-BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

Agents of Foreign Banks

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

Proposed: September 20, 2004 at 36 N.J.R. 4281(a).

Adopted: September 19, 2005 by Donald Bryan, Acting Commissioner, Department of Banking and Insurance.

Filed: September 20, 2005 as R. 2005 d.344, without change.

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

Effective Date: October 17, 2005

Expiration Date: October 24, 2007

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 on behalf of the Legislative and Regulatory Committee of the New Jersey League of Community Bankers; Jay Samuels, Esq., of the law firm of Windels Marx Lane & Mittendorf, LLP; and Gerald Goldman, Esq., General Counsel, on behalf of the New Jersey Check Cashers Association.

COMMENT: One commenter noted that they have no objections to the proposal and believe that the delineation of what activities are permissible and what activities are prohibited seems reasonable.

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

COMMENT: One commenter noted that proposed N.J.A.C. 3:4-4.4(b) allows a foreign bank to conduct business by closing loans in New Jersey provided that the agent is an attorney admitted to practice law in New Jersey and that in proposed N.J.A.C. 3:4-4.2, the definition of "agency agreement" requires that the agent of the foreign bank agree to be subject to the jurisdiction of the New Jersey Department of Banking and Insurance as well as the jurisdiction of the New Jersey courts regarding the activities of the agent in the course of his or her agency. The commenter stated that the net effect is that attorneys acting as agents of foreign banks in the closing of loans must subject themselves to the jurisdiction of New Jersey Department of Banking and Insurance in order to provide standard legal services for foreign bank clients. The commenter suggested that, as attorneys are already subject to professional regulation by the New Jersey Supreme Court and because loan closing services, even with an agency component, do not intrude into any specialized areas that the Department regulates, that the Department should revise the regulation to omit the jurisdictional requirement as it applies to attorneys.

RESPONSE: The Department disagreees with the suggestion that it revise the regulation to omit the jurisdictional requirement as it applies to attorneys. Even though attorneys are subject to professional regulation by the New Jersey Supreme Court, when they take on the capacity of an agent of a foreign bank they may engage in activities that are within the Department's regulatory scope. The Department believes the requirement that all agents of foreign banks, without exception, subject themselves to Department jurisdiction is essential to enabling the Department to take necessary administrative action against any agent who violates the rules. The construction urged in the comment would weaken the Department's enforcement authority and would be inconsistent with the legislative intent underlying the 1996 amendments to N.J.S.A. 17:9A-316 (P.L. 1996, c. 17).

COMMENT: One commenter stated that presumably the proposed regulation intends to regulate only actions of non-depository affiliates acting as agents pursuant to the "or other agents" provision of N.J.S.A. 17:9A-316E and does not intend to regulate or restrict actions of non-depository affiliates generally. The commenter stated that this should be made explicit, so that it is clear that non-depository affiliates are not limited in their otherwise allowable activities by virtue of being affiliates of foreign banks, and may engage in any activity allowable under any other statute, regulation or legal ruling, irrespective of their status as an affiliate of a foreign bank.

RESPONSE: The Department agrees, provided that the non-depository affiliate does not act as an agent of the foreign bank. This distinction is in accord with the commenter's remarks. Further, the Department does not believe the proposal needs to be made more explicit. The heading of the subchapter is "Agents of Foreign Banks" which reflects the Department's intent that the proposed rule is not directed at all activities of non-depository affiliates, but only those activities having to do with agency. Because the Department thinks that its language and intent are clear, it will not change the proposal upon adoption.

COMMENT: One commenter stated that it would seem that the limited scope allowed for non-depository affiliate/agents under N.J.A.C. 3:4-4.6 should be equally open to depository affiliate/agents and that this should be made explicit.

RESPONSE: To the extent that the commenter reads N.J.A.C. 3:4-4.6 to limit the activities of insured depository institution affiliates, the commenter misreads this aspect of the proposal. The activities specified in N.J.A.C. 3:4-4.6 are fully open to insured depository institution affiliates.

The Department does not intend to disrupt existing correspondent banking relationships and activities, some of which may even go beyond the activities specified in N.J.A.C. 3:4-4.6. The Department does not believe a change is necessary to clarify this. Therefore, the Department declines the suggestion and will not change the proposal upon adoption.

COMMENT: One commenter stated that proposed regulation N.J.A.C. 3:4-4.6(a), governing the scope of the regulation, should be clarified to be consistent with the heading of this section. The commenter suggested that the subsection read, in part "… an affiliate of a foreign bank acting as the agent of the foreign bank, or any employee of such affiliate, may:" rather than "… 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:" The commenter stated that, as presently written, N.J.A.C. 3:4-4.6(a) appears to apply to any entity except an insured depository institution affiliate.

RESPONSE: The regulation does not address the permissible activities of an affiliate that is an insured depository institution. The Department has concluded that no amendment to the language is necessary.

COMMENT: One commenter noted that the proposed prohibitions in N.J.A.C. 3:4-4.3(a)2, 3, and 6, which would prevent an affiliate of a foreign bank from accepting loans in person in New Jersey, and from receiving or accepting loan applications and accepting fees other than in conjunction with closings, represent a material departure from the historical position of the Department and are at odds with the long-standing interpretation of what constitutes "transacting business" by a foreign bank. The commenter referred to Advisory Opinion 2-1984 and noted that it found no infirmity in a subsidiary of a foreign bank serving as a loan production office.

The commenter stated that no mention is made in Advisory Opinion 2-1984 of any restriction on loan solicitation activities by the subsidiary and that the entire tenor of the Opinion is that the activities of the subsidiary will be to solicit loans on behalf of the foreign bank parent. The commenter stated that Advisory Opinion 2-1984 incorporated a position of the Department, apparently of long-standing even at that time, that allowed subsidiaries or affiliates (through common ownership) of foreign banks to solicit loans in New Jersey. The commenter stated that the standard language in the Banking Act did not change with the enactment of N.J.S.A. 17:9A-316E in 1996. The commenter stated that the language of the prohibition on a foreign bank transacting business in New Jersey in N.J.S.A. 17:9A-316A was not changed by the 1996 amendments to Section 316 or by any prior or subsequent amendments to the statutes and dates back to the original enactment in 1948. The commenter continued that, notwithstanding this, the proposed regulation seeks to prohibit activity that has been allowed by the Department as not violative of the "transacting business" prohibition for at least the past 20 years. The commenter stated that there is no reason to believe that the Legislature, in enacting N.J.S.A. 17:9A-316E, was not aware of the interpretation of the Department in allowing solicitation by non-bank affiliates and in any way sought to preclude or adversely affect that practice, or in any way intended to expand the scope of the prohibition on "transacting business." The commenter stated that, if anything, N.J.S.A. 17:9A-316E would seem to have been intended to be expansive in regard to allowing activities on behalf of foreign banks without violation of the statutory prohibition.

The commenter stated that the proposed regulation seeks to preclude activities (solicitation by a subsidiary or affiliate) that cannot legally be precluded in the context of the subsidiary or affiliate acting in transactions having no direct nexus to the foreign bank. The

commenter stated that whether the presence of a foreign bank as the ultimate lender would serve to justify the solicitation constrictions in the proposed rule is a subject about which the Department has apparently changed its view. The commenter recommended that the Department consider whether this change of view is appropriate, in light of the apparent absence of history of complaints with respect to commercial lending activities of foreign banks, and in light of the issues raised by the Third Circuit Court of Appeals in *Arab African International Bank v. Epstein*, 10 F.3rd 168 (Third Circuit 1993).

RESPONSE: The Department notes that the position expressed in Advisory Opinion 2-1984 was subsequently revisited and changed in 1989. Thereafter, the then Department of Banking consistently took the position that neither a foreign bank nor a subsidiary or affiliate of a foreign bank, other than an insured depository institution affiliate, could operate a loan production office in this state. This prohibition also applied to agents of those entities.

N.J.S.A. 17:9-316 has two prongs: transacting business and maintaining an office. These two prongs apply to all foreign banks that are not seeking to enter New Jersey through explicitly provided paths of entry, for example, under the Interstate Banking and Branching Act, P.L. 1996, c. 17. With regard to the first prong, solicitation offices transact business in New Jersey as described in Formal Advice of the Attorney General 17-1975 and are therefore prohibited from being established in New Jersey on that basis. Moreover, they are offices not otherwise authorized by law and, as such, they are prohibited from being established in New Jersey on that basis under the clear language of N.J.S.A. 17:9A-316C. This construction also applies to all agents other than insured depository institution affiliates.

In addition, there is no reason to believe that the 1984 informal advisory opinion of the Department was relied upon by the Legislature in enacting N.J.S.A. 17:9A-316E in 1996 when

the Department had, in 1989 and thereafter, taken the position that solicitation of loans by non-bank affiliates was prohibited. Indeed, the presumption is that the Legislature was aware of the Department's position. Likewise, there is no basis to support the commenter's assertion that the enactment of N.J.S.A. 17:9A-316E was intended to relax the prohibition upon foreign banks "transacting business" in New Jersey. That provision primarily focuses upon such banks "conducting business in this state through an agent in this state." Finally, the Department is aware of the issue of the burden on interstate commerce as expounded upon by the Third Circuit Court of Appeals in *Arab African International Bank v. Epstein* 10 F. 3rd 168 (Third Circuit 1993). That case dealt with loan closings in New Jersey, which are permitted under certain circumstances by the proposal. Thus, the proposal is consistent with the opinion of the court in the Arab African case.

COMMENT: The commenter stated that, to the extent that the Department has concerns regarding payday lending, refund anticipation lending or title lending directed at consumers, substantive regulation might more appropriately be directed at those areas. The commenter stated that such substantive regulation would then apply to all lenders making such loans, not merely those who happen to be foreign banks. The commenter continued by stating that, to the extent that the protection of domestic institutions is the goal to be affected by the proposed regulations, that protection is either illusory or is accomplished at the cost of constricting the capital and the choices available to commercial loan consumers. The commenter stated that, in the light of the inability to legally preclude subsidiaries and affiliates from access to the marketplace, an efficient marketplace may well simply shift lending to entities not subject to preclusion. The commenter stated that, to the extent that any such shift results in lenders and

capital exiting the New Jersey marketplace, the effect of the proposed regulations will be a net loss to New Jersey economy and commercial loan consumers, with no legitimate corresponding benefit.

RESPONSE: Regarding the comments about payday lending, refund anticipation lending or title lending, the Department has concluded these types of loans violate criminal usury, civil usury and the consumer loan provisions of the Licensed Lenders Act. The purpose of the proposal is to clarify that, with regard to agents of foreign banks, the agent clause in N.J.S.A. 316E may not be used to circumvent New Jersey law.

Regarding the comments about protecting domestic institutions and the risk of lenders and capital exiting the New Jersey marketplace, the Department believes the commenter misses the main thrust of the proposal. Protecting consumers from paying excessive interest rates (sometimes more than 15 times New Jersey's criminal usury limit) was a major goal of the rules, overriding concerns with regard to protecting domestic institutions. While the Department remains sensitive to economic impacts, in this case the Legislature has clearly spoken. Moreover, the commenter has provided no support for his opinion that lenders and capital may exit the marketplace generally because of an inability to charge New Jersey consumers exorbitant rates on the segment of the market involving payday, title or tax refund anticipation loans. New Jersey lenders successfully operate loan businesses with interest rates below criminal usury.

COMMENT: The commenter stated that the statutorily and constitutionally proper and historically consistent course would be to affirmatively allow foreign bank affiliates to solicit loans in person in New Jersey, receive loan applications and accept fees in conjunction with

those loan applications and that such authority would not flow from the agency provisions of N.J.S.A. 17:9A-316E but from the accepted legal analysis, that long predated the agency provisions, that solicitation of loans by a subsidiary or affiliate did not and does not constitute prohibited transaction of business by the foreign bank.

RESPONSE: The Department disagrees. With regard to the stated legal basis, the Department has never taken the position and does not now take the position that "accepted legal analysis" allows subsidiaries and affiliates of foreign banks (other than insured depository institution affiliates) to solicit loans in person in New Jersey, receive loan applications and accept fees in conjunction with those loan applications unless they are properly licensed for that activity.

With regard to the activities of insured depository institution affiliates, they may, in the capacity as an agent of an affiliated foreign bank, conduct normal correspondent banking activities on behalf of a foreign bank. All other affiliates must comply with the restrictions on the activities of agents of foreign banks.

After issuing Advisory Opinion 2-1984, the Department re-examined its legal position with regard to activity conducted at offices by entities that are not insured depository institution affiliates in the light of N.J.S.A. 17:9A-316C and in light of Formal Opinion of the Attorney General, No. 17-1975. As a consequence, the Department's position since 1989 has been that insured depository institution affiliates may conduct normal correspondent banking activities on behalf of a foreign bank. All other affiliates must comply with the restrictions on the activities of agents that are not insured depository institution affiliates of foreign banks.

COMMENT: The commenter stated that, although the Department's explanation of the proposed regulations dismisses summarily any possibility that the rules would be preempted by Federal law, the principle legal basis supporting preemption is neither discussed nor cited. The commenter stated that if there was any doubt in the year 2000 respecting the validity of the regulations, developments during the ensuing years have crystallized into an absolute certainty that the regulations are invalid as applied to the exportation of interest rates by out-of-state banks operating under sections 85 of the National Banking Act, 12 U.S.C. §85 and section 27(a) of the Federal Deposit Insurance Act, 12 U.S.C. §1831D(a).

RESPONSE: The Department disagrees with the commenter's allegation that the proposed rules would be preempted by Federal law. The commenter's assertions that the National Banking Act, 12 U.S.C. §85, and 27(a) of the Federal Deposit Insurance Act, 12 U.S.C. §1831D(a) invalidate the proposed rules are not persuasive. It is the position of the Department that the National Banking Act regulates national banks, not entities separate from the bank. (See *Long v. Ace Cash Express, Inc.*, Case No 3:00-CV-1306-J-25TJC (D. Fla. 2001) and *Colorado, et rel. Salazar v. Ace Cash Express, Inc.*, 188 F. Supp. 2nd 1282 (D. Colorado 2002).

Further, as recently as June of 2005, the Eleventh Circuit Court of Appeals has held that the states remain the prime regulator of state chartered banks notwithstanding Section 27(a) of the Federal Deposit Insurance Act (FDIA). "With regard to field preemption, it is clear that the FDIA was not intending to 'occupy the field' of state bank regulation. In the case of state chartered banks, the FDIA itself makes it clear that while state banks are subject to some federal regulation, the *states* remain the 'primary regulatory authority' over state banks participating in the FDIC's deposit insurance program." *Bankwest, Inc. et al. v. Baker*, 411 F.3rd 1289, 1301. Further the court noted "Although §27(a) authorizes state banks to export their home interest rate

to another state, the FDIA expressly acknowledges that the host state's consumer and fraud laws still apply to the exporting state banks. 12 U.S.C. §1820 (h)(1)A." *Id*. at 1302. "The language of §7(a) refers only to state banks, and does not address non-bank businesses…at all. Even as to 'any' loan of state banks, the language of §27(a) does not mention any other element or term of the loan other than interest rates. Importantly, it does not mention any collateral activity associated with the loan, such as marketing, advertising, solicitation, or any aspect of the loan procurement process." *Id*. at 1304. "Further, nothing in §27(a) regulates separate contracts between out-of-state banks and in-state vendors to which the borrower is not even a party (such as the agency agreements here). The apparent clarity of §27(a)'s language is, at least, important evidence of legislative intent… The scope of §27(a) is quite narrow and restricted to one element of any loan by out-of-state banks: the interest rate." *Id*. at 1304-1305. In reviewing the specific Georgia agency law in contention in the *Bankwest* case, the court noted: "In fact, Section 16-17-2(b)(4) and even the Act itself does not place any limitation on the entirely separate loan contract between the out-of-state bank and the borrower. …Therefore, the Act is nothing more than a narrow agency limitation on contracts between in-state payday stores and out-of-state banks. …Section 27(a) refers to 'state banks' and certainly protects the subsidiaries, various employees, divisions and the like. Section 27(a) does not address or purport to protect an out-of-state bank's ability to use any local, non-bank vendors as agents or to have any form of agency relationship with non-bank vendors. There is also nothing in Section 27(a) that preempts a state's power to regulate local, non-bank entities operating within the state as independent contractors or agents for an out-of-state bank." *Id*. at 1306. Although not rendered in New Jersey's Circuit, the opinion of the Court of Appeals in *Bankwest* supports the Department's

position that Federal preemption does not reach state laws and rules that regulate the activities of agents of foreign banks that are not insured depository institution affiliates.

COMMENT: One commenter stated that they believed that the proposed regulations are misconceived, entirely inconsistent with pre-emptive Federal law and, ultimately, will harm New Jersey consumers while simultaneously violating a whole host of vital public policies.

RESPONSE: The Department disagrees with the statements that the proposed rules are misconceived, or inconsistent with preemptive Federal law, harmful to New Jersey consumers and violative of vital public policies. The Department notes that the commenter fails to provide relevant facts or legal authority in the balance of the comments to support these statements. Rules addressing the activities of agents of foreign banks were originally proposed in 2000 and the current proposal reflects refinements made based upon the comments received on the initial proposal. The proposed rules implement New Jersey public policy on this issue as established by the Legislature through its enactment of N.J.S.A. 17:9A-316 as amended.

COMMENT: One commenter stated that the scarcely concealed purpose of the regulations is to impose prohibitory restrictions on out-of-State banks to preclude, or at least substantially eviscerate, their ability to “export” interest rates in various consumer transactions, including payday lending, tax refund anticipation loans and title loans. The commenter noted that the Department’s exceptionally bland explanation of the draft regulation effectively eschews any discussion of the “rate exportation” issue and, by doing so, the Department seemingly has evaded reference to the controlling Federal law authorizing “rate exportation” and the question of whether it preempts the proposed regulations. The commenter stated that, whether or not the regulations are preempted by Federal banking statutes, the Department owes the citizens of New

Jersey a reasoned discussion of this issue and an acknowledgement of exactly what basis New Jersey has to frustrate interstate banking practices expressly authorized by Congress. The commenter stated that before draft regulations can be promulgated, the Department must explain how it can indirectly interdict the rate exportation programs of foreign banks by crippling their business practices and agency relationships, when the drafters of the regulations unequivocally admit the foreign banks themselves are completely free to engage in the supposed "prohibited" transactions if they merely established an office in this State.

RESPONSE: The Department disagrees with the commenter's conclusion that the purpose of the rules are to impose prohibitory restrictions on out-of-State banks to preclude their ability to export interest rates. The proposed rules are not centrally concerned with interest rate exportation. The rules focus on permissible activities of agents in New Jersey. Within this context, the position of the Department is that foreign banks, using agents, cannot violate New Jersey's criminal usury provisions by exporting interest rates into New Jersey that are proscribed as criminal by N.J.S.A. 2C:21-19. This law embodies an important and deeply held public policy position of the State.

Further, the commenter is mistaken in his analysis of the rules when he states "…the drafters of the regulations unequivocally admit the foreign banks themselves are completely free to engage in the supposed 'prohibited' transactions if they merely established an office in this State." The Department has not, nor would it, make such a statement. A foreign bank that established an office in New Jersey would be subject to New Jersey criminal and civil usury laws which would prohibit their making payday, tax refund anticipation and title loans as defined in the rules because the rates charged on such loans are, by definition, in excess of the criminal usury limit established by N.J.S.A. 2C:21-19.

COMMENT: One commenter stated that the disingenuous nature of these regulations and the official explanation is illustrated by the failure of the Department to mention the term “rate exportation” even once in the twenty pages that comprise the regulations and the accompanying commentary. The commenter stated that regulation and reality should not be divorced so entirely and that the Administrative Procedure Act (APA) demands a much more diligent and thorough analysis before any exercise of final regulatory authority. The commenter stated that these comments are intended to assist the Department in understanding the magnitude of the infirmities inherent in the draft regulations and why they are both misconceived and harmful to New Jersey consumers.

RESPONSE: The Department disagrees with the commenter’s opinion that rate exportation is the central issue to this proposal. The goal is to specify permissible activities of agents of foreign banks. Regardless of whether rate exportation may be ostensibly available to a financial institution based on Federal law, New Jersey maintains its ability to specify permissible types of activities for those who wish to conduct business as agents of foreign banks in New Jersey pursuant to N.J.S.A. 17:9A-316. The position of the Department is and has been that foreign banks cannot, through the use of agents, export interest rates into New Jersey that violate New Jersey criminal usury provisions set forth at N.J.S.A. 2C:21-19. The Department is, through the promulgation of these rules, now formally pronouncing that policy to the regulated community affected by it.

COMMENT: One commenter stated that, under long settled law, a nationally chartered bank is entitled to charge any interest rate authorized in the state where it is located to a consumer in a

foreign state even where the interest rate would be usurious in that foreign state. The commenter went on to note that this is expressly authorized by section 85 of the National Banking Act, 12 U.S.C. §85, as construed in a lengthy, unvarying line of controlling cases, for example *Marquette National Bank v. First of Omaha Corporation*, 439 U.S. 298, 317-319 (1978). The commenter further noted that in 1980 Congress enacted the Depository Institutions Deregulation and Monetary Control Act (DIDAMCA) which, the commenter stated, effectively extended to state-chartered banks the same right to export interest rates enjoyed by Federally-chartered banks under section 85 of the National Banking Act. The commenter stated that the operative preemptive language appears in 12 U.S.C. §1831(d)a. The commenter stated that there is direct controlling precedent in New Jersey upholding the right of State banks operating under DIDAMCA to charge New Jersey consumers interest rates that would otherwise be usurious and even in criminal violation of N.J.S.A. 2C:21-19(a). The commenter contends that in *Hunter v. Greenwood Trust Company*, 272 N.J. Super. 526, 533-537 (App. Div 1994), the Appellate Division upheld the Federally guaranteed right of a Delaware-chartered bank to charge interest rates to New Jersey credit card customers where the rate of interest was legal in Delaware but usurious in New Jersey. The commenter stated that, after reversal by New Jersey Supreme Court, the case was remanded to it by the United States Supreme Court for reconsideration in light of its decision upholding credit card rate exportation in *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735 (1996). The commenter stated that the New Jersey Supreme Court then acknowledged the preemption of State usury law and upheld the Appellate Division's decision in the case of *Hunter v. Greenwood Trust Company*, 146 N.J. 65 (1996).

The commenter stated that the proposed regulations impair the right of out-of-State banks to export interest rates and engage in transactions with New Jersey consumers under lawful rate

exportation programs and that preemption applies to payday loans, tax return refund anticipation loans and title loans.

RESPONSE: The commenter cites a case that he refers to as *Marquette National Bank v. First of Omaha Corporation*, 439 U.S. 298, 317-319 (1978). (The actual caption of the case is *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, 439 U.S. 299 (1978). The commenter cites the case to support rate exportation and the contention that state usury laws may be impaired by this concept. The Department notes that the case does not deal with the issue of agents of foreign banks and that the court, when it discussed the impairment of state usury laws, mentioned that: "This impairment may in fact be accentuated by the ease with which interstate credit is available by mail through the use of modern credit cards," *Marquette National Bank of Minneapolis*, *supra*, at 318-319. Similarly, the *Hunter* case did not deal with the permissible activities of agents of foreign banks. The proposed rules do not attempt to restrict Federal banks and State-chartered banks from using the mails to conduct credit card transactions. They do, however, properly govern the activities of non-bank entities and the actions they may take within New Jersey on behalf of foreign banks under N.J.S.A. 17:19A-316.

COMMENT: One commenter claimed that New Jersey is powerless to bar out-of-State banks from engaging in rate exportation through the services of "agents." The commenter claims this is especially true with a rate exportation program that operates in accordance with the procedures specifically approved by Federal banking regulators, such as the guidelines for payday lending, issued and implemented by the FDIC and available for review at http://www.fdicgov/regulation/safety/payday. The commenter claims New Jersey is without

authority to require, as a precondition to engaging in rate exportation, that out-of-State banks establish "offices" in this State merely because they "advertise" in New Jersey based media.

RESPONSE: The conclusion of the commenter that New Jersey is powerless to bar out-of-State banks from engaging in rate exportation through the services of "agents" lacks support. The cases cited earlier by the commenter all dealt with preemption of state usury law in the context of depository institutions using the mail to do business with out-of-State customers. As noted in responses above, the position of the Department is that Federal law does not preempt state regulation of agents that are not insured depository institution affiliates of out-of-state banks and, consequently, does not shield such agents from state law.

Further, the webpage cited is actually a promotional page for payday lenders. The Department's analysis of these "jump-off sites" reveals that they charge a 456 percent annual percentage rate of interest. New Jersey's public policy is to insulate and protect consumers from such lending terms.

Lastly, the commenter's opinion that "…New Jersey is without authority to require, as a precondition to engaging in rate exportation, that out-of-state banks establish 'offices' in this State merely because they 'advertise' in New Jersey" misconstrues the proposal, which contains no such requirement.

COMMENT: One commenter stated that the Department should be seeking a way to provide New Jersey consumers greater choice in subprime lending transactions which are going to be occurring anyway. The commenter stated that all society benefits from healthy competition, not from stifling extensions of credit for which there is demonstrable demand.

RESPONSE: The Department supports fairly priced subprime lending; however, it strongly opposes lending that violates New Jersey law as enacted by the Legislature, especially loans that can include interest rates that are many times more than that permitted by the criminal usury limit of 30 percent.

The Department notes that usury law is not dependent on whether consumer demand for the loan product exists. Loans in excess of usury limits are prohibited even if the consumer desires the product.

Federal Standards Statement

A Federal standards analysis is not required because the adopted new rules are not the subject of directly applicable Federal requirements or standards. The adopted 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.

Full text of the adoption follows:

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