

HOUSE BILL No. 2505

By Committee on Financial Institutions

1-23

1 AN ACT concerning limitations on loans and borrowing; relating to
2 derivative transactions; amending K.S.A. 9-1104 and repealing the
3 existing section.
4

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

6 Section 1. K.S.A. 9-1104 is hereby amended to read as follows: 9-
7 1104. (a) *Definitions.* As used in this section:

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

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

18 (3) "Loan" means:

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

21 (B) a contractual commitment to advance funds;

22 (C) an overdraft;

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

25 (i) Discharge in bankruptcy;

26 (ii) expiration of the statute of limitations;

27 (iii) judicial decision; or

28 (iv) the bank's forgiveness of the debt; ;

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

33 (4) *"Derivative transaction" means any transaction that is a contract,*
34 *agreement, swap, warrant, note or option that is based in whole, or in*
35 *part, on the value of any interest in, or any quantitative measure or the*
36 *occurrence of any event relating to, one or more commodities, securities,*

1 *currencies, interest or other rates, indices or other assets.*

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

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

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

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

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

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

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

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

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

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

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

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

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

42 (A) The bank shall have as collateral a first lien or liens on real estate
43 securing a portion of the liability equal to at least the amount by which the

1 total liability exceeds the 25% limit;

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

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

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

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

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

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

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

22 (f) *Combination Rules.*

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

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

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

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

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

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

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

42 (i) Loans are made to borrowers who are related directly or indirectly
43 through common control, including where one borrower is directly or

1 indirectly controlled by another borrower. Common control means to
2 own, control or have the power to vote 25% or more of any class of voting
3 securities or voting interests or to control, in any manner, the election of a
4 majority of the directors, or to have the power to exercise a controlling
5 influence over the management or policies of another person; and

6 (ii) substantial financial interdependence exists between or among the
7 borrowers. Substantial financial interdependence is deemed to exist when
8 50 percent or more of one borrower's gross receipts or gross expenditures
9 (on an annual basis) are derived from transactions with the other borrower.
10 Gross receipts and expenditures include gross revenues, expenses,
11 intercompany loans, dividends, capital contributions and similar receipts
12 or payments; or

13 (C) when separate persons borrow from a bank to acquire a business
14 enterprise of which those borrowers will own more than 50% of the voting
15 securities or voting interests, in which case a common enterprise is
16 deemed to exist between the borrowers for purposes of combining the
17 acquisition loan.

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

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

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

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

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

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

1 partnership liability.

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

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

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

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

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

17 (g) The commissioner may order a bank to correct any loan not in
18 compliance with this section. A violation of this section shall be deemed
19 corrected if that portion of the borrower's liability which created the
20 violation could be legally advanced under current lending limits. Failure
21 to comply with the commissioner's order within 60 days shall be grounds
22 for the proposed removal of a bank officer or director pursuant to K.S.A.
23 9-1805, and amendments thereto.

24 Sec. 2. K.S.A. 9-1104 is hereby repealed.

25 Sec. 3. This act shall take effect and be in force from and after
26 January 21, 2013, and its publication in the statute book.

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