

BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

General Provisions

State Association Parity

Adopted Repeal and New Rule: N.J.A.C. 3:26-4.1

Proposed: April 19, 2004 at 36 N.J.R. 1900(b).

Adopted: April 7, 2005 by Donald Bryan, Acting Commissioner, Department of Banking and Insurance.

Filed: April 7, 2005 as R. 2005 d. 139, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-8.1, 17:1-15e and 17:12B-48(21).

Effective Date: May 2, 2005

Expiration Date: June 17, 2006

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) received written comments from the following: James R. Silkensen, Executive Vice President, The New Jersey League of Community Bankers and David McMillin, Esq., Senior Attorney, Legal Services of New Jersey, Inc.

COMMENT: One commenter stated that the current proposal is much improved over the initial proposal issued for banks and savings banks and, along with the final rule that was adopted for banks and savings banks, goes a long way toward providing parity between State-chartered institutions and those that are Federally-chartered.

RESPONSE: The Department thanks the commenter for his support for the rule.

COMMENT: One commenter stated that one area where there would continue to be disparity between the powers of State-chartered savings associations versus those of Federally-chartered savings associations and nationally-chartered banks is in lending powers that are governed by the New Jersey Homeowners' Security Act of 2002 (P.L. 2003, c. 64). The commenter stated that the provisions of that law that regulate the terms of credit, loan related fees, disclosures, mortgage processing, origination, refinancing, servicing and disbursements have been preempted for Federally-chartered savings associations and nationally-chartered banks by actions of the Federal Office of Thrift Supervision and the Office of the Comptroller of the Currency. The commenter stated that, in fairness, the parity regulations for State associations should reflect the preemptions of State law allowed for Federally chartered institutions. The commenter further stated that any change made for savings associations should also be made for banks and savings banks to maintain a level playing field. The commenter continued by stating that state savings associations are not predatory lenders. The commenter stated that they believe that the Federal regulators recognize the problems created by predatory lending practices and are taking effective steps to oversee the lending practices of Federally chartered institutions to ensure that they are not involved in predatory practices. Under the parity law, the Department will be able to utilize the guidance issued by Federal supervisory agencies in supervising State-chartered institutions. The commenter also believes that the Department has adequate authority under other laws, including the Consumer Fraud Act, to guard against predatory practices. The commenter concluded by urging the Department to provide full parity with the powers of national banks and Federal savings associations.

RESPONSE: The Department notes the commenter's concern over the New Jersey Home Ownership Security Act of 2002. The Department concluded that the most reasonable reading of the legislative intent does not permit a construction that would allow State associations to avoid that Act through the application of parity. The Department agrees that State associations are not involved, to any significant degree, with predatory lending. Consequently, the retention of the reference to the Homeowner's Security Act of 2002 in N.J.A.C. 3:26-4.1(c) as adopted should have no effect upon the vast majority of such associations.

The Department applauds Federal regulators for any steps they have taken or will take in their efforts to curtail predatory lending among Federally chartered institutions. However, the New Jersey Department of Banking and Insurance is specifically concerned with carrying out its mission of regulating the institutions it charters. Further, the Department is not prevented from using any guidance, research or experience obtained from Federal regulators. The Department recognizes that other New Jersey laws, such as the Consumer Fraud Act, may also be used to combat predatory lending, however, the New Jersey Homeowner Security Act of 2002 affords additional protections and addresses areas not covered by existing New Jersey laws. Lastly, the Department notes that the Consumer Fraud Act focuses on fraudulent activity, whereas the New Jersey Home Ownership Security Act of 2002 identifies a number of prohibited acts not based on fraud.

COMMENT: One commenter noted that N.J.S.A. 17:12B-48(21), as amended by P.L. 2000, c. 69, provides that, notwithstanding the provisions of P.L. 1963, c.144 or any other laws, savings associations may exercise those powers, rights, benefits or privileges now or hereafter authorized for national banks or for Federal savings banks or savings associations. The commenter also

noted that similar authority is granted with respect to the powers of out-of-State banks and savings institutions, but that the Commissioner of Banking and Insurance is given authority to decide whether those powers are appropriate for New Jersey-chartered institutions. The commenter stated that he believes that Federal law provides extensive protections to consumers. The commenter noted that the statutory amendment makes it clear that New Jersey institutions that choose to exercise Federal powers must abide by all Federal conditions, including provisions designed to protect consumers. The commenter stated that if full parity is not provided, State-chartered savings associations will be at a competitive disadvantage to Federally-chartered institutions and the attractiveness of the State charter will be greatly diminished. The commenter stated that by limiting competition, New Jersey State-chartered savings associations cannot fully compete with their Federal counterparts.

RESPONSE: The Department regards the term “power, right, benefit or privilege” as a term of art. As was noted in the proposal:

“The purpose of the Parity Act is to preserve a level playing field for New Jersey state-chartered state associations so they can continue to compete effectively with their federally chartered counterparts and to provide a full range of innovative services to New Jersey consumers. The Department has chosen not to define the term ‘powers, rights, benefits or privileges.’ It has taken this course in this proposal because the term is in common use in the banking industry and the Department’s research has disclosed no New Jersey statutes or rules that define it, and no Federal definition.”

The Department agrees that Federal law provides certain protections to consumers. The Department takes no position on the commenter’s characterization of those protections as being extensive. The Department also believes that, consistent with our Federal system, New Jersey

laws on criminal usury, corporate governance, supervisory powers, the New Jersey Consumer Checking Account Act and the New Jersey Home Ownership Security Act of 2002 are valuable and effective provisions that represent local treatment of problems that are specific to New Jersey, as compared to Federal laws and regulations that are general and cover the entire nation. P.L. 2000, c. 69 §10 provides that: “The Commissioner shall have the authority to adopt rules and regulations pursuant to this section, which rules and regulations shall have as their objective the placing of state associations on a substantial competitive parity with national and out-of-state banks and Federal and out-of-state savings banks and savings associations.” The Department believes that requiring a depository institution to comply with New Jersey State laws on criminal usury, corporate governance and supervisory powers does not prevent New Jersey-chartered institutions from providing a complete range of innovative services, nor create a significant competitive disadvantage, nor prevent vigorous competition with Federal institutions. The Department also believes that requiring New Jersey institutions to comply with the New Jersey Home Ownership Security Act of 2002 will not prevent those institutions from being placed in “substantial competitive parity” as that phrase is used in P.L. 2000, c.69 §10. Finally, the Department has concluded that the Legislature intended to except the New Jersey Home Ownership Security Act from the substantial competitive parity conferred by P.L. 2000, c. 69 §10.

COMMENT: One commenter stated that the Department should not adopt the proposed regulations, or, in the alternative, should clarify that no unintended implications should be drawn. The commenter noted that the Department’s Summary of its initial proposed Parity Act regulations for State-chartered banks and savings banks correctly recognized that the Parity Act

“was not intended to repeal by implication important New Jersey state consumer protection laws.” 34 N.J.R. 1491 The commenter stated that they believe that the Department’s statement of the Legislature’s intent was entirely accurate, that nothing in the language in the statute authorizes regulations that directly or indirectly limit the application of laws intended to protect New Jersey consumers. The commenter stated that, unfortunately, the Department’s proposed regulations governing State associations threaten to do nothing less than effectively open the door to the repeal by implication of New Jersey State consumer protection laws. The commenter stated that the proposed regulations would unduly tie the Department’s hands and implicitly encourage State associations to engage in conduct violating New Jersey State laws protecting consumers, low income consumers in particular. The commenter stated that these consequences would occur because State associations would be free to contend in any forum that State laws other than those specifically identified in proposed N.J.A.C. 3:26-4.1(c) are inapplicable to them because Congress, the courts or Federal regulatory agencies would find that to be the case, if hypothetically faced with the same question as to Federally chartered institutions.

RESPONSE: The Department disagrees with the commenter and believes the proposed rule should be adopted. Further, the Department intends no inference regarding the non-applicability of general State laws on State associations. Areas of law such as tort, real estate, contract and the Uniform Commercial Code are applicable to both State and Federally chartered institutions and may not be circumvented through parity. Parity is only granted for “powers, rights, benefits and privileges.” The Department disagrees that the repropoed regulation would unduly tie the Department’s hands.

Further, the suggestion by the commenter regarding what the Congress, courts and Federal regulatory agencies “would find” is not relevant. A power, right, benefit or privilege

subject to parity must already be authorized for Federal or out-of-State institutions for parity to apply. Hypothetical or assumed “authorizations” do not qualify for parity.

COMMENT: One commenter stated that as a result of the limited scope of proposed N.J.A.C. 3:26-4.1(c), the proposal would create a significant opportunity for State associations to skirt New Jersey State laws based on tenuous arguments that someone else is authorized to do so, simply because those New Jersey laws have been omitted from the list included in that subsection. The commenter stated that indeed such a position could be taken without notice to the Department even if no Federally chartered competitors were actually engaged in such conduct. The commenter stated that there is good reason for concern and that, on numerous occasions, Federally chartered banks and savings associations have engaged in conduct violating laws of states in which they did business in reliance on the Federal preemption arguments that were subsequently rejected by courts. The commenter further stated that the types of state laws that even the Office of the Comptroller of the Currency (OCC) and Office of Thrift Supervision (OTS) have recognized as beyond their claims of preemptive authority are extensive although these regulatory positions are constantly subject to change and currently subject to much uncertainty. The commenter therefore urged the Department to abandon this proposal to avoid the harm that it would do to New Jersey’s low-income residents without further clarification. In the alternative, the commenter urged the Department to clarify that it intends no implied preemption of State law with respect to State associations by the identification of a few specific State statutes and types of State statutes that are not “powers, rights, benefits or privileges.” Furthermore, if the Department chooses this later course, the commenter proposed that the

Department add the phrase “By way of illustration and not by limitation” at the beginning of proposed N.J.A.C. 3:26-4.1(c).

As a second alternative, the commenter urged the Department to include a catch-all provision, with sufficient flexibility to apply to all important New Jersey State consumer protection laws in effect now and in the future, by adding to N.J.A.C. 3:26-4.1(c) the following:

“6. Any other New Jersey State law protecting consumers or other residents, except to the extent expressly preempted by an Act of Congress or by the decision of a court of competent jurisdiction.”

The commenter continued by noting that in previously rejecting similar proposals with respect to its Parity Act regulations for State-chartered banks and savings banks, the Department failed to consider the great degree of uncertainty and controversy that already surrounds the entire area of Federal preemption of State laws applicable to financial services companies. The Department’s statement that its objective in adopting a closed-end list of State laws outside the reach of Parity Act preemption “is to give clear guidance to the institutions it regulates, and not put them in the position of having to guess what laws apply notwithstanding parity,” ignores the extent to which every institution, State or Federal – and every consumer, as well – currently must guess at the scope of preemption enjoyed by federally-chartered institutions in light of the unprecedented, extraordinarily broad, very controversial, and frequently challenged pronouncements as to the scope of federal preemption by both the OCC and the OTS. The commenter noted that these pronouncements have engendered strong statements of opposition and concern from the Attorneys General of all 50 states, fighting against the current move toward a regulatory regime in which federally-chartered financial institutions can assert that they have “total immunity from all state consumer protection regulation and enforcement.” Letter from the

National Association of Attorneys General to the OCC dated October 6, 2003 (opposing proposed OCC preemption regulations that were subsequently promulgated substantially as proposed).

The commenter stated that they are confident that the New Jersey Legislature did not intend the Parity Act to authorize the Department to strive for certainty by way of regulations that throw into question the applicability of many New Jersey consumer protection laws governing its depository institutions.

RESPONSE: The Department disagrees that State associations could skirt New Jersey law based on the argument that relevant New Jersey laws were omitted from the list in N.J.A.C. 3:26-4.1(c). The list at N.J.A.C. 3:26-4.1(c) is a complete list, although it, like other regulations, could be amended at a future date. Note, however, that the list was never intended to include general New Jersey law that applies to State and Federally chartered institutions absent a specific Federal preemption. Examples of such general New Jersey law are contract law, tort law, the Uniform Commercial Code, laws governing rights with respect to collection of debts, property law and zoning. The Department's objective in adopting these rules is to give clear guidance to the institutions it regulates, and not put them in a position of having to guess what laws apply notwithstanding parity. Further, the Department disagrees with the statement by the commentator that the proposal would do harm to New Jersey's low-income residents. The Department believes that the areas specifically not avoidable through parity contain important consumer protections.

The Department agrees with the commentator's sentiments about the broad claims made by both the OCC and the OTS regarding the scope of Federal preemption. However, the Department cannot control uncertainties stemming from Federal action. While the Department is

very concerned about the impact of the proposed rules on consumers, the language suggested by the commenter to add a new paragraph at N.J.A.C. 3:26-4.1(c)6 preserving all consumer protection laws is overly broad because much of State banking law is concerned at some level with consumer protection, for example, provisions promoting safety and soundness. It would be impossible for State associations to know with any degree of certainty which of the many statutes applicable to such associations fall within the fair meaning of the phrase “New Jersey state law protecting consumers” suggested by the commenter. In order to provide clarity, the Department opted to specify the particular provisions it concluded the Legislature intended to be beyond the scope of the Parity Act. The rationale for those Department decisions is discussed elsewhere in this adoption.

In conclusion, the Department’s responsibility is to implement the statutory amendment passed by the Legislature, which had made a policy decision that New Jersey savings and loans were to have substantial competitive parity with State and Federally-chartered institutions. The Department, as an administrative agency, has used its best efforts to implement the intent of the Legislature of preserving and furthering this goal.

COMMENT: One commenter urged the Department to initiate negotiated rulemaking, including a balance of consumer and industry representatives, to address the extent to which “powers, rights, benefits or privileges” may give rise to the preemption of state law under the state Parity Act.

RESPONSE: The Department appreciates the commenter’s suggestion regarding “negotiated rulemaking.” The Department feels, however, that the current regulatory process allows for sufficient input from, and communication between, all interested parties.

COMMENT: One commenter noted that proposed N.J.A.C. 3:6-12.1(d) requires that, before accessing any powers, rights, benefits or privileges authorized for out-of-State banks, savings banks or savings associations, a State association must provide 45 days notice to the Commissioner. The Commissioner may approve or disapprove the activity within that time. The commenter stated that, since the determination by the Commissioner on such notices will have significant effects on consumers and will be of substantial public interest, the Department should make such notices, except portions containing proprietary information, available on the Department's website and by any other means that the Department deems appropriate. The commenter stated that the Commissioner's response or statement of the Commissioner's determination not to respond to each such notice should also be made publicly available.

RESPONSE: The Department will include a summary of any Application to Exercise Parity with out-of-State institutions on its website. The Department does not presently intend to post the documents provided by an institution seeking to exercise parity on its website. They or the non-confidential portions of them will, however, be available for inspection and/or copying at the Department, subject to certain restrictions related to legitimate confidentiality concerns. In addition, the Department agrees with the commenter's suggestion regarding posting the result of the applications on its website.

COMMENT: One commenter stated that the Department's comments in connection with Parity Act regulations applicable to State chartered banks and savings banks noted that the Department will post "a summary of any Applications to Exercise Parity, but not the actual documents" on its website. The commenter stated that to be useful to the public, particularly in light of the 45-day

response time and the level of technical details that most applications will contain, the applications themselves, with appropriate redactions, should be posted on the Department's website. The commenter also stated that any mailings of information in connection with such applications should be made to any parties that have notified the Department of their interest in receiving them, rather than only to the New Jersey Bankers Association and the New Jersey League of Community Bankers. The commenter also noted that interested members of the public are entitled to receive information from the Department on the same terms as industry trade associations.

RESPONSE: As indicated in the prior response, the Department will post on its website a summary of any Application to Exercise Parity, but not the actual documents, or redacted documents, supplied by the applicant. In addition, anyone seeking non-confidential information regarding any application may notify the Department of their interest, and such information will be provided in accordance with applicable law and procedures concerning the supplying of such information by the Department.

Federal Standards Analysis

New Jersey associations may, in the future, become subject to Federal standards pursuant to a proper exercise of parity in accordance with the adopted repeal and new rule. While the Federal standards applicable in such cases cannot be identified at this time, no applicable State standards may exceed them because parity with Federal institutions may only be exercised pursuant to the pertinent Federal standards.

The adopted repeal and new rule, however, also provide that certain State statutory and regulatory consumer protection requirements may not be avoided through parity: for example,

state criminal usury limitations, protections against predatory lending and the requirement to offer New Jersey Consumer Checking Accounts. In some cases, these limitations on activities by State-chartered State associations may exceed Federal standards applicable to Federally chartered banks, savings banks, and savings associations – that is, the State-chartered institutions will be subject to more limitations than their Federal counterparts. The limitations in the adopted repeal and new rule may restrict New Jersey State associations from certain types or levels of activity in which their Federal counterparts may conceivably be permitted to engage at the present time or in the future. Notwithstanding these limitations, New Jersey-chartered State associations would, because of parity, be able to offer many new services and products to New Jersey consumers not specifically authorized by applicable New Jersey statutes and rules, and reap the resulting economic benefits.

The Department views the adopted provisions imposing these limitations as reasonable and necessary to discharge the Commissioner's statutory responsibility to promulgate rules for the appropriate regulation of New Jersey-chartered State associations. Specifically, the Department is required to implement the legislative authorization in the Parity Act to promulgate rules with the objective of achieving substantially competitive parity between State-chartered and Federally chartered institutions, with the goal of maintaining a vigorous dual banking system. Solid benefits will be afforded to New Jersey consumers by the continued viability of laws addressing consumer checking accounts, criminal law including usury, and high cost residential mortgages. Finally, the Department sees no technological obstacle to the regulated industry's continued compliance with these limitations.

Full text of the adopted new rule follows (addition to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

3:26-4.1 State Association parity with Federal and out-of-State institutions

(a) State associations as defined in N.J.S.A. 17:12B-5 may exercise those powers, rights, benefits or privileges authorized as of *[the effective date of this rule]* ***May 2, 2005*** and, thereafter; for national banks, Federal savings banks or Federal savings associations, either directly or through a financial subsidiary or other subsidiary, to the same extent and subject to the same limitations as national banks, Federal savings banks or Federal savings associations may exercise those powers, rights, benefits or privileges. Pursuant to P.L. 2000 c. 69, § 10 (N.J.S.A. 17:12B-48(21)), State associations may exercise such powers, rights, benefits or privileges consistent with (c) and (d) below, notwithstanding the provisions of N.J.S.A. 17:12B-1 et seq. or any other law. If, under Federal law, the exercise of a power, right, benefit or privilege is subject to compliance with state law in the state in which the national bank, Federal savings bank or Federal savings association exercises the power, right, benefit or privilege, then the exercise of the power, right, benefit, or privilege in this State shall be subject to New Jersey law.

(b) State associations may exercise those powers, rights, benefits or privileges as of *[the effective date of this rule]* ***May 2, 2005*** and thereafter authorized for out-of-State banks, savings banks or savings associations either directly or through a financial subsidiary or other subsidiary, to the same extent and subject to the same limitations as out-of-State banks, savings banks or savings associations may exercise those powers, rights, benefits or privileges, provided that, before exercising any such power, right, benefit or privilege, the Commissioner has approved, by rule, the exercise of such a power, right, benefit or privilege by State

associations generally, or the State association provides notice of its intent to exercise such a power, right, benefit or privilege to the Commissioner and, on a case by case basis, the Commissioner either approves the activity or does not determine, within 45 days of his or her receipt of such notice, that the power, right, benefit or privilege is not to be exercised by the State association on grounds of safety and soundness or on other grounds as provided in this rule. Pursuant to P.L. 2000 c. 69, § 10 (N.J.S.A. 17:12B-48(21)), State associations may exercise such powers, rights, benefits or privileges, consistent with (c) and (d) below, notwithstanding the provisions of N.J.S.A. 17:12B-1 et seq. or any other law. If the exercise of a power, right, benefit or privilege is subject to compliance with state licensing law in the state to which the institution looks for the authority to exercise the power, right, benefit or privilege, then the exercise of the power, right, benefit, or privilege in this State shall be subject to applicable New Jersey licensing law regulating the conduct in which the state Association seeks to engage.

(c) - (d) (No change from proposal.)

Par26ad/INOREGS