

HOUSE BILL No. 2505

AN ACT concerning limitations on loans and borrowing; relating to derivative transactions; amending K.S.A. 9-1104 and 9-2111 and repealing the existing sections.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. From and after January 21, 2013, K.S.A. 9-1104 is hereby amended to read as follows: 9-1104. (a) *Definitions*. As used in this section:

(1) “Borrower” means an individual, sole proprietorship, partnership, joint venture, association, trust, estate, business trust, corporation, limited liability company, not-for-profit corporation, government unit or agency, instrumentality, or political subdivision thereof, or any similar entity or organization.

(2) “Capital” means the total of capital stock, surplus, undivided profits, 100% of the allowance for loan and lease loss, capital notes and debentures, and reserve for contingencies. Intangibles, such as goodwill, shall not be included in the definition of capital when determining lending limits.

(3) “Loan” means:

(A) A bank’s direct or indirect advance of funds to or on behalf of a borrower based on an obligation of the borrower to repay the funds;

(B) a contractual commitment to advance funds;

(C) an overdraft;

(D) loans that have been charged off the bank’s books in whole or in part, unless the loan is unenforceable by reason of:

(i) Discharge in bankruptcy;

(ii) expiration of the statute of limitations;

(iii) judicial decision; or

(iv) the bank’s forgiveness of the debt;

(E) *any credit exposure to a borrower arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction or securities borrowing transaction between a bank and that borrower.*

(4) “*Derivative transaction*” means any transaction that is a contract, agreement, swap, warrant, note or option that is based in whole, or in part, on the value of any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices or other assets.

(b) *General Lending Limit Rule*. Subject to the provisions in (d), (e) and (f), loans to one borrower, including any bank officer or employee, shall not exceed 25% of a bank’s capital.

(c) *Calculation of the Lending Limit*. (1) The bank’s lending limit shall be calculated on the date the loan or written commitment is made. The renewal or refinancing of a loan shall not constitute a new lending limit calculation date unless new funds are advanced.

(2) If the bank’s lending limit increases subsequent to the origination date, a bank may use the current lending limit to determine compliance when advancing funds. An advance of funds includes the lending of money or the repurchase of any portion of a participation.

(3) If the bank’s lending limit decreases subsequent to the origination date, a bank is not prohibited from advancing on a prior commitment that was legal on the date the commitment was made.

(d) *Exemptions*. That portion of a loan which is continuously secured on a dollar for dollar basis by any of the following will be exempt from any lending limit:

(1) A guaranty, commitment or agreement to take over or to purchase, made by any federal reserve bank or by any department, bureau, board, commission, agency or establishment of the United States of America, including any corporation wholly owned, directly or indirectly by the United States;

(2) a perfected interest in a time deposit account in the lending bank. In the case of a time deposit which may be withdrawn in whole or in part prior to maturity, the bank shall establish written internal procedures to prevent the release of the deposit;

(3) a bonded warehouse receipt issued to the borrower by some other person;

(4) treasury bills, certificates of indebtedness, or bonds or notes of the United States of America or instrumentalities or agencies thereof, or those fully guaranteed by them;

(5) general obligation bonds or notes of the state of Kansas or any other state in the United States of America;

(6) general obligation bonds or notes of any Kansas municipality or quasi-municipality; or

(7) a perfected interest in a repurchase agreement of United States government securities with the lending bank.

(e) *Special Rules.* (1) The total liability of any borrower may exceed the general 25% limit by up to an additional 10% of the bank's capital. To qualify for this expanded limit:

(A) The bank shall have as collateral a first lien or liens on real estate securing a portion of the liability equal to at least the amount by which the total liability exceeds the 25% limit;

(B) the amount of the recorded lien or liens shall equal at least the amount of the excess liability;

(C) the appraised value of the real estate shall equal at least twice the amount of the excess liability; and

(D) a portion of the loan equal to at least the excess liability shall have installment payments sufficient to amortize that portion within 20 years.

(2) That portion of any loan endorsed or guaranteed by a borrower will not be added to that borrower's liability until the endorsed or guaranteed loan is past due 10 days.

(3) If the total liability of any active bank officer will exceed \$50,000, prior approval from the bank's board of directors shall be noted in the minutes.

(4) To the extent they are insured by the federal deposit insurance corporation, time deposits purchased by a bank from another financial institution shall not be considered a loan to that financial institution and shall not be subject to the bank's lending limit.

(5) Third-party paper purchased by the bank will not be considered a loan to the seller unless and until the bank has the right under the agreement to require the seller to repurchase the paper.

(f) *Combination Rules.*

(1) *General Rule.* Loans to one borrower will be attributed to another borrower and their total liability will be combined:

(A) When proceeds of a loan are to be used for the direct benefit of the other borrower, to the extent of the proceeds so used; or

(B) when a common enterprise is deemed to exist between the borrowers.

(2) *Direct Benefit.* The proceeds of a loan to a borrower will be deemed to be used for the direct benefit of another person and will be attributed to the other person when the proceeds, or assets purchased with the proceeds, are transferred to another person, other than in a *bona fide* arm's length transaction where the proceeds are used to acquire property, goods or services.

(3) *Common Enterprise.* A common enterprise will be deemed to exist and loans to separate borrowers will be aggregated:

(A) When the expected source of repayment for each loan or extension of credit is the same for each borrower and neither borrower has another source of income from which the loan, together with the borrower's other obligations, may be fully repaid;

(B) when both of the following circumstances are present:

(i) Loans are made to borrowers who are related directly or indirectly through common control, including where one borrower is directly or indirectly controlled by another borrower. Common control means to own, control or have the power to vote 25% or more of any class of voting securities or voting interests or to control, in any manner, the election of a majority of the directors, or to have the power to exercise a controlling influence over the management or policies of another person; and

(ii) substantial financial interdependence exists between or among the borrowers. Substantial financial interdependence is deemed to exist when 50 percent or more of one borrower's gross receipts or gross expenditures (on an annual basis) are derived from transactions with the other borrower. Gross receipts and expenditures include gross revenues, expenses, intercompany loans, dividends, capital contributions and similar receipts or payments; or

(C) when separate persons borrow from a bank to acquire a business enterprise of which those borrowers will own more than 50% of the voting

securities or voting interests, in which case a common enterprise is deemed to exist between the borrowers for purposes of combining the acquisition loan.

(D) An employer will not be treated as a source of repayment for purposes of determining a common enterprise because of wages and salaries paid to an employee.

(4) *Special Rules for Loans to a Corporate Group.* (A) Loans by a bank to a borrower and the borrower's subsidiaries shall not, in the aggregate, exceed 50% of the bank's capital. At no time shall loans to any one borrower or to any one subsidiary exceed the general lending limit of 25%, except as allowed by other provisions of this section. For purposes of this paragraph, a corporation or a limited liability company is a subsidiary of a borrower if the borrower owns or beneficially owns directly or indirectly more than 50 percent of the voting securities or voting interests of the corporation or company.

(B) Loans to a borrower and a borrower's subsidiaries that do not meet the test contained in subsection (f)(4)(A) will not be combined unless either the direct benefit or the common enterprise test is met.

(5) *Special Rules for Loans to Partnerships, Joint Ventures and Associations.* (A) As used in this subpart (5), the term "partnership" shall include a partnership, joint venture or association. The term partner shall include a partner in a partnership or a member in a joint venture or association.

(B) *General Partner.* Loans to a partnership are considered to be loans to a partner, if by the terms of the partnership agreement that partner is held generally liable for debts or actions of the partnership.

(C) *Limited Partner.* If the liability of a partner is limited by the terms of the partnership agreement, the amount of the partnership debt attributable to the partner is in direct proportion to that partner's limited partnership liability.

(D) Notwithstanding the provisions of subsections (f)(5)(B) and (f)(5)(C), if by the terms of the loan agreement the liability of any partner is different than delineated in the partnership agreement, for the purpose of attributing debt to the partner the loan agreement shall control.

(E) Loans to a partner are not attributed to the partnership unless either the direct benefit or the common enterprise test is met.

(F) Loans to one partner are not attributed to other partners unless either the direct benefit or common enterprise test is met.

(G) When a loan is made to a partner to purchase an interest in a partnership, both the direct benefit and common enterprise tests are deemed to be met, and the loan is attributed to the partnership.

(6) Notwithstanding the provisions of this subsection, the commissioner may determine, based upon an evaluation of the facts and circumstances of a particular transaction, that a loan to one borrower may be attributed to another borrower.

(g) The commissioner may order a bank to correct any loan not in compliance with this section. A violation of this section shall be deemed corrected if that portion of the borrower's liability which created the violation could be legally advanced under current lending limits. Failure to comply with the commissioner's order within 60 days shall be grounds for the proposed removal of a bank officer or director pursuant to K.S.A. 9-1805, and amendments thereto.

Sec. 2. K.S.A. 9-2111 is hereby amended to read as follows: 9-2111.

(a) Except as provided in K.S.A. 9-2107, and amendments thereto, no trust company, trust department of a bank, corporation or other business entity, the home office of which is located outside the state of Kansas, shall establish or operate a trust facility within the state of Kansas, *unless the laws of the state where the home office of the nonresident trust company, trust department of a bank, corporation or other business entity is located, reciprocally authorize a Kansas chartered trust company, trust department of a bank, corporation or other business entity to establish or operate a trust facility within that state.*

(b) *Before any nonresident trust company, trust department of a bank, corporation or other business entity establishes a trust facility in Kansas, a copy of the application submitted to the home state, and proof that the home state has reciprocity with Kansas, must be filed by the applicant with the commissioner.*

(c) No Kansas trust company shall establish an out-of-state trust facility until an application has been filed with the commissioner and approval has been received. An application filed pursuant to this section shall be subject to the provisions in K.S.A. 9-2108, and amendments thereto.

(d) No Kansas bank with a trust department shall establish an out-of-state trust facility until an application has been filed with the commissioner and approval has been received. An application filed pursuant to this section shall be subject to the provisions in K.S.A. 9-1135, and amendments thereto.

~~(b)~~(e) As used in this section, “trust facility” means any office, agency, desk or other place of business, at which trust business, as defined by ~~K.S.A. 9-701 and amendments thereto~~, is conducted.

Sec. 3. K.S.A. 9-2111 is hereby repealed.

Sec. 4. On January 21, 2013, K.S.A. 9-1104 is hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the Kansas register.

I hereby certify that the above BILL originated in the HOUSE, and passed that body

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HOUSE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*Speaker of the House.*

\_\_\_\_\_  
*Chief Clerk of the House.*

Passed the SENATE  
as amended \_\_\_\_\_

SENATE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*President of the Senate.*

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*Secretary of the Senate.*

APPROVED \_\_\_\_\_

\_\_\_\_\_  
*Governor.*