

BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

Agents of Foreign Banks

Reproposed New Rules: N.J.A.C. 3:4-4

Authorized By: Holly C. Bakke, Commissioner, Department of Banking and Insurance

Authority: N.J.S.A. 17:1-8.1, 17:1-15(e) and 17:9A-316 and 330.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2004-372

Submit comments by November 19, 2004 to:

Douglas Wheeler, Assistant Commissioner
Legislative and Regulatory Affairs
Department of Banking and Insurance
20 West State Street
P.O. Box 325
Trenton, New Jersey 08625-0325
Fax: (609) 292 -0896
Email: Legsregs@dobi.state.nj.us

The agency proposal follows:

Summary

The general law in New Jersey, set forth at N.J.S.A. 17:9A-316, is that foreign banks may not transact business in New Jersey. Under the law, a foreign bank is a bank that is not chartered by the State of New Jersey or which has not properly established an office in New Jersey. In 1996, N.J.S.A. 17:9A-316 was amended to grant an exception to the prohibition against foreign banks transacting business in New Jersey if the foreign bank conducts business through an agent. The Department of Banking and Insurance (Department) is concerned that foreign banks may seek not merely to "conduct" but to "transact" business with New Jersey consumers through the

"agent" exception. Therefore, the Department believes it is appropriate to clarify the type of business that may be conducted by foreign banks through agents in New Jersey.

In the fall of 2000, the Department proposed N.J.A.C. 3:4-4 to regulate agents of foreign banks. See 32 N.J.R. 3357(a). In light of comments received, upon review of that proposal the Department determined that the interests of the general public, the Department and the regulated community would be better served if the rule as proposed were modified and repropose to permit certain, defined activities and to clearly prohibit others.

Therefore, the Department repropose this rule to more clearly specify the permissible activities that a foreign bank may conduct in this State through an agent, and what activities are prohibited. The repropose new rules do not affect foreign banks that perform back office operations at service facilities, nor those that are properly admitted to transact business in New Jersey or that have an office in this State under other interstate and foreign banking law.

When these rules were previously proposed, the Department received three written comments from financial institutions and business trade associations as follows:

1. New Jersey League of Community Bankers;
2. New Jersey Retail Merchants Association; and
3. Merrill Lynch Bank and Trust Company and Merrill Lynch Bank USA

A summary of these comments and the Department's responses follows:

COMMENT: One commenter supported the proposed regulation.

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

COMMENT: One commenter was concerned that the rule swept too broadly and may have had unintended consequences that would limit retail sellers from assisting their customers in obtaining financing for the purchase of the retailers' goods and services.

RESPONSE: The Department agrees. The Department does not desire to disrupt this practice that has generated no, or virtually no, consumer complaints and that seems consistent with legislative intent. Accordingly, the Department has, in the reproposal, included a subsection permitting it. Appropriate restraints are placed on this activity, providing that no retail deposits are taken, there is no signage and the assistance in obtaining financing is in connection with a sale.

COMMENT: One commenter was concerned that the rule swept too broadly and may have had unintended consequences that would limit financing transactions offered in New Jersey through affiliated financial services companies.

RESPONSE: The Department agrees. The Department recognizes the efficiencies and customer convenience that can result from cross marketing and, consequently, has proposed a subsection permitting it. Appropriate restraints are placed on this activity so that, among other things, no retail deposits are taken, there is no signage and the agent is licensed if licensing would otherwise be required for non-bank employees.

COMMENT: One commenter was concerned that the rule could be interpreted to prohibit a retailer from soliciting loans and loan applications in its own store or from assisting customers in obtaining financing for the purchase of goods or services.

RESPONSE: Under the repropose language, a retail seller may, subject to the provisions of N.J.S.A. 17:16C-1, engage in both activities with respect to loans and financing related to the purchase of goods or services from its own store.

COMMENT: Several commenters suggested that the Gramm-Leach-Bliley Act (GLB), Pub. L. No.106-102, might be violated by the initially proposed rule if it prevented or restricted an insured depository from associating with any person as authorized or permitted by any provision of Federal law.

RESPONSE: The Department disagrees. GLB is concerned with affiliations between specified types of institutions, not with the right of association generally. The rules did not prohibit associations, only certain activities by agents of foreign banks. The current proposed new rules establish reasonable limitations on activities by business associates consistent with GLB and the Department's regulatory responsibilities.

COMMENT: One commenter suggested that GLB prohibits discrimination against insured depository institutions in the regulation of financial services activities authorized or permitted by GLB and, since the rule as initially proposed only prohibited insured depository institutions from engaging in activities through agents, the rule discriminates against insured depository institutions.

RESPONSE: The commenters' concern with discrimination against depository institutions is misplaced. References to lending in section 103a of Gramm-Leach-Bliley do no preempt state licensing and regulatory authority. To the contrary, Gramm-Leach-Bliley specifically preserve state licensing authority in many areas. Thus, GLB prevents or restricts a state from prohibiting

a depository institution which is qualified under applicable licensing requirements from engaging in any activity authorized by the Act. Gramm-Leach-Bliley extends no general lending authority apart from state licensing and regulatory authority.

COMMENT: One commenter suggested that a foreign bank should not be characterized as “transacting business” under N.J.S.A. 17:9A-316(A) because a retailer in New Jersey solicits applications for credit card accounts and that the initially proposed rule improperly expanded the scope of the prohibition on foreign banks “transacting business” in New Jersey by the interpretation of the exemption for activities of an agent that are conducted in this State.

RESPONSE: In the repropose rules the Department has provided that retail sellers may solicit credit card accounts in New Jersey on behalf of a foreign bank to finance the purchase of goods or services from their own businesses, provided that the bank does not advertise in New Jersey media, display signage, accept deposits at the retail location, or solicit independently of a retail sale of goods or services. Such activity would not result in the foreign bank to which the application was submitted being deemed to be transacting business in New Jersey.

COMMENT: One commenter understands the Department’s concern with abusive lending practices in New Jersey due to activities of out-of-State lenders, but recommends that any abuses should be addressed directly and not through the rule as initially proposed, which the commenter believes threatened to undermine legitimate lending and other activities that benefit consumers and the public.

RESPONSE: The Department is very aware of abusive lending practices in other states and has added provisions to the repropose rules concerning payday loans, title loans and refund

anticipation loans by agents of foreign banks that clearly provide that those practices violate N.J.S.A. 17:9A-316E(1). These types of loans, as defined, would also violate New Jersey civil usury laws, N.J.S.A. 31:1-1 et seq., criminal usury laws, N.J.S.A. 2C:21-19, and the Licensed Lenders Act, N.J.S.A. 17:11C-1 et seq. The Department has concerns beyond these types of loans that are addressed in other provisions of the repropose rules

COMMENT: One commenter suggested that the sweeping prohibitions against the use of agents for “soliciting loans …through New Jersey media” or “accepting loan applications” or “making loans,” as set forth at N.J.A.C. 3:4-4.3(c) in the initial proposal (N.J.A.C. 3:4-4.3(a) in the reproposal), would create unnecessary and possibly unconstitutional barriers against the effective interstate marketing and delivery of loans to New Jersey consumers through the use of affiliated entities.

RESPONSE: The Department disagrees. As repropose, the rule will assure that New Jersey borrowers will transact business either with a depository institution or licensed lender directly, not merely an agent, for the aspects of loan transactions specified in the comment. The rule also assures that people or entities will not circumvent New Jersey licensing provisions by merely calling themselves an agent of a foreign bank.

COMMENT: One commenter suggested that the initially proposed rule will be ineffective in limiting the ability of national banks and Federal savings banks to involve retailers in their programs because of Federal preemption of state regulation. Federal law authorizes depository institutions to use agents and establish representative offices to originate and service loans.

RESPONSE: The Department is sensitive to the potential uneven playing field that would have been created under the original proposal. Accordingly, the current reproposal allows retail merchants to act as agents of foreign banks. The reasonable restrictions that the reproposal contains would apply to Federally chartered banks because State law applies to the entry of foreign banks into this State irrespective of charter.

The reproposed rules are summarized as follows:

Proposed N.J.A.C. 3:4-4.1 sets forth the purpose and scope of the subchapter.

Proposed N.J.A.C. 3:4-4.2 sets forth definitions of terms used throughout the subchapter.

Payday, title and refund anticipation loans are defined.

Proposed N.J.A.C. 3:4-4.3 sets forth prohibited activities of agents of foreign banks and sets forth the treatment of an insured depository institution affiliate. Through the adoption of this rule, the Department does not intend to disrupt established correspondent banking relationships between affiliated depository institutions. Therefore, the Department has determined that it is not necessary for those rules to address what activities an agent of a foreign bank that is an insured depository institution affiliate of the foreign bank may conduct. The Department will in the future continue to monitor the activities in which such affiliated institutions engage as agents to determine whether there is any basis for revising that conclusion. The proposed rule distinguishes between particular types of agents in order to accurately reflect the public policy concerns underlying the transacting business prohibition found at N.J.S.A. 17:9A-316.

Proposed N.J.A.C. 3:4-4.4 sets forth permitted activities of agents of foreign banks.

Proposed N.J.A.C. 3:4-4.5 sets forth permitted activities of sellers of retail goods or services who have a banking relationship with a foreign bank in connection with the financing of customer purchases.

Proposed N.J.A.C. 3:4-4.6 sets forth permitted activities of non-depository affiliates of a foreign bank.

Proposed N.J.A.C. 3:4-4.7 sets forth procedures for the entry of agents of foreign banks into New Jersey in emergency situations.

Proposed N.J.A.C. 3:4-4.8 sets forth penalties for violations of the subchapter.

There are certain differences in the rules originally proposed and the rules as repropored at this time. In the original proposal, N.J.A.C. 3:4-4.3 encompassed both prohibited activities, and permitted activities. In the repropored rules, these are now located in two different sections with N.J.A.C. 3:4-4.3 covering prohibited activities and N.J.A.C. 3:4-4.4 covering permitted activities. In addition, the repropored rules have added sections N.J.A.C. 3:4-4.5 and 4.6 regarding permitted activities of sellers of retail goods and services and permitted activities of non-depository affiliates of a foreign bank. These were added in connection with comments received on the original proposal and the basis and reasons for these additions are set forth in the responses to the comments. Proposed N.J.A.C. 3:4-4.7 regarding emergency situations is new to the repropored rules. This section has been added in response to the emergency situations that developed with financial institutions as a result of the events on September 11, 2001.

This rule proposal provides for a comment period of 60 days, and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

These repropored new rules will affect foreign banks that wish to conduct business in this State and their agents. The repropored new rules set forth activities a foreign bank is permitted to conduct through agents and activities that are prohibited.

The repropored new rules will provide an appropriate level of Department oversight and control over the business conducted by agents on behalf of foreign banks in New Jersey. The repropored new rules will have a beneficial social impact by affording clear notice to foreign banks and their agents as to what activities such agents may undertake. The repropored new rules will also have a beneficial social impact on consumers because foreign banks and their agents will be appropriately guided in the conduct of business in this State. The repropored new rules also make it clear that payday, title, and refund anticipation loans, which are illegal in New Jersey, are also illegal if done by an agent of a foreign bank.

Economic Impact

The repropored new rules clarify the statutory provision permitting agents to act on behalf of foreign banks in New Jersey by specifying what business activities a person may conduct as an agent of a foreign bank and what a person may not do as an agent of a foreign bank. The Department will incur costs to oversee the activities of agents that are permitted or prohibited by these repropored new rules. The costs to the Department are not expected to be substantial or burdensome. This conclusion is based on the current level of activity by agents of foreign banks monitored by the Department. The costs to the Department of this monitoring are part of the overall operating expenses of the Department. Further, by clarifying N.J.S.A. 17:9A-316E, the repropored new rules will lessen the legal risks and associated costs of agent activities

in this State. The Department notes that the sanctions for violations of N.J.S.A 17:9A-316E are substantial. Therefore, the repropored new rules should provide some legal comfort and incentive to those institutions engaging in agent activities in this State. The Department does not anticipate that foreign banks will incur any special expenses associated with compliance with the repropored new rules. As a result of these factors, the overall economic impact of these repropored new rules should be positive.

Foreign banks that desire to conduct business in New Jersey beyond what is permitted by these repropored new rules would be required to establish an office in this State. They would need to establish that office in accordance with applicable law and incur the expenses that would normally be associated with such an undertaking.

Federal Standards Statement

A Federal standards analysis is not required because the repropored new rules are not the subject of directly applicable Federal requirements or standards. The repropored new rules, however, are consistent with Federal law and regulations governing the related topic of foreign bank branching and operations, such as 12 U.S.C. § 36 and 12 CFR 545.2.

Jobs Impact

The Department does not anticipate that any jobs will be generated or lost as a result of the repropored new rules. The Department invites commenters to submit any data or studies concerning the jobs impact of the repropored new rules together with their written comments on other aspects of this proposal.

Agriculture Industry Impact

The Department does not expect any agriculture industry impact as a result of the repropored new rules.

Regulatory Flexibility Analysis

The repropored new rules will apply to agents of foreign banks and foreign banks. Some agents of foreign banks and foreign banks may be small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The compliance requirements established in the repropored new rules implement N.J.S.A. 17:9A-316 and would require the modification of any inconsistent existing practices. Foreign banks acting through agents in New Jersey will continue to be required to maintain records of their business conducted through agents in New Jersey under their general recordkeeping responsibilities. However, to a great extent this is a presently existing burden inherent to financial services industries. There are no new reporting requirements imposed by the repropored new rules.

The Department does not believe that any additional professional services will be needed to comply with the repropored new rules as any required documentation can be prepared in-house in the regular course of business of the institution.

There has been no distinction made in the recordkeeping or other compliance requirements for small businesses, as the requirements relate to the Department's oversight of financial institutions. The Department's interest in the effective oversight of foreign banks and their agents applies regardless of business size. Accordingly, since no undue burden would be imposed, and no distinction could be made without diminishing the efficiency of Department's oversight, no differentiation in compliance requirements is made based on business size.

Smart Growth Impact

The reproposed new rules will have no impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

Full text of the repropo
sed new rules follows:

SUBCHAPTER 4. AGENTS OF FOREIGN BANKS

3:4-4.1 Purpose and scope

(a) The purpose of this subchapter is to specify the activities that foreign banks and agents of foreign banks may conduct in New Jersey. It also specifies what activities are illegal for foreign banks and agents of foreign banks.

(b) This subchapter shall apply to foreign banks and agents of foreign banks that conduct business in New Jersey.

3:4-4.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Agency Agreement” means a written agreement between a foreign bank and another person acknowledging that the other person is an agent of the foreign bank, and providing that the agent and the foreign bank shall be subject to the jurisdiction of the Department and New Jersey courts regarding the activities of the agent in the course of his or her agency activities in this State. An agency agreement is necessary for the foreign bank to conduct business in this State pursuant to N.J.S.A. 17:9A-316E.

"Agent" means a person:

1. Identified as an agent of the foreign bank in an agency agreement;
2. Who is not an employee of the foreign bank; and
3. Shall include an insured depository institution affiliate located in New Jersey which acts in New Jersey on behalf of a foreign bank.

"Affiliate" means entities that are related, directly or indirectly, through a common ownership interest of 10 percent or more.

"Commissioner" means the Commissioner of the Department of Banking and Insurance.

"Department" means the New Jersey Department of Banking and Insurance.

"Foreign bank" means a company, other than a banking institution, organized under the laws of the United States, another state or a foreign government, which is authorized by the laws under which it is organized to exercise some or all of the powers specified in N.J.S.A. 17:9A-24(4), 25(4), (5) and (13), and 28(3) through (9).

"Insured depository institution affiliate" means any banking institution, as defined in N.J.S.A. 17:9A-1, or association, as defined in N.J.S.A. 17:12B-5, the deposits of which are insured by the Federal Deposit Insurance Corporation, that controls or is controlled by, or is under common control with a foreign bank.

"Payday loan" means an agreement with respect to which an agent, acting on behalf of the foreign bank, solicits, negotiates, facilitates or agrees to defer the presentment of a negotiable item to the foreign bank, or defer the deposit of an item for collection, or defer debiting the borrower's account electronically or by any other means, in return for a consideration or other thing of value where the rate, fee or other consideration charged for such forbearance exceeds the

limitation on usury set forth at N.J.S.A. 2C:21-19. "Payday loan" shall include, but not be limited to, such loans made:

1. In person;
2. Through an agent;
3. By electronic means (including telephone, fax, computer, internet or similar means); or
4. Through response to an advertisement or solicitation made in this State.

"Primary regulator" means the regulator that issued the charter to the foreign bank.

"Refund anticipation loan" means an agreement with respect to which an agent, acting on behalf of the foreign bank, solicits, negotiates, facilitates or loans a borrower funds, or extends any other consideration to a borrower in return for an assignment of the borrower's tax refund or for any other agreement by the borrower to repay the loan or other consideration from the borrower's tax refund where the rate, fee or other consideration charged for forbearance of the agent or foreign bank exceeds the limitations on usury set forth at N.J.S.A. 2C:21-19. "Refund anticipation loan" includes, but is not limited to, such loans made:

1. In person;
2. Through an agent;
3. By electronic means (including telephone, fax, computer, internet or similar means); or
4. Through response to an advertisement or solicitation made in this State.

"Retail seller" means any person selling goods or services in New Jersey and includes a retail seller as defined in N.J.S.A. 17:16C-1(c).

"Title loan" means an agreement with respect to which an agent, acting on behalf of the foreign bank, solicits, negotiates, facilitates or agrees to make a loan, secured by a title to a motor vehicle, in return for a consideration or other thing of value where the rate, fee or other consideration of such forbearance exceeds the limitation on usury set forth at N.J.S.A. 2C:21-19.

"Title loan" shall include, but not be limited to, such loans made:

1. In person;
2. Through an agent;
3. By electronic means (including telephone, fax, computer, internet or similar means); or
4. Through response to an advertisement or solicitation made in this State.

3:4-4.3 Prohibited Activities

(a) Except as may be permitted by (b) below and by N.J.A.C. 3:4-4.4 through 4.6 for the particular types of agents referenced therein, and by N.J.A.C. 3:4-4.7, foreign banks and their agents are prohibited from engaging in the following activities, which constitute transacting business in this State.

1. Accepting retail deposits;
2. Soliciting loans in person or through New Jersey media;
3. Receiving or accepting loan applications;
4. Making loans, including any types of loans specifically defined in N.J.A.C. 3:4-4.2;
5. Making loan underwriting decisions; or
6. Accepting fees other than in conjunction with closings.

(b) The prohibitions in (a) above shall not apply to an insured depository institution affiliate of a foreign bank.

3:4-4.4 Permitted activities

(a) For the purposes of N.J.S.A 17:9A-316 a foreign bank shall not be deemed to transact business or maintain an office in this State by virtue of conducting business in this State through an agent.

(b) For the purposes of N.J.S.A. 17:9A-316E, and this subchapter, "conducting business" means:

1. Closing loans in New Jersey provided that:

i. The agent is an attorney admitted to practice in New Jersey, a New Jersey-licensed title insurance producer, or an insured depository institution affiliate; and
ii. The interest rate charged does not exceed the maximum permitted by N.J.S.A. 2C:21-19(a);

2. Performing appraisals on real property in New Jersey in connection with a loan, provided that the agent or other individual who performs the appraisal is properly licensed or certified pursuant to N.J.S.A. 45:14F-1 et seq.;

3. Examining the progress of construction on real property in New Jersey that is security for a loan;

4. Soliciting the purchase, negotiating the purchase, or purchasing portfolios of loans or other instruments in the secondary market; or

5. Using the New Jersey court system to enforce the provisions of a loan, to the extent permitted by law.

3:4-4.5 Sellers of retail goods

(a) Subject to (b) below, in connection with the sale of retail goods or services by its own business, a retail seller in this State may:

1. Offer or distribute information from a foreign bank to a customer;
2. Offer or distribute an application to a customer;
3. Receive, accept for transmittal to a foreign bank, or transmit to a foreign bank a customer's application or application information; and
4. Receive fees from a customer in connection with a sale.

(b) A retail seller may engage in the activities set forth in (a) above provided that the conditions set forth below are fulfilled.

1. The foreign bank, with regard to the retail seller's activities:
 - i. Makes the underwriting decision out of State;
 - ii. Does not have an office in this State;
 - iii. Does not display signage in this State;
 - iv. Does not advertise in New Jersey-based media; and
 - v. Does not receive retail deposits from the customer through the seller; and
2. The retail seller, and relevant employees of the retail seller, are licensed in good standing to engage in the activity if a person who is not an employee of a banking institution as defined in N.J.S.A. 17:9A-1, or an entity that is not such a banking institution would be required to be licensed by this State to engage in the same activity.

3:4-4.6 Non-depository affiliates

(a) Subject to (b) below, an entity or an employee of an entity located in this State, that is not an insured depository institution affiliated with a foreign bank, may:

1. Offer or distribute information from the foreign bank to a customer;
2. Offer or distribute an application for banking products or services to a customer;
3. Transmit, or receive, or accept for transmittal to the foreign bank a customer's application or application information; and
4. Receive fees from a customer in connection with banking products or services.

(b) An entity, or an employee of an entity as described in (a) above, may engage in the activities enumerated in (a) above provided that the conditions set forth below are fulfilled.

1. The foreign bank, with regard to the entity's or employee's activities:
 - i. Makes the underwriting decision out-of-State;
 - ii. Does not have an office in this State;
 - iii. Does not display signage in this State;
 - iv. Does not advertise in New Jersey-based media; and
 - v. Does not receive retail deposits from the customer through the employee or entity. This restriction shall not, however, prohibit the receipt by a foreign bank from such an entity or an employee of such an entity of a transmittal of funds held or controlled by the affiliate in a brokerage account, mutual fund, money market or other non-depository account to a depository account in the foreign bank; and

2. The entity and employee(s) as described in (a) above are licensed in good standing to engage in the activity if a person who is not an employee of a banking institution as defined in N.J.S.A. 17:9A-1, or an entity that is not such a banking institution, would be required to be licensed by this State to engage in the same activity.

3:4- 4.7 Emergency cases

(a) The Commissioner may, in emergent cases, permit agents of a foreign bank to conduct activities in this State that would otherwise be prohibited by N.J.A.C. 3:4-4.3, subject to the following conditions:

1. The primary regulator of the foreign bank shall verify to the Department that the bank presents no safety and soundness or consumer protection concerns, and shall agree to notify the Department promptly if such concerns develop during the time the agent is engaging in activities in New Jersey;
2. The primary regulator of the foreign bank shall agree to remain the primary regulator of the foreign bank;
3. The agent activities of the foreign bank in this State are conducted pursuant to the regulatory law of the primary regulator, including powers provisions, except that such activities shall be subject to the general law of New Jersey, including, but not limited to theft, fraud, and criminal law;
4. The approval granted by the Commissioner shall be limited to a specified period, not to exceed 180 days. If concluding agent activities within the specified period would constitute a substantial hardship, the foreign bank may apply to the Commissioner for one or more extensions not to exceed 180 days each;

5. The foreign bank shall agree that the Commissioner may withdraw the approval for cause, provided that the primary regulator has been given notice of such cause and has not taken effective action to correct it or otherwise address it satisfactorily; and

6. The foreign bank shall agree that the Commissioner shall have access to the institution and documents for purposes of determining its compliance with the conditions for admission to the State and whether there have been violations of general state law, provided that the Commissioner has requested documents or information from the primary regulator and has not received the same in a timely manner.

(b) Statements satisfying the conditions in (a) above shall be submitted in writing to the Commissioner as a basis for approval.

3:4-4.8 Penalties

Violation of this subchapter shall subject the foreign bank and the agent to the penalties authorized by law, including, but not limited to, those provided in N.J.S.A. 17:9A-330.

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