

BANKING.
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

Dedicated Funding Assessment

Adopted New Rules: N.J.A.C. 3:5

Proposed: January 3, 2006 at 38 N.J.R. 20(a).

Adopted: May 24, 2006 by Steven M. Goldman, Commissioner, Department of Banking and Insurance.

Filed: May 25, 2006 as R. 2006 d. 234, **with substantive change** not requiring additional public notice and comment (see N.J.S.A. 1:30-6.3).

Authority: N.J.S.A. 17:1-8, 17:1-8.1, 17:1-15, and 17:1C-33 et seq.

Effective Date: June 19, 2006.

Expiration Date: June 19, 2011.

Summary of Public Comments and Agency Responses:

The Department received comments from James M. Deamers, President, New Jersey Financial Services Association; Gerald Goldman, Esq., General Counsel, New Jersey Check Cashers Association and John F. Henderson, State Regulatory and Governmental Affairs Counsel, MoneyGram International.

COMMENT: One commenter commended the Department for its efforts on the proposed regulation and its efforts in attempting to allocate the financial burden of the dedicated funding assessments fairly across all regulated sectors.

RESPONSE: The Department appreciates the expression of support for the proposal.

COMMENT: One commenter stated that they were generally in agreement with the policies underlying the proposed regulations and that dedicated funding is the preferred mechanism for

funding financial regulatory activities because it provides greater assurance that the regulator will have sufficient operating funds in the event of economic fluctuations which would otherwise impact the state budget. The commenter stated that they believed that past budgetary and resources issues have negatively affected the Department's efficiency and timeliness in processing licenses and other applications and that shortages in personnel and resources have negatively affected the Department's ability to pursue unlicensed and illegal check cashers and other money service businesses which still continue to operate in New Jersey. The commenter noted that they hoped that dedicated funding will provide resources to the Department that will allow it to be more responsive to industry and to rid the state of illegal and unlicensed check cashers.

RESPONSE: The Department appreciates the expression of support for the proposal.

COMMENT: One commenter noted that with respect to N.J.A.C. 3:5-4.3, the proposed regulation provides that the base assessment will be calculated as determined by a "complexity factor" of greater than zero but not more than five and provides that the "complexity factor" will be multiplied by an amount not to exceed \$300.00. The commenter stated that it is their position that the methodology for calculating the complexity factor is too subjective and permits the Department to rely on "any other criteria" that the Department deems appropriate. The commenter proposed that the complexity factor be more narrowly defined and tied into actual expenses incurred by the Department in regulating that particular industry sector.

RESPONSE: As stated in the proposal, in determining the complexity factor the Department shall consider such criteria as statutorily mandated regulatory activities, number and locations of business sites, varying degrees of complexity in oversight and/or reporting requirements and any

other criteria that the Commissioner deems appropriate. While N.J.S.A. 17:1C-46 states that in computing the assessment for depository institutions, licensees or registrants, the Commissioner may consider those additional factors the Commissioner deems appropriate, the statute further requires that the Department distribute the financial burden on the regulated industries proportionately consistent with the division's regulatory activities. Therefore, the Department does not believe the language is too subjective, as the language reiterates the statute by allowing the Commissioner to consider additional factors in the face of changing circumstances so long as any criteria used is consistent with the parameters delineated in the statute.

COMMENT: One commenter stated that with respect to N.J.A.C. 3:5-4.4(c)1vi, the proposed regulation states that for the purpose of the volume assessment for check casher licensees, the Department shall consider the dollar volume of checks cashed for a fee by each licensee in the preceding year as reported in the licensee's annual report. The proposed regulation provides that the volume assessment shall include "payroll services." The commenter stated that it is their position that the volume assessment should not include payroll service fees. The commenter stated that the Check Casher Regulatory Act as amended provides that "payroll service providers are not subject to the fee limitations at N.J.S.A. 17:15A-43 when providing those services." The commenter stated that as such, fees received from payroll services should not be included as contributing to the volume assessment. The commenter stated that for certain licensees conducting payroll services, calculating assessments based on fees received from payroll services may result in an unreasonably skewed assessment as compared with other licensees.

RESPONSE: Initially the Department notes that the commenter referred to payroll service fees and that those fees should not be included in the calculation of the volume assessment. The Department has construed the comments to refer to the amount of checks cashed by a payroll service.

Although instruments cashed through payroll services are not subject to the fee limitations in N.J.S.A. 17:15A-43, that is not a rationale for excluding checks cashed by licensees when providing payroll services when calculating the volume assessments of check cashers. Payroll services are provided by licensed check cashers, which are regulated by the Department. Payroll services are provided at locations licensed as “limited branch offices.” Those operations of a check casher, together with the books and records related to that activity, are subject to examination by the Department. Although the Legislature has chosen, by the recent amendment to N.J.S.A. 17:15A-50(d), not to apply to payroll services the limitations on the fees that may be charged to a customer cashing a check, the Department views that exemption as related to the fact that, when providing payroll services, the “customer” (that is, the individual payee on the check) does not pay a fee to the check casher for cashing the check, but rather the payee’s employer pays a fixed fee or rate established contractually with the licensed check casher.

COMMENT: One commenter addressed N.J.A.C. 3:5-4.4(c)1ii through viii. The commenter expressed concern that the Department’s fee formula does not account for the vast differences between true money transmitters and entities that are issuers of payment instruments but are licensed as “money transmitters.” The commenter stated the proposed funding mechanism determines fees for money transmitters in part based on “the dollar volume of money

transmitted, the dollar volume of bills paid and the dollar volume of checks sold by each licensee for the preceding calendar year as reported in the licensee's annual report." The commenter stated that the proposed mechanism viewed dollars transmitted to Mexico the same as dollars used to pay utility bills and dollars used to close on home mortgages. The commenter stated that, because it is both a foreign money transmitter and an issuer of money orders and various bank checks, its dollar volume resulting from both types of transactions will unfairly skew the overall formula and corresponding assessment amount. The commenter stated that it cannot be said that the official check business presents a burden to the Department or risk to the general public that is many times that of traditional money transmission and that their assessment is proportionally high by comparison to other licensed money transmitters that are not involved in the sale of payment instruments.

The commenter stated that the typical money transfer product presents a vastly different revenue to dollar volume percentage than a typical payment instrument (including money orders and official checks). The commenter stated that because the face amounts and company revenues for these items differ so dramatically, comparing the dollar volume of money transfers to dollar volume of payment instruments is like comparing apples to oranges. The commenter stated that payment instruments are different from money transfers in terms of operations, selling locations, and risks. The commenter states that they believe it is appropriate that payment instruments either be excluded from the formula, or be subjected to an entirely different formula for calculating an assessment with some accommodation being made that fairly considers the fundamental differences between these products. The commenter stated that the Department has an interest in offering a formula that is measurable, examinable, and transparent, but the commenter wished to offer suggested entire formulas that will provide for greater fairness among

licensees and which more accurately reflects the risk and oversight responsibilities of the Department. The commenter went on to offer six alternative assessment formulas.

RESPONSE: The Department thanks the commenter for its thoughtful analysis and suggestions as to alternate assessment formulas. While the Department acknowledges that the dollar volume of money transfers differs from the dollar volume of payment instruments, there are also variations in the volumes of the different types of transactions conducted by other regulated entities being assessed by the Department. The dollar volumes as defined in the rule are an indicator of the volume of business conducted by licensed money transmitters in this State. The Department believes that the use of such volume as a component of the assessment formula is reasonably related to the Division's regulatory functions and is necessary to assure that fair and equitable assessments are imposed on all licensees of all types and sizes. After full implementation of the assessment process, the Department will continue to monitor all assessments to assure that the assessments are consistent with the statutory mandate. With respect to licensees, N.J.S.A. 17:1C-4(b) requires that the assessment shall consider "volume of money transmitted" and "number of transactions." The statute makes no distinction between "payment instruments" in small amounts and international money transfers. In addition, by requiring that the volume of transactions be considered, the statute indicates that transactions involving smaller amounts are not to be discounted when calculating the assessments on licensees. Accordingly, as proposed the rule text is consistent with the statutory language, and will not be revised upon adoption as suggested in the comment.

COMMENT: One commenter requested a clarification on how the “base assessment” will be applied. The commenter stated that it is unclear how the base assessment would apply – whether it would be applied to a licensee as a whole or to each licensed location of the licensed entity.

RESPONSE: The base assessment will be applied to each licensee as a whole. As stated in the proposal, each regulated entity will be assessed a total assessment consisting of a base assessment and a volume assessment. N.J.A.C. 3:5-2.1 defines a "regulated entity" as a depository institution, other financial entity or person chartered, licensed or registered by the Division of Banking or that should be chartered, licensed or registered. N.J.A.C. 3:5-4.3(d) provides that, for purposes of determining the base assessment on licensees, the number of business locations will be considered when determining the complexity factor to be applied as a component in the base assessment formula applicable to particular license types.

COMMENT: One commenter referenced N.J.A.C. 3:5-4.4(d), the requirement that a licensee that ceases business or is acquired must prepay the annual base assessment within 15 days of the cessation or acquisition. The commenter stated that the 15-day period is unreasonably short. The commenter went on to note that combined with proposed N.J.A.C. 3:1-7.6, which provides that any late payment of an assessment “shall be” subject to a \$50.00 per diem penalty with no cap to the \$50.00 per diem provision, the proposed 15-day period is a dangerous trap for the unwary and is unnecessarily punitive.

RESPONSE: As proposed, N.J.A.C. 3:1-7.6 did not impose a \$50.00 per day penalty that would be uncapped for the late payment of an assessment. As proposed and adopted (see notice of adoption published elsewhere in this issue of the New Jersey Register), N.J.A.C. 3:1-7.6(c)2 provides that for the late payment of an assessment, there shall be a penalty of \$150.00 per day

up to a maximum of 20 percent of the assessment due. The Department has noted the validity of the commenter's concern with respect to the requirement that a regulated entity that ceases business or is acquired prepay the base assessment for the year of discontinuance by paying the amount of the most recently billed base assessment within 15 days of being acquired or of ceasing operations. The Department intends to propose amendments in the near future to revise this timeframe. In the interim, the requirement will have no effect, as there will be no base assessment amounts determined prior to August 15, 2007. Thus, entities that are acquired or cease operations before January 1, 2008 would not be required to prepay the base assessment from the preceding year because no assessments will be made prior to 2007.

COMMENT: One commenter stated that with regard to N.J.A.C. 3:5-6.1, the proposed regulation states that a licensee that objects to its assessment has only 15 days after the date of mailing to file an objection to its assessment. The commenter stated that the 15-day period for filing an objection is unreasonably short and unfair. Moreover, since the assessment has presumably been or will be paid, the 15-day limitation appears to act as a mechanism to shield the Department from even valid objections. The commenter stated that in determining if an assessment is correct or invalid, a licensee should be permitted a reasonable time to consult with his accountant or counsel and to prepare and file a written objection to the assessment. The commenter concluded that permitting licensees only a 15-day (actually less due to mailing) period to discover and commence the objection process is both unfair and unnecessary.

RESPONSE: The 15-day period for filing an objection is the time frame mandated in the underlying statute, N.J.S.A. 17:1C-36. The Department also notes that the same time frame has

been in existence for the Division of Insurance assessment at N.J.S.A. 17:1C-21 for many years, and has been applied without any major problems.

COMMENT: One commenter stated that with respect to N.J.A.C. 3:5-9.1, the regulation states that a licensee that submits an annual report that is substantially or materially in error shall be liable for an administrative penalty not to exceed \$10,000 for each submission and the Commissioner is empowered to take action to revoke, suspend or refuse to renew a license. The commenter disagrees with the non-discretionary and punitive nature of the language. Further, the penalty of up to \$10,000 is excessive, particularly in light of the relatively modest amount of the average licensee assessment. The commenter noted that depositories are subject to the same \$10,000 penalty limitation, notwithstanding their greater assets, revenues and relative profitability. The commenter stated that although an enforcement mechanism must be in place, the proposed language is truly harsh and provides absolutely no requirement to provide notice to the affected licensee that the figures submitted are erroneous. The commenter went on to state that the proposed regulation does not provide the licensee an opportunity to be heard before assessment of a penalty, suspension or revocation proceedings. The commenter suggested that a more fair and reasonable approach would be to require the Department to provide notice of the erroneous report and a reasonable period to provide corrected figures. Further, the licensee should only be subject to license suspension and revocation after notice and opportunity to be heard.

RESPONSE: The language to which the commenter objects, including the reference to a \$10,000 maximum administrative penalty, is statutory language found in N.J.S.A. 17:1C-48. Also, although the maximum has been set, there is no minimum penalty, leaving discretion to the Commissioner. The language that the commenter stated is nondiscretionary and punitive in

nature simply states that if the annual report contains figures that are substantially or materially erroneous, in addition to monetary penalties "the licensee shall be subject to revocation." The intent of the language is to make clear that, whether or not monetary penalties are assessed, the Commissioner retains the right to seek to revoke the license of the regulated entity. If the Commissioner does commence an action seeking revocation, it would be in accordance with the normal procedures for revocation and would contain all the requisite due process.

Summary of Agency-Initiated Change upon Adoption:

When reviewing the comments submitted by the public, the Department noted language in a comment that caused it to review the description of "payroll services" included in N.J.A.C. 3:5-4)c)vi. The Department realized that the text therein describing "payroll services" was different from the statutory definition of "payroll services" in N.J.S.A. 17:15A-31. The Department is concerned that this may cause confusion in a regulated community. The change deleting that language and substituting the citation in the statutory definition of "payroll services" may be made upon adoption without additional public notice and comment because there is no substantive change to the underlying dedicated funding concept.

Federal Standards Statement

A Federal standards analysis is not required because the adopted new rules are not subject to any Federal standards or requirements.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

3:5-4.4 Volume assessments

(a) – (b) (No change from proposal.)

(c) The volume assessment for licensees shall be calculated as follows:

1. Using filings of each licensee, the Department shall calculate the percentage, to nine decimal places, of the loan volume and/or its equivalent as calculated below for each licensee, in relation to total loan volume and/or its equivalent for all licensees as of December 31 of the prior calendar year.

i. – v. (No change from proposal.)

vi. For check cashers, the Department shall consider the dollar volume of checks cashed for a fee by each licensee for the preceding calendar year, as reported in the licensee's annual report. The volume shall include all checks cashed for a fee or other compensation, whether received directly or indirectly, and shall treat the dollar volume of such checks as if it were a volume of dollars loaned. The volume shall include payroll services [where the check casher receives a fee or other compensation from either the employer or from the employees/payees*] ***as defined in N.J.S.A. 17:15A-31.***