described in this subsection must bear the full recourse endorsement of the owner. However, loans or extensions of credit arising from the discount of such paper in export transactions may be endorsed by the owner without recourse or with limited recourse, or may be accompanied by a separate agreement for limited recourse: Provided, That if transferred without full recourse, the paper must be supported by an assignment of appropriate insurance covering the political, credit and transfer risks applicable to the paper. Insurance provided by the Export-Import Bank or the Foreign Credit Insurance Association is considered appropriate for this purpose. Loans or extensions of credit based on this exception are not subject to any limitation.

(b) Since the reason for the unlimited credit under this exception is that the paper arises from the sale of a commodity which may reasonably be expected to provide funds for payment of the paper, failure to pay either principal or interest when due removes the reason for unlimited credit. Therefore, although the line of credit to the maker or endorser should not be classified as excessive by reasons of the default, the paper on which the default has occurred must thereafter be taken into consideration in determining whether additional loans or extensions of credit may be made within the limits of W.Va. Code § 31A-4-26(a). The same principles of disqualification from the exception applies apply to any renewal or extension of either the entire loan or an installment of the loan.

~~7-2.~~ 6.2. Bankers' acceptances. -- W.Va. Code § 31A-4-26(a)(4)(B) provides that:

The purchase of bankers' acceptances of the kind described in section thirteen of the Federal Reserve Act and issued by other banks shall not be subject to any limitation based on capital and surplus.

(a) This exception permits the purchase by a state-chartered banking institution without limitation of bankers' acceptances created by other banks: Provided, that the acceptances are of the kind described in 12 U.S.C. § 372 (eligible acceptances). Acceptances other than those described in 12 U.S.C. § 372 must be included within the purchasing state-chartered banking institution's lending limit to each acceptor bank.

(b) The limits under which a state-chartered banking institution may itself accept drafts eligible for rediscount are contained in 12 U.S.C. § 372. These limits are distinct from the limits under W.Va. Code § 31A-4-26(a). Acceptances by a bank of "Ineligible" drafts, i.e., time drafts which do not meet the requirements for discount with a Federal Reserve Bank, are subject to the limitations of W.Va. Code § 31A-4-26(a).

(c) During any period within which a state-chartered banking institution holds its

own acceptances, eligible or ineligible, having given value therefore, the amount given is considered, for purposes of this rule, to be a loan or extension of credit to the customer for whom the acceptance was made and is subject to the lending limits. To the extent that a loan or extension of credit created by discounting the acceptance is covered by a bona fide participation agreement, the discounting bank need only consider that portion of the discounted acceptance which it retains as being subject to the limitations of W.Va. Code § 31A-4-26(a).

~~7.3.~~ 6.3. Loans secured by bills of lading or warehouse receipts covering readily marketable staples.

(a) The total loans and extensions of credit made by a state chartered banking institution to any one person or common enterprise may exceed fifteen percent (15%) of the unimpaired capital and unimpaired surplus of that state chartered banking institution at the time the loans or extensions of credit are made if they are fully secured by bills of lading or other documents giving a lien on readily marketable staples, as determined in a manner consistent with subdivision ~~7.3(b)~~ 6.3(b) of this rule, notwithstanding the collateral requirements in subsection 3.2 of this rule.

(b) Where the total loans and extensions of credit by a state chartered banking institution to any one person or common enterprise are fully secured by bills of lading or other documents giving a lien on readily marketable staples, the market value of which at all times equals or exceeds one hundred fifteen percent (115%) of the outstanding amount of such loans or extensions of credit, the bank may provide such loans or extensions of up to twenty percent (20%) of the unimpaired capital and unimpaired surplus of that state chartered banking institution. This limitation is in addition to the limitation contained in subsection 3.1 of this rule. ~~The~~ Thus, the total amount allowed under this provision may ~~thus~~ not exceed thirty-five percent (35%) of a bank's unimpaired capital and unimpaired surplus (~~viz. 20% + 15%~~).

(c) The maximum term of a loan or extension of credit extended under subdivision ~~7.3(b)~~ 6.3(b) of this rule shall be ten (10) months.

(d) ~~A "Readily Marketable Staple" means an article of commerce, agriculture or industry of such uses as to make it the subject of dealings in a ready market with sufficiently frequent price quotations as to make the price easily and definitely ascertainable, and the staple itself easy to sell at any time at a price determined in an organized market.~~ Staples eligible for this exception must be nonperishable and must be fully covered by insurance when insurance is customary. This exception is intended to apply primarily to basic commodities, such as wheat and other grains, cotton, wool, and basic metals such as tin, copper, lead and the like. Whether a commodity is readily marketable depends upon existing conditions and it is possible that a commodity that qualifies at one time may cease to qualify at a later date. Fabricated commodities, which do not constitute standardized interchangeable units and do not possess uniformly broad marketability, do not qualify as readily marketable staples.

(e) Commodities sometimes fail to qualify as nonperishable because of the manner in which they are handled or stored during the life of the loan or extension of credit. Accordingly, the lending bank must determine the question as to whether a staple is nonperishable on a case-by-case basis.

(f) The important characteristic of warehouse receipts, order bills of lading or other similar documents is that the holder of the documents has control of the commodity and can obtain immediate possession. (However, the existence of brief notice periods or similar procedural requirements under state law, for the disposal of the collateral will not affect the eligibility of instruments for this exception.) Only documents with these characteristics are eligible security for loans under this exception. In the event of default on a loan secured by such documents, the bank must be in a position to sell the underlying commodity and promptly transfer title and possession to the purchaser, thus being able to protect itself without extended litigation. Generally, documents of title qualifying under the Uniform Commercial Code [W.Va. Code § 46A-1-201] are "~~Similar Documents~~" similar documents qualifying for this exception.

(g) Field warehouse receipts are an acceptable form of collateral when they are issued by a duly bonded and licensed grain elevator or warehouse having exclusive possession and control of the commodities even though the grain elevator or warehouse is maintained on the commodity owner's premises.

(h) Warehouse receipts issued by the borrower-owner which is a grain elevator or warehouse company, duly bonded and licensed and regularly inspected by state and federal authorities, may be considered eligible collateral under this exception only when the receipts are registered with an independent registrar whose consent is required before the commodities can be withdrawn from the warehouse.

(i) If collateral values fall below the levels required by subdivision ~~7.3(b)~~ 6.3(b) of this rule, to the extent that a loan is no longer in conformance with the collateral requirements and exceeds the general fifteen percent (15%) limitation, the loan must be brought into conformance within five (5) business days, except where judicial proceedings, regulatory actions or other extraordinary occurrences prevent the bank from taking action.

~~7.4.~~ 6.4. Loans secured by obligations of the United States and West Virginia.--W.Va. Code § 31A-4-26(a)(4)(D) provides that:

Loans or extensions of credit secured by bonds, notes, certificates of indebtedness or treasury bills of the United States or by other such obligations fully guaranteed as to principal and interest by the United States or by bonds, notes, certificates of indebtedness which are general obligations of the state of West Virginia or by other such obligations fully guaranteed as to principal and interest by the state of West Virginia shall not be subject to any limitation based on capital and surplus.

(a) This exception applies only to the extent that loans or extensions of credit are fully secured by the current market value of obligations of the United States or the state of West Virginia or guaranteed by the United States ~~of~~ or the state of West Virginia.

(b) If the market value of the collateral declines to the extent that the loan is no longer in conformance with this exception and exceeds the general fifteen percent (15%) limitation, the loan must be brought into conformance within five (5) business days.

~~7.5.~~ 6.5. Loans to or guaranteed by a federal agency or the state of West Virginia. -- W.Va. Code § 31A-4-26(a)(4)(E) provides that:

Loans or extensions of credit to or secured by unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission or establishment of the United States or of the State of West Virginia or any corporation wholly owned directly or indirectly by the United States shall not be subject to any limitation based on capital and surplus.

(a) This exception may apply to only that portion of a loan or extension of credit that is covered by a federal government or state of West Virginia guarantee or commitment.

(b) For purposes of this exception, the commitment or guarantee must be payable to cash or its equivalent within sixty (60) days after demand for payment is made.

(c) A guarantee or commitment is unconditional if the protection afforded the bank is not substantially diminished or impaired in the case of loss resulting from factors beyond the bank's control. Protection against loss is not materially diminished or impaired by procedural requirements, such as an agreement to take over only in the event of default, including default over a specific period of time, a requirement that notification of default be given within a specific period after its occurrence, or a requirement of good faith on the part of the bank.

~~7.6.~~ 6.6. Loans secured by segregated deposit accounts. -- W.Va. Code § 31A-4-26(a)(4)(F) provides that:

Loans or extensions of credit secured by a segregated deposit account in the lending bank shall not be subject to any limitation based on capital and surplus.

(a) The lending bank must ensure that a security interest has been perfected in the deposit, including the assignment of a specifically identified deposit and any other actions required by state law.

(b) Deposit accounts ~~which~~ that may qualify for this exception include deposits in any form generally recognized as deposits. In the case of a deposit eligible for withdrawal prior to the maturity of the secured loan, the bank must establish internal procedures ~~which~~ that ~~will~~ prevent the release of the security.

(c) A deposit which is denominated and payable in a currency other than that of a loan or extension of credit which it secures may be eligible for this exception if it is freely convertible to United States dollars. The deposit must be revalued at least monthly, using appropriate foreign exchange rates to ensure that the loan or extension of credit remains fully secured. This exception applies to only that portion of the loan or extension of credit that is covered by the United States dollar value of the deposit. If the United States dollar value of the deposit falls to the extent that the loan is in nonconformance with this exception and exceeds the general fifteen percent (15%) limitation, the loan must be brought into conformance within five (5) business days, except where judicial proceedings, regulatory actions or other extraordinary occurrences prevent the bank from taking such action. This exception is not authority for state-chartered banking institutions to take deposits denominated in foreign currencies.

~~7.7.~~ 6.7. Loans to depository institutions with the approval of the Commissioner.-- W.Va. Code § 31A-4-26(a)(4)(G) provides that:

Loans or extensions of credit to any banking institution or to any receiver, conservator or other agent in charge of the business and property of such banking institution or other federally insured depository institution, when such loans or extensions of credit are approved by the Commissioner of banking, shall not be subject to any limitation based on capital and surplus.

(a) This exception is intended to apply only in emergency situations where a state-chartered banking institution is called upon to provide assistance to another depository institution.

(b) For purposes of this subsection, a depository institutions means a commercial bank, savings bank, trust company, savings association or credit union.

7.8. 6.8. Discount of installment consumer paper.

(a) Loans and extensions of credit arising from the discount of negotiable or nonnegotiable installment consumer paper ~~which that~~ carries a full recourse endorsement or unconditional guarantee of any one person or common enterprise transferring the paper are subject ~~under this section~~ to a maximum limitation equal to ~~10 percent (10%)~~ twenty-five percent (25%) of the bank's unimpaired capital and unimpaired surplus, provided the state-chartered banking institution has assessed the financial capacity of the endorser or guarantor upon which it is relying. ~~notwithstanding the collateral requirements set forth in subsection 3.2 of this rule. This limitation is separate from and in addition to the amount allowed under the bank's general limitation set forth in subsection 3.1 of this rule. Thus, the total amount allowable under this provision may not exceed (25%) of the bank's total unimpaired capital and unimpaired surplus.~~

(b) The unconditional guarantee may be in the form of a repurchase agreement or a separate guarantee agreement. A condition reasonably within the power of the bank to perform, such as the repossession of collateral, will not be considered to make conditional an otherwise unconditional agreement.

(4) (i) For purposes of this section of ~~this the~~ rule only, "Consumer" means the user of any products, commodities, goods, or services, whether leased or purchased, and does not include any person who purchases products or commodities for the purpose of resale or for fabrication into goods for sale.

(2) (ii) For purposes of this section of the rule only, "Consumer Paper" includes paper relating to automobiles, mobile homes, residences, office equipment, household items, tuition fees, insurance premium fees and similar consumer items. Also included is paper covering the lease (where the bank is not the owner or lessor) or purchase of equipment for use in manufacturing, farming, construction or excavation.

(b) (c) Under certain circumstances, installment consumer paper which otherwise meets the requirements of this section will be considered a loan or extension of credit to the maker of the paper rather than the seller ~~or transferor~~ of the paper even though it carries a full recourse endorsement or unconditional guarantee. Specifically, where (A) through a review of the bank's files it has been determined that the financial condition of each maker is reasonably

adequate to repay the loan or extension of credit and (B) an officer designated by the bank's Chairman or Chief Executive Officer pursuant to authorization by the board of directors certifies in writing that the bank is relying primarily upon the maker to repay the loan or extension of credit, the loan or extension of credit is subject only to the lending limits of the maker of the paper. Where paper is purchased in substantial quantities, the records, evaluation and certification may be in such form as is appropriate for the class and quantity of paper involved. The bank may use sampling techniques, or other appropriate methods, to independently verify the reliability of the credit information supplied by the seller.

~~7.9.~~ 6.9. Loans and extensions of credit secured by livestock.

(a) The total loans and extensions of credit made by a state-chartered banking institution to any one person or common enterprise may exceed fifteen percent (15%) of the unimpaired capital and unimpaired surplus of that state-chartered banking institution at the time the loans or extensions of credit are made if they are fully secured by documents or instruments securing title or giving a lien on livestock, as determined in a manner consistent with subdivision ~~7.9(b)~~ 6.9(b) of this rule.

(b) Where the total loans and extensions of credit by a state-chartered banking institution to any one person or common enterprise are fully secured by:

(i) shipping documents or instruments transferring or securing title covering livestock or giving a first lien on livestock when the market value of the livestock securing the obligation is not at any time less than one hundred fifteen percent (115%) of the face amount of the obligation; or,

(ii) discounted paper given in payment for livestock by dealers, which carries a full recourse endorsement or unconditional guarantee of the seller, and which is secured by a first lien on the livestock being sold when the market value of the livestock securing the obligation is not at any time less than one hundred percent (100%) of the face amount of the obligation;

Then, the bank may provide those loans or extensions of credit of up to an additional ten percent (10%) of the unimpaired capital and unimpaired surplus of that state-chartered banking institution calculated at the time that loan or extension is made. This limitation is separate from and in addition to the limitation contained in subsection 3.1 of this rule.

(c) "Livestock" as the term is used in this subsection, includes dairy and beef cattle, hogs, sheep, goats, horses, mules, poultry and fish, whether or not they are held for resale.

(d) Banks must maintain in their files an inspection and valuation report on the livestock pledged, in order to demonstrate compliance with this subsection. The inspection and valuation report should be performed at least every twelve (12) months or more frequently as considered prudent.

(e) Liens on the livestock must be in a form ~~which~~ that allows the bank to maintain a perfected security interest in the livestock under applicable state law.

(f) If collateral values fall below the levels required by subdivision ~~7.9(b)~~ 6.9(b) of this rule, to the extent that the loan is no longer in conformance with the collateral requirements and exceeds the general fifteen percent (15%) limitation, the loan must be brought into conformance within thirty (30) business days, except where judicial proceedings, regulatory actions or other extraordinary occurrences prevent the bank from taking action.

~~7.10.~~ 6.10. Loans to Student Loan Marketing Association. -- W.Va. Code § 31A-4-26(a)(1)(4)(J) provides that:

Loans or extensions of credit to the Student Loan Marketing Association shall not be subject to any limitation based on capital and surplus.

~~7.11.~~ 6.11. Loans to a corporation owning the property in which that state-chartered banking institution is located. -- W.Va. Code § 31A-4-26(a)(4)(K) provides that:

Loans or extensions of credit to a corporation owning the property in which that state-chartered banking institution is located, when that state-chartered banking institution has an unimpaired capital and surplus of not less than one million dollars (\$1,000,000) or when approved in writing by the ~~C~~commissioner of ~~B~~banking, shall not be subject to any limitation based on capital and surplus.

This exception is intended for "Persons" (as defined in subsection 2.4 of this rule) who own real property and lease one hundred percent (100%) of the useable space to a state-chartered banking institution for use as either a main office or branch office, or other operations of a bank, and through its lease payments, the state-chartered banking institution provides one hundred percent (100%) of the debt service on the loan or extension of credit.

#### ~~§ 9-8.~~ §9-7. Miscellaneous.

~~8.1.~~ 7.1. Obligations of accommodation parties. -- The liability of a drawer, endorser or guarantor who does not receive any of the proceeds, or the benefit of the proceeds, of the loan or extension of credit is not a loan or extension of credit to such person for purposes of this rule unless ~~one of the tests set forth in Section 4 of this rule is satisfied.~~ either the direct benefit or the common enterprise test is met. However, no person shall serve as an accommodation party on loans exceeding fifty percent (50%) of a state-chartered banking institution's unimpaired capital and unimpaired surplus.

~~8.2.~~ 7.2. Sale of federal funds and limitations on interbank liabilities.

(a) "Sale of Federal Funds" means, ~~for purposes of this subsection,~~ any transaction among depository institutions involving the transfer of immediately available funds resulting from credits to deposit balances at federal reserve banks or from credits to ~~new or existing~~ deposit balances due from a correspondent depository institution.

(b) Immediately available balances may be sold for one business day, under a continuing contract, or for more than one business day.

~~(b)(c)~~ A "Continuing Contract" means, ~~for purposes of this subsection,~~ an agreement that remains in effect for more than one business day but has no specified maturity and requires no advance notice for termination.

~~(e) Sales of federal funds with a maturity of one (1) business day or under a continuing contract are not "Loans and Extensions of Credit" for purposes of this rule and are governed by the guidelines set forth in Federal Reserve Board Regulation F [12 CFR 206].~~

~~(d) Extensions of credit or sales of federal funds to other banking or depository institutions, regardless of maturity, with a maturity of more than one business day are subject to the legal lending limits generally set forth in W.Va. Code § 31A-4-26(a)(1) and (2).~~

~~8.3. 7.3.~~ Purchase of third-party paper. -- Where a ~~bank~~ state-chartered banking institution purchases third-party paper subject to an agreement that the seller will repurchase the paper upon default or at the end of a stated period after default, the seller's obligation to repurchase is subject to W.Va. Code § 31A-4-26(a)(1) and is measured by the total unpaid balance of the paper owned by the bank less any applicable dealer reserves. Where the seller's obligation to repurchase is limited, the seller's total loans or extensions of credit, for the purpose of W.Va. Code § 31A-4-26(a)(1) are measured by the total amount of paper the seller may ultimately be obligated to repurchase. Where no more than an agreed percentage of the purchase price is retained by the bank and credited to a reserve to be held as a form of collateral security, but the bank has no direct or indirect recourse to the seller, the loans or extensions of credit do not constitute loans or extensions of credit to the seller subject to the expanded limitations of ~~subsection 7.8(a)~~ subdivision 6.8(a) of this rule.

~~8.4. 7.4.~~ Overdrafts. -- Overdrafts, whether or not prearranged, are ~~"Loans and Extensions of Credit"~~ loans and extensions of credit for purposes of this rule. This rule does not apply to ~~"Intra-day"~~ intra-day or ~~"Daylight"~~ daylight overdrafts.

~~8.5. 7.5.~~ Loans charged off, in whole or in part.-- The legal lending limits apply to all existing loans or extensions of credit to a person by the bank, including loans or extensions of credit ~~which that~~ that have been charged off ~~on~~ the books of the bank in whole or in part. Loans or extensions of credit ~~which that~~ that have become unenforceable by reason of discharge in bankruptcy or are no longer legally enforceable for other reasons are not ~~"Loans and Extensions of Credit"~~ loans and extensions of credit for purposes of this rule.

~~8.6. 7.6.~~ Sale of loan participation.

(a) When a ~~bank~~ state-chartered banking institution sells a participation in a loan or extension of credit, including the discount of a the bank's own applicable acceptance, that portion of the loan that is sold on a nonrecourse basis will not be applied to the bank's lending limits. In order to remove the sold, nonrecourse portion of a loan or extension of credit from a bank's lending limit, that state-chartered banking institution must have a written commitment to purchase from the participating bank prior to loan closing and must remove the disallowed portion of the loan from the books within ten (10) days of closing. In addition, the a participation must result in a pro rata sharing of credit risk proportionate to the respective interests of the originating and participating lenders. This is so even where the participation agreement provides that repayment must be applied first to the shares sold. In that case, the pro

rata sharing may only be accomplished if the agreement also provides that, in case of a default or comparable event defined in the agreement, participants shall share in all subsequent repayments and collections in proportion to the percentage of participation at the time of the occurrence of the event.

(b) The provisions of ~~subsection 8.6(a)~~ subdivision 7.6(a) of this rule apply to all ~~"Loans and Extensions of Credit,"~~ loans and extensions of credit as defined in Section 2 of this rule, including ~~"Contractual Commitment(s) to Advance Funds,"~~ contractual commitments to advance funds, as defined in Section 2.4 of this rule.

~~8.7.~~ 7.7. Interest or discount on loans. -- The legal lending limits do not apply to the portion of a loan or extension of credit that represents accrued or discount interest.

~~8.8. Loans to or guaranteed by general obligations of a state or political subdivision.~~

~~(a) A loan or extension of credit to a bank customer which is guaranteed or secured by a "General Obligation" of any state or political subdivision thereof, is not considered an obligation of the customer for purposes of W.Va. Code § 31A-4-26(a). The lending bank should obtain the opinion of competent counsel that the guarantee or collateral is a valid and enforceable obligation of the public body.~~

~~(b) A loan or extension of credit to a state or political subdivision of the state is not subject to any limitation based on capital or surplus if the loan or extension of credit constitutes a "general obligation" of the state or political subdivision. The lending bank should obtain the opinion of competent counsel that the loan or extension of credit is a valid and enforceable obligation of the borrower.~~

~~8.9.~~ 7.8. Loans to industrial development authorities. -- A loan or extension of credit to an industrial development authority or similar public entity created for the purpose of constructing and leasing a plant facility, including a health care facility, to an industrial occupant is not a loan or extension of credit to the authority for the purposes of W.Va. Code § 31A-4-26(a) if:

(a) The bank relies on the credit of the industrial occupant in making the loan;

(b) The authority's liability with respect to the loan is limited solely to whatever interest it has in the particular facility;

(c) The authority's interest is assigned to the bank as security for the loan or a promissory note from the lessee to the bank provides a higher order of security than the assignment of a lease; and

(d) The industrial occupant's lease rentals are assigned and paid directly to the bank. ~~A loan or extension of credit meeting the above criteria will be considered a loan or extension of credit to the lessee and will be combined with other obligations of the lessee for the purposes of W.Va. Code § 31A-4-26(a).~~

A loan or extension of credit meeting all of the above criteria will be considered a loan or

extension of credit to the lessee and will be combined with other obligations of the lessee for the purposes of W.Va. Code § 31A-4-26(a).

~~8.10.~~ 7.9. Loans to leasing companies. -- A loan or extension of credit to a leasing company for the purpose of purchasing personal property for lease will be deemed a loan to the lessee, provided that the following criteria are met:

(a) The bank evaluates the creditworthiness of the lessee before the loan is extended to the leasing corporation;

(b) The loan is without recourse to the leasing corporation;

(c) The bank is given a security interest in the personal property and in the event of default, may proceed directly against the property and the lessee for any deficiency resulting from the sale of the property;

(d) The leasing corporation assigns all of its rights under the lease to the bank;

(e) The lessee's lease payments are assigned and paid to the bank; and

(f) The lease terms are subject to the same limitations that would apply to a state bank acting as the originating lessor.

~~8.11.~~ 7.10. Separate limitations for W.Va. Code § 31A-4-26(a). -- The legal lending limits prescribed by W.Va. Code § 31A-4-26(a) are separate and distinct from the investment limits prescribed by W.Va. Code § 31A-4-26(b). Accordingly, a state-chartered banking institution may make loans or extensions of credit to one borrower up to the full amount permitted by W.Va. Code § 31A-4-26(a) and also hold eligible investment securities of the same obligor up to the full amount permitted by W.Va. Code § 31A-4-26(b). In order for a security to be an "~~Investment Security~~" investment security, it must be eligible for investment by a state-chartered banking institution in accordance with the standards set forth in W.Va. Code § 31A-4-26(b).