

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 2004

By Delegate Phillips, Kimble, Nestor, Cannon,
Holstein, Willis, Espinosa, Miller, Hall, Sheedy, and
Martin

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

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

Be it enacted by the Legislature of West Virginia:

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

§31A-2A-4. Exceptions.

1 (a) Nothing in this article is intended to, or shall prohibit, apply to, or interfere with:
 2 (1) The lawful authority or ability of the commissioner of banking or any other state or
 3 federal regulatory agency of a bank, savings and loan association, trust company, or credit union
 4 to obtain or to share between such regulatory agencies any records which the commissioner of

5 banking or such state or federal regulatory agency may deem appropriate for the examination and
6 regulation of the financial institution: Provided, That nothing in this subdivision permits disclosure
7 of protected financial information in violation of §31A-2B-1 et seq. of this code;

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

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

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

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

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

24 (7) The exchange, in the regular course of business, of information showing the
25 outstanding balance of a mortgage loan account in connection with a sale, refinancing, or
26 foreclosure of real property in a transaction to which the state entity is a party; or the disclosure, in
27 the regular course of business, of information on a mortgage or deed of trust on a subject property
28 to a state entity as holder of any subordinate mortgage, deed of trust or security interest;

29 (8) The disclosure to the Department of Health and Human Resources, upon written
30 request, of an individual's financial records which the department determines are necessary to

31 verify or confirm the individual's eligibility or ineligibility for public assistance;

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

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

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

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

47 (13) The notification to appropriate local, state, or federal law-enforcement authorities or
48 regulatory agencies that the financial institution, its officers, employees or agents thereof have
49 information which may be relevant to a possible violation of any statute or regulation: Provided,
50 That nothing in this subdivision permits disclosure of protected financial information in violation of
51 §31A-2B-1 et seq. of this code. The disclosure of any information pursuant to this subdivision may
52 only include the name or other identifying information concerning any individual, corporation, or
53 account involved in and the nature of any suspected illegal activity;

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

57 institution itself or in its role as a fiduciary;

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

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

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

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

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

82 (c) Nothing in this article shall preclude a state entity from obtaining information or financial

83 records voluntarily submitted to it by others in an attempt to seek governmental assistance or
 84 redress of a grievance, including legislative change: *Provided*, That the financial record or
 85 information was not solicited by the state entity in an effort to evade the requirements of this article
 86 or submitted by a financial institution in contravention of ~~section seven of this article~~ §31A-2A-7 of
 87 this code.

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

ARTICLE 2B. THE SECOND AMENDMENT FINANCIAL PRIVACY ACT.

§31A-2B-1. Short title.

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

§31A-2B-2. Findings and intent.

1 (a) The Legislature finds that:

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

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

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

11 (4) In the letter to payment card networks, federal lawmakers stated that the new Merchant

12 Category Code for firearms retailers would be "[. . .] the first step towards facilitating the collection
13 of valuable financial data that could help law enforcement in countering the financing of terrorism
14 efforts", expressing a clear government expectation that networks will utilize the new Merchant
15 Category Code to conduct mass surveillance of constitutionally protected firearms and
16 ammunition purchases in cooperation with law enforcement;

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

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

25 (7) While federal law requires some financial institutions to report transactions that are
26 highly indicative of money laundering or other unlawful activities, there is no federal or state law
27 authorizing financial institutions to surveil and track lawful activities by customers in cooperation
28 with law enforcement; in fact, both the federal Right to Financial Privacy Act and West Virginia's
29 Maxwell Governmental Access to Financial Records Act prohibit financial institutions from
30 disclosing a customer's financial records except in limited circumstances.

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

§31A-2B-3. Definitions.

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

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

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

9 (2) "Customer", in addition to the definition provided in §31A-2A-1(a) of this code, includes
10 any person engaged in a payment card transaction that a financial institution facilitates or
11 processes.

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

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

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

21 (6) "Firearms retailer" means any person engaged in the lawful business of selling or
22 trading firearms or antique firearms, as those terms are defined in §61-7-2 of this code, or
23 ammunition to be used in firearms or antique firearms.

24 (7) "Firearms code" means any code or other indicator a financial institution assigns to a
25 merchant or to a payment card transaction that identifies whether a merchant is a firearms retailer
26 or whether the payment card transaction involves the purchase of a firearm or ammunition. The
27 term includes, but is not limited to, a Merchant Category Code assigned to a retailer by a payment
28 card network or other financial institution.

29 (8) "Government entity" means any state or local government agency or instrumentality

30 thereof, located in West Virginia.

31 (9) "Protected financial information" means any record of a sale, purchase, return, or
32 refund involving a payment card that is retrieved, characterized, generated, labeled, sorted, or
33 grouped based on the assignment of a firearms code. A "customer's protected financial
34 information" refers to protected financial information appearing in the financial records of a
35 customer.

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

1 A financial institution is prohibited from disclosing a customer's protected financial
2 information unless:

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

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

9 (3) The customer has consented to disclosure, according to the requirements of
10 §31A-2B-5 of this code; or

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

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

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

5 (1) A statement that the customer consents to the disclosure of the protected financial

6 information, along with the definition provided in §31A-2B-3(9) of this code, for a specific period;

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

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

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

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

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

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

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

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

6 (1) The subpoena must state that protected financial information is being sought, along
7 with the definition provided in §31A-2B-3(9) of this code; and

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

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

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

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

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

7 customer;

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

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

§31A-2B-8. Civil remedies.

1 (a) A customer may bring a civil action for damages against any financial institution or
2 government entity that causes the customer’s protected financial information to be disclosed in
3 violation of this article. For each violation, the individual may recover:

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

6 (2) Against any person who intentionally violates this article, liquidated damages of
7 \$20,000 for each or actual damages, whichever is greater.

8 (b) Any person aggrieved by a violation of §31A-2B-7 of this code may bring a civil action
9 for damages. Said person may recover liquidated damages of \$30,000 or actual damages,
10 whichever is greater.

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

15 (d) It shall not be a defense to a civil action filed pursuant to this article that the information
16 was disclosed to a federal government entity, if said disclosure is neither required nor authorized
17 by federal law or regulation.

18 (e) Any action under this article is barred unless the action is commenced within five years
19 after the violation occurs.

20 (f) The remedies provided in this article are the exclusive remedies for violations of this
21 article.

§31A-2B-9. Contractual authority of the State.

1 In selecting a financial institution to provide a financial service or product to the state
2 related to payment card processing, the State Treasurer may disqualify a financial institution from
3 the competitive bidding process or from any other official selection process if:

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

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

8 (3) The financial institution has publicly stated that it has adopted or intends to adopt
9 policies or practices that violate this article.

§31A-2B-10. Scope and Severability.

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

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

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

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