

BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

General Provisions
State Association Parity

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

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

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

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

Proposal Number: PRN 2004-157

Submit comments by June 18, 2004 to:

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The agency proposal follows:

Summary

The Department of Banking and Insurance (Department) is responsible for promoting the safety and soundness, as well as the growth and efficiency, of New Jersey State associations. State associations are defined in the Savings and Loan Act (1963), N.J.S.A. 17:12B-1 et seq., as "...any savings and loan association, building and loan association, or any corporation, however named, now or hereafter operating pursuant to the provisions of this act." A majority of these entities are savings and loan associations. Because our State associations have strong Federal and out-of-State competitors which also operate in New Jersey, it is important that they be

allowed to compete fairly with their counterparts, and that a level playing field between the institutions with different types of charters be preserved. In the past, such a competitive arrangement has contributed to the ability of state associations to provide a full range of financial services to the citizens of this State. It has produced a dynamic, innovative market in the financial services industry, creating an environment that has served consumers well by making readily available a wide variety of products and services. Thus, this parity proposal is intended to maintain the ability of New Jersey State associations to compete effectively with Federal and non-New Jersey state-chartered banking institutions in this State.

The Department proposes to repeal N.J.A.C. 3:26-4.1 and replace it with a new rule to implement the parity provisions enacted in P.L. 2000, c. 69, § 10 (herein referred to as the “Parity Act”) and codified at N.J.S.A. 17:12B-48(21). The proposed repeal and new rule would clarify the concept of a “power, right, benefit or privilege.” Because the grant of parity contained in the Parity Act applies only to “powers, rights, benefits or privileges” that are possessed by Federally-chartered or out-of-State state banks, savings banks or savings associations, the rule has the effect of clarifying which powers are reachable through parity for New Jersey State associations.

The purpose of the Parity Act is to preserve a level playing field for New Jersey-chartered State associations so they can continue to compete effectively with their Federally-chartered counterparts and 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 has chosen not to undertake such a definition in the first

instance. The Department has, however, noted what is excluded from the term “powers, rights, benefits or privileges” based on common usage and practice, as interpreted by the Department.

Consistent with the Parity Act, the proposed repeal and new rule address both New Jersey-chartered State association parity with Federally-chartered and out-of-State state-chartered banks, savings banks, and savings associations. Any such power shall be exercised upon the same terms and subject to the same conditions as are authorized for Federally-chartered or out-of-State state-chartered banks, savings banks, and savings associations.

To exercise a power, right, benefit, or privilege authorized for an out-of-State, state-chartered bank, savings bank, or savings association, a New Jersey-chartered State association would be required to submit a notice of intent to the Department, supported by information specified in the proposed new rule. Within 45 days, the Commissioner may approve, disapprove, or condition the exercise of the activity based on safety and soundness grounds, failure to comply with New Jersey licensing requirements, or on any other ground established by administrative rule.

The proposed repeal and new rule would clarify that certain areas of this State’s regulation of State associations are not reached by the Parity Act because they are not “powers, rights, benefits or privileges.” These proposed limitations apply to a New Jersey-chartered State association’s ability to exercise a power, right, benefit or privilege authorized for either Federal or out-of-State, state-chartered institutions.

The Department notes, for example, that some State associations operating in New Jersey may claim that they are exempt from the requirement of offering New Jersey Consumer Checking Accounts established in N.J.S.A. 17:16N-1 et seq. Consumer Checking Accounts are low cost personal checking accounts that require only minimal amounts of money to open and

maintain. The accounts provide a substantial benefit to young, low income, and elderly people. In the legislative findings and declarations, set forth at N.J.S.A. 17:16N-1, the Legislature noted these benefits and the groups it intended to assist by requiring the offering of these accounts. Based on these findings and declarations, the Department does not believe that the Legislature intended to permit New Jersey state associations to use parity to avoid their responsibilities to comply with this consumer protection law. Accordingly, in the proposed new rule, the Department has identified this law as one that may not be avoided through the use of parity.

Similarly, the proposed repeal and new rule would provide that State-chartered State associations may not use parity to avoid the limitations set forth in the New Jersey Criminal Code, N.J.S.A. 2C:1-1 et seq., including, but not limited to, limitations on criminal usury set forth at N.J.S.A. 2C:21-19. The Department does not believe that avoiding a state's criminal law is properly regarded as a "power, right, benefit or privilege"; hence, the provision in the proposed new rule that would preserve the State's criminal usury limitation.

The Department has concluded that the Legislature did not intend to allow as a "power, right, benefit, or privilege" activities that would violate the New Jersey Home Ownership Security Act of 2002, P.L. 2003, c.64, codified at N.J.S.A. 46:10B-22 et seq. In reaching this conclusion, the Department was sensitive to the subject matter of the Act, the public concern with regard to predatory lending, the fact that the law is a general, consumer protection law of the State rather than a financial services law, and to the accepted usage of the term "power, right, benefit or privilege." The Department also considered the legislative findings and declarations concerning abusive lending practices set forth at N.J.S.A. 46:10B-23.

The proposed repeal and new rule also establishes grounds for disapproving an application to exercise, or conditioning the exercise of a power, right, benefit or privilege in the

case of parity with an out-of State state-chartered depository, in accordance with rulemaking authority specifically granted in the Parity Act. The grounds established are safety and soundness, and a failure to comply with New Jersey licensing requirements.

A 60-day comment period is provided in this notice of proposal and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the notice is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

The proposed repeal and new rule would apply to all New Jersey State associations, providing them substantially competitive parity with their Federal and out-of-State counterparts. The proposed repeal and new rule will permit the Department to continue to require State associations to adhere to safe and sound banking practices and certain key consumer protections. The proposed repeal and new rule should therefore have a beneficial social impact on the banking industry and on consumers. Consumers should gain access to a wider variety of financial services and products, and should benefit from a more innovative banking system.

Economic Impact

The Department expects that the ability of New Jersey-chartered State associations to exercise powers, rights, benefits, and privileges authorized now or in the future for Federally-chartered or out-of-State, state-chartered institutions will have a positive economic impact. New Jersey State associations will be able to offer services and products that are not specifically authorized by New Jersey statutes and rules, but which may enable New Jersey State associations to better serve their customers. In so doing, they should increase their

competitiveness with their Federal and out-of-State counterparts and, depending upon the efficiency of their operations, their market share and profitability.

New Jersey associations that seek to exercise parity with out-of-State, state-chartered institutions will incur costs in order to submit a notice of intent with the required supporting information. The Department expects that associated administrative costs will be minimal. Consumers should benefit economically from resulting increases in service and product options and marketplace competition.

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 proposed 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 proposed 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 proposed 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 or in the future. Notwithstanding these proposed 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 proposed 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.

Jobs Impact

The Department does not anticipate that any jobs will be lost as a result of the proposed repeal and new rule. If State associations increase their business or market share as a result of the parity permitted by the proposed repeal and new rule, additional jobs may be generated.

The Department invites commenters to submit any data or studies concerning the jobs impact of the proposed repeal and new rule together with their written comments on other aspects of this proposal.

Agriculture Industry Impact

The Department does not expect any agriculture industry impact from the proposed repeal and new rule.

Regulatory Flexibility Analysis

Some New Jersey State associations are small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed repeal and new rule would impose compliance requirements on these entities if they seek to exercise a power, right, benefit or privilege authorized for out-of-State, state-chartered banks, savings banks or savings associations. The State associations would be required to provide notice to the Commissioner of its intent to exercise such power, right, benefit or privilege and to provide a description of the intended activity, a copy of the regulatory authority that governs the class of the out-of-State institution that the State associations proposes as the basis of parity, and a business plan and statement describing the general or specific experience of the State associations indicating how the proposed exercise of parity will be conducted in a manner consistent with safe and sound banking practices. The Department believes that this information is necessary in all cases for it to perform its supervisory function.

If State associations seek to exercise parity with out-of-State banks, savings banks or savings associations, professional assistance in the form of attorneys and accountants may be necessary. The cost of compliance will vary from professional to professional depending on the services needed.

The proposed repeal and new rule will grant New Jersey State associations flexibility, yet require them to operate in a manner that is responsible to the Department, their customers and

the general public. The Department does not believe that the compliance requirements are unduly burdensome and finds that they are consistent with prudent banking practices. The purpose of these requirements does not vary based upon business size. Accordingly, no differentiation based on business size is provided.

Smart Growth Impact

The proposed repeal and new rule have no impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

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

SUBCHAPTER 4. STATE [SAVINGS AND LOAN] ASSOCIATION PARITY

3:26-4.1 State [Savings and Loan] Association parity with Federal [savings and loan associations] **and out-of-State institutions**

[In addition to other authority granted by law, and unless contrary to State law, a savings and loan association may exercise any power, right, benefit or privilege which is now or hereafter authorized for Federal savings and loan associations pursuant to Federal law or rules and regulations of any appropriate Federal agency. Any such power shall be exercised upon the same terms and subject to the same conditions as are authorized for Federal savings and loan associations. The powers, rights, benefits or privileges shall be automatically exercisable upon the expiration of 30 days from the date of adoption by the Federal regulatory agency, except if

the Commissioner of Banking and Insurance within that 30-day period provides notice that the power shall not be granted to State savings and loan associations. Such notice shall be provided to each savings and loan association, and to the trade publications of the New Jersey Bankers Association and the New Jersey League Community and Savings Bankers, and/or their successor organizations, if any, for publication. The Commissioner of Banking and Insurance may permit savings and loan associations to begin exercise of a power prior to the expiration of the 30-day period by providing notice of permission to each savings and loan association to the above mentioned trade publications.]

(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) 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) 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) "Power, right, benefit or privilege" shall not mean any activity that would fail to comply with or would violate:

1. The New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 et seq., including, but not limited to, the criminal usury limits established at N.J.S.A. 2C:21-19 as applied to loan products;

2. New Jersey statutes and rules providing for the structure and corporate governance of state associations, including, but not limited to, statutes and rules governing amendments of certificates of incorporation, adoptions of bylaws, rights of shareholders or members, membership of boards of directors, closing of branch offices, establishing of *de novo* branch offices by foreign banks, applications where there is a supervisory concern, and requests for approvals or no objection opinions where there is a supervisory concern;

3. New Jersey statutes and rules providing the Department with supervisory powers over state associations with regard to safety and soundness and other matters, including, but not limited to, the power to issue orders and apply for relief from a court of competent jurisdiction established at N.J.S.A. 17:12B-177 et seq., and the power to require reports and examination by the Department pursuant to N.J.S.A. 17:12B-171 et seq. and similar law;

4. The provisions of N.J.S.A. 17:16N-1 et seq. and any rules regarding Consumer Checking Accounts; and

5. The New Jersey Homeownership Security Act of 2002 (N.J.S.A. 46:10B-22 et seq.).

(d) Prior to the exercise by a State association of any power, right, benefit, or privilege that is exercised by an out-of-State bank, savings bank, or savings association, the State association shall submit a notice of intent for the Commissioner's approval. Such notice of intent shall include: a description of the intended activity; a copy of the statutory or regulatory authority, including any pertinent regulatory interpretation of such authority, that governs the out-of-State institution that the applicant State association proposes as the basis for such exercise of parity; and a business plan and statement of the

general or specific experience of the applicant that establishes how such exercise of parity would be conducted in a manner consistent with safe and sound banking practices. The items submitted as part of the business plan and the statement of experience shall be treated as confidential by the Department and shall not be public records pursuant to N.J.S.A. 47:1A-1 et seq. The Commissioner may disapprove the exercise of any power, right, benefit or privilege on the grounds of: an incomplete notice of intent; safety and soundness; failure to comply with New Jersey licensing requirements; or other grounds as provided in this subchapter. The Commissioner may condition the exercise of any power, right, benefit or privilege on the grounds of safety and soundness, compliance with New Jersey licensing requirements, or on other grounds as provided in this subchapter.

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