

BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

General Provisions
State Bank and Savings Bank Parity

Adopted Repeal and New Rule: N.J.A.C. 3:6-12.1

Adopted Repeals: N.J.A.C. 3:6-12.2 and 12.3

Proposed: August 4, 2003 at 35 N.J.R. 3433(a)

Adopted: December 22, 2003 by Holly C. Bakke, Commissioner, Department of Banking and Insurance

Filed: December 23, 2003 as R. 2004 d. 40, **with technical chances** 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, 15e and 17:9A-24b.1.

Effective Date: January 20, 2004

Expiration Date: May 20, 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, New Jersey League of Community Bankers; Mary Kathryn Roberts, Esq., of the law firm of Riker Danzig Scherer Hyland Perretti, LLP, on behalf of the New Jersey Bankers Association; and David McMillin, Esq., Senior Attorney, Legal Services of New Jersey, Inc.

COMMENT: One commenter noted that N.J.S.A. 17:9A-24b.1 as amended by P.L. 2000, c. 69 provides that, notwithstanding the provisions of the State banking laws or any other laws, banks and savings banks 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 they believe that Federal law provides extensive protections to consumers. They note 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 banks and savings institutions 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 banks and savings banks cannot fully compete with their Federal counter parts.

RESPONSE: The proposal 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 banks, savings banks and savings 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 and the New Jersey Home Ownership Security Act of 2002 are valuable, and 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 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 banks and savings banks on a substantially competitive parity with national and out-of-state banks and federal and out-of-state savings banks and savings and loan 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 “substantially competitive parity” as that phrase is used in P.L. 2000, c.69. Finally, notwithstanding that belief, for the reasons set forth in the Response to the next Comment, the Department has concluded that the Legislature intended to except the New Jersey Home Ownership Security Act from the substantially competitive parity conferred by P.L. 2000, c. 69.

COMMENT: One commenter noted that the reproposal was, in their opinion, much improved over the initial proposal, and goes a long way towards providing parity between State-chartered institutions and those that are Federally-chartered. The commenter noted that one area where disparity continues between the powers of New Jersey State banks and savings banks versus those of Federally-chartered savings associations, and most likely nationally-chartered banks based on recent action by the Comptroller of the Currency, is in the lending powers that are governed by the New Jersey Home Ownership Security Act of 2002 (P.L. 2003, c. 64). The commenter noted that the provisions of that law which regulate terms of credit, loan related fees, disclosures, mortgage processing, origination, refinancing, servicing and disbursements have been preempted for Federally chartered savings associations by action of the Federal Office of Thrift Supervision, and the parity regulation should reflect the preemptions of State law allowed for Federally-chartered institutions. The commenter further stated that New Jersey State banks and savings banks are not predatory lenders. Federal regulators recognized 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 engaged in predatory practices. The commenter noted that under the parity law, the Department will be able to utilize the guidance issued by the Federal regulatory agencies in supervising State-chartered institutions, and they believe that the Department has adequate authority under other laws, including the Consumer Fraud Act, to guard against predatory practices. The commenter therefore urged the Department to provide full parity with the powers of national banks and Federal savings associations.

RESPONSE: The Department thanks the commenter for his support for the rule and also his statements regarding improvement. The Department notes the commenter’s concern over the New

Jersey Home Ownership Security Act of 2002 and also notes that, during the legislative process leading up to its enactment, the industry and others suggested to the Legislature that depository institutions be exempted from coverage under that Act. The Legislature rejected that suggestion, and decided to include depository institutions under the New Jersey Home Ownership Security Act of 2002. In light of this clear choice by the Legislature to include them under that law, the Department concluded that the most reasonable reading of the legislative intent does not permit a construction that would allow depository institutions to avoid that Act through the application of parity. The Department agrees that depository institutions are not involved, to a significant degree, with predatory lending. 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 includes 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 dependent on fraud.

COMMENT: One commenter stated they appreciate the Department's consideration of their prior comments on the initial proposal and incorporation of some of those comments into the reproposal.

RESPONSE: The Department appreciates the commenter's support for the reconsidered new rules.

COMMENT: One commenter objected to the Department's carving out of specific exceptions to the parity powers granted in the Parity Act. They noted that N.J.S.A. 17:9A-24b.1 as amended specifies that the rules and regulations adopted pursuant to the parity law "shall have as their objective the placing of banks and savings banks on a substantially competitive parity with national and out-of-state banks, savings banks and Federal and out-of-state savings banks and savings associations." The commenter

noted that the Department sets out its belief that the Legislature did not intend to preempt certain State laws, most notable for the commenter's purposes, the recently enacted New Jersey Home Ownership Security Act of 2002. The commenter noted that the Legislature had the opportunity to specifically provide that the New Jersey Home Ownership Security Act of 2002 preempted the parity law when it enacted the law just a few months ago, but opted not to take such action. The commenter stated that the Department, therefore, should not presume what the Legislature intended with respect to this particular Act and carve it out as an exception to the parity law. The commenter went on to note that, in light of the Office of Thrift Supervision's preemption of the New Jersey Home Ownership Security Act of 2002 for Federal savings associations, and the action by the Georgia Department of Banking in issuing a determination that Georgia's Predatory Lending Law did not apply to banks, the Department should revise the regulation to remove the exception for the New Jersey Home Ownership Security Act of 2002 contained in proposed N.J.A.C. 3:6-12.1(c)5.

RESPONSE: The Department does not agree with the commenter's characterization that the Department "carved out" specific exceptions to the parity powers granted in the Parity Act. Pursuant to P.L. 2000, c. 69, the term "power, right, benefit or privilege," does not encompass all State laws.

P.L. 2000, c. 69 contemplates decisions by the Commissioner concluding that certain powers, rights, benefits or privileges are not appropriate for New Jersey banks or savings banks "on the grounds of safety and soundness or on other grounds designated by the Commissioner by regulation." In the adopted rule, the Commissioner has designated such grounds as being reflected in New Jersey law relating to criminal conduct including criminal usury, corporate governance, consumer checking accounts, and predatory lending practices. Consistent with the explicit reference to it in P.L. 2000, c. 69, the rule also refers to New Jersey laws relating to the safety and soundness of financial institutions. In arriving at these conclusions, the Department relied upon the legislative histories of both P.L. 2000, c. 69 and the New Jersey Home Ownership Security Act of 2002 (P.L. 2003, c. 64), as well as the text of P.L. 2003, c. 64 and the fact that it was enacted subsequent to the Parity Act. One commenter stated that since the New Jersey Home Ownership Security Act of 2002 did not say that parity does not apply to it, therefore parity does apply. However, by including depository institutions under the New Jersey Home Ownership Security Act of 2002, the Legislature explicitly indicated that it did not intend to let depository institutions

avoid its requirements through parity. In addition, with respect to the laws referenced in the rule other than P.L. 2003, c. 64, the Department determined that excluding those subjects from the ambit of the parity granted to New Jersey banks and savings banks by P.L. 2000, c. 69 would not cause them to be, in the words of the Parity Act, placed on other than “a substantially competitive parity with national and out-of-state banks and federal and out-of-state savings banks and savings associations.”

The Department is aware that Federal regulators may claim preemption for their institutions, and specifically of the Office of Thrift Supervision’s claim of preemption of the New Jersey Home Ownership Security Act of 2002 for Federal savings associations. The Department is also cognizant of the action taken by the Georgia Department of Banking and Finance. However, the Department notes that predatory lending practices and legislation enacted against them vary widely from state to state. Further, the Georgia Department of Banking and Finance is constrained by the powers and operating directives of the Georgia legislation, and any comparison to the New Jersey regulatory structure is of limited benefit. The New Jersey Department of Banking and Insurance is solely an administrative agency, enforcing the statutes that are passed by the New Jersey Legislature. Although references to its actions may be of limited benefit, the Department has noted that the Georgia Department of Banking and Finance recently issued a declaratory ruling based on the amended Georgia Fair Lending Act that contains a parity provision. That ruling provides guidance for Georgia State banks in the event of OCC preemption of the law. The Department also notes that on October 3, 2003, the Georgia Department of Banking and Finance issued an extensive memo entitled “Guidelines Regarding the Avoidance of Predatory and Abusive Lending Practices in Georgia State Chartered Banks.” In the memo the Georgia commissioner stated “...we do not intend to permit parity to be used to condone or permit practices which are clearly abusive to the consumer.”

COMMENT: One commenter noted that the Department’s summary of the initial proposed regulations recognized that the Parity Act “was not intended to repeal by implication important New Jersey State consumer protections laws.” The commenter stated that the initial proposed regulation threatened to do that, and, unfortunately, the reposed regulation retains the same fundamental weakness.

The commenter stated that the repropoed regulation would unduly tie the Department's hands and implicitly encourage State chartered banks and savings banks to engage in conduct violating New Jersey State laws protecting consumers, low income consumers in particular. The commenter claimed that these consequences would occur because State-chartered banks and savings banks would be free to contend in any forum that State laws other than those specifically identified in proposed N.J.A.C. 3:6-12.1(c) are inapplicable to them. The rationale offered in support of this assertion is that Congress, the courts and the relevant Federal regulatory agency would find that to be the case if, hypothetically, they were faced with the same question as to Federally-chartered institutions.

RESPONSE: The Department intends no inference regarding the non-applicability of general State laws on depository institutions. Areas of law such as taxation, tort, real estate, contract and the Uniform Commercial Code 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 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 banks for parity to apply. Hypothetical or assumed "authorizations" do not qualify for parity.

COMMENT: One commenter stated that the limited scope of the proposed N.J.A.C. 3:6-12.1(c) would create a significant opportunity for State-chartered banks and savings banks to skirt New Jersey State law based on tenuous arguments that someone else is authorized to do so, simply because New Jersey laws have been omitted from the list. The commenter stated that 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 noted that, on numerous occasions, Federally-chartered banks and savings banks have engaged in conduct violating laws of states in which they did business in reliance on preemption arguments that were subsequently rejected by courts. The commenter therefore urged the Department to abandon its proposal in order to avoid the harm that its adoption would do to New Jersey's low-income residents. In the alternative, the commenter urged the Department to clarify that it intends no

implied preemption of State law with respect to State-chartered banks and savings banks 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. 3:6-12.1(c).

RESPONSE: The Department disagrees that State-chartered banks and savings banks could skirt New Jersey law based on the argument that relevant New Jersey laws were omitted from the list. The list at N.J.A.C. 3:6-12.1(c) is a complete list, although it, like other regulations, could be amended sometime in the future. Therefore the Department disagrees with the suggestion to add the phrase “By way of illustration and not by limitation” at the beginning of N.J.A.C. 3:6-12.1(c). 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 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.

COMMENT: One commenter urged the Department to initiate negotiated rulemaking, including a balance of consumer and industry representatives, to address the extent of State bank powers, rights, benefits or privileges under the Parity Act.

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

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, the bank or savings bank 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 affects on consumers and

will be of substantial public interest, the Department should make such notices (except 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 the introduction to the reproposal indicate that the Department is determined to post notice of all applications for parity powers on its website. The commenter stated that to be useful to the public; however, particularly in light of the 45-day response time, 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.

RESPONSE: As indicated in the prior response, the Department will post a summary of any Application to Exercise Parity, but not the actual documents, or redacted documents, supplied by the applicant. In addition, anyone seeking information regarding any application may notify the Department of their interest, and such information will be mailed.

Federal Standards Analysis

Banks and savings banks may, in the future, become subject to Federal standards pursuant to a proper exercise of parity in accordance with the adopted new rule and repeals. While the Federal standards applicable in such cases cannot be identified at this time, there will be no applicable State

standards that may exceed them because parity with Federal institutions may only be exercised pursuant to the pertinent Federal standards.

The adopted new rule and repeals, 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 banks and savings banks may exceed Federal standards applicable to Federally-chartered banks, savings banks, and savings associations. The limitations in the adopted new rule may restrict New Jersey banks and savings banks from certain types or levels of activity in which their Federal counterparts may conceivably be permitted to engage at the present or in the future. Notwithstanding these adopted limitations, State-chartered banks and savings banks 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 limitations as reasonable and necessary to discharge the Commissioner's statutory responsibility to promulgate rules for the appropriate regulation of New Jersey State-chartered banks and savings banks. 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 (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

3:6-12.1 State bank and savings bank parity with Federal and out-of-State institutions

(a) Banks and savings banks may exercise those powers, rights, benefits or privileges authorized as of *[(the effective date of this rule)]* **January 20, 2004** 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 bank or Federal savings associations may exercise those powers, rights, benefits or privileges. Pursuant to P.L. 2000, c.69, § 3 (N.J.S.A. 17:9A-24(b)1), banks and savings banks may exercise such powers, rights, benefits or privileges, consistent with (c) below, notwithstanding the provisions of N.J.S.A. 17:9A-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) Banks and savings banks may exercise those powers, rights, benefits or privileges as of *[(the effective date of this rule)]* **January 20, 2004** and thereafter authorized fore 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 banks and savings banks generally, or the bank or savings bank 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 bank or savings bank on one or more of the grounds specified in (d) below. Pursuant to P.L. 2000 c.69, § 3 (N.J.S.A. 17:9A-24b.1), banks and savings banks may exercise such powers, rights, benefits or privileges, consistent with (c) and (d) below, notwithstanding the provisions of N.J.S.A. 17:9A-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 institutions 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 bank or savings bank to engage.

(c) – (d)(No change in text.)

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