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Delivered via e-mail

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Regulation Comments
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Re: **FDIC** 12 CRF Chap. III; **FRB** Docket No. R–1206; **OCC** Docket No. 04–18: **OTS** Docket No. 2004–35; Agency Compliance with Section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996; 69 Federal Register 43347; July 20, 2004

Ladies and Gentlemen:

Section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) requires federal banking agencies (Agencies) to review their regulations at least once every 10 years. The Agencies are now in the third phase of this review and are asking for comments on the ways in which the Consumer Protection: Account/Deposit Relationships and Miscellaneous Consumer Rules may be outdated, unnecessary, or unduly burdensome. The American Bankers Association (ABA) brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership - which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks - makes ABA the largest banking trade association in the country.

General Comments

Specific comments on the regulations posed for comment in this third round of EGRPRA review are set out below, but ABA notes that the agencies have been diligent in updating a number of these regulations in the last few years. For example,

the FDIC has made several amendments to the agency's deposit insurance coverage regulations to improve banker and customer understanding and protection. Other of the regulations currently have proposals pending. In those cases, we will reference our comment letters already on file with the agencies for additional detail.

Specific Comments

Consumer Protection in Sales of Insurance

As ABA and its subsidiary, the American Bankers Insurance Association, have previously recommended, we believe that the federal banking agencies should narrow the scope of the Consumer Protection in Sales of Insurance regulation by excepting certain insurance products from the disclosure requirements imposed by the regulation. We believe that this would reduce the potential for consumer confusion and also would reduce unnecessary compliance burden imposed on depository institutions.

The Agencies' current regulations require certain disclosures on all insurance products sold by banks or bank affiliates. We believe that this creates customer confusion with respect to advising customers of a potential for loss of principal on insurance products that lack investment features. Because such products lack investment features, there is no "principal" that the customer can lose, and this causes considerable confusion. These products should be excluded from the disclosure requirements imposed by the regulation

The term "insurance" is not defined in Section 305 of the Gramm-Leach-Bliley Act or the insurance sales disclosure and consumer protection regulation. Instead, the federal banking agencies have decided to look to conventional definitions, judicial interpretations and other federal laws to determine what is or is not an insurance product. The practical effect of this decision is that the regulation applies to a wide range of insurance products, even those that present little, if any, potential for consumer confusion with deposit or savings products.

As ABA and ABIA acknowledge that it is difficult to define the term insurance, we do not advocate the inclusion of a specific definition of the term in the regulation. We do advocate that the regulation be modified to provide that certain products are NOT insurance for purposes of the disclosure requirements imposed by the regulation. Since it is generally recognized that a regulatory agency responsible for implementing a statute may define an undefined term, it is clear that the federal banking agencies have the power to determine what is NOT insurance for purposes of the disclosure requirements. More specifically, we propose that the federal banking agencies determine that the disclosure requirements do not apply to insurance products that present little, if any, potential for consumer confusion.

The legislative history accompanying Section 305 of GLBA indicates that many of the provisions in the section were based upon the Interagency Statement on Retail Sales of Nondeposit Investment Products.[1] That Statement was issued to help consumers distinguish between deposit products and nondeposit investment products, such as annuities and mutual funds. It is, however, difficult to imagine a situation in which a consumer could confuse products such credit insurance, property and casualty insurance, long-term health care insurance, employee benefit products, and term life insurance with savings and deposit products. Such forms of insurance have no principal and interest

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[1] The Report accompanying the House version of Section 305 notes that "...Many of the provisions of this section are based on the Interagency Statement on Retail Sales of Non-deposit Products...." House Report 106-74, Part I, 106th Congress, 1st Session, page 143.

features. They require a consumer to pay a fee, or premium, in exchange for some monetary benefit in the event of a specified occurrence. Therefore, providing the disclosure statements to consumers in connection with the sale of these forms of insurance actually may cause consumer confusion, and definitely adds to the compliance burden of depository institutions.

Credit Insurance - Credit insurance, in particular, does not have the characteristics of a deposit product or an investment product.[2] Deposit and investment products involve the placement of a sum of money by a consumer with an institution in exchange for a certificate or some security that promises a rate of return on the funds, or has the potential for earning some return. In contrast, credit insurance involves the payment of a fee by a borrower in exchange for a promise by an insurance company to pay off the balance of a loan in the event a borrower dies or becomes disabled. Credit insurance, therefore, cannot be confused easily with a deposit or investment product.

Additionally, lenders already provide consumers a disclosure in connection with credit insurance sales. Regulation Z, which implements the Truth-in-Lending Act (TILA), provides that the cost of credit insurance may be excluded from the required TILA disclosure if a lender separately discloses to the consumer that the insurance coverage is not required, provides the consumer with information about the cost of the insurance, and obtains an affirmative written request from the consumer to purchase the insurance. This existing TILA disclosure ensures that consumers are fully aware of the nature and terms of credit insurance.

Fixed Rate Annuities - We also recommend that the regulation be modified to exclude fixed rate annuities from the investment risk disclosure. Again, neither Section 305 nor the regulation defines what constitutes an "investment risk." In the context of insurance, however, the term has been defined to be "the possibility of a reduction in value of an insurance instrument resulting from a decrease in the value of the assets incorporated in the investment portfolio underlying the insurance instrument."[3] Fixed rate annuities present no such risk to a policyholder. A fixed-rate annuity is a contract between a policymaker and an insurer that requires a policyholder to pay either a lump sum or periodic payments to the insurer to establish the principal upon which the insurer <u>guarantees</u> the policyholder a fixed rate of return. In other words, with a fixed rate annuity, a policyholder faces no possibility of a reduction in the value of the contract; the return to the policyholder is guaranteed. The investment risk, if any, rests with the insurance company, which issues the guarantee. Therefore, making the investment risk disclosure to consumers can be confusing and misleading as to the actual type of risk associated with a fixed rate annuity. Furthermore, should an insurance company become insolvent, state guaranty funds would step in to protect annuity policies up to a certain amount (as much as $400,000 for individuals).[4]

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[2] We define credit-related insurance to include credit life, health, accident or disability insurance and credit unemployment insurance.

[3] <u>Barron's Dictionary of Insurance Terms.</u>

[4] Additionally, when Section 305 was enacted, Congress clearly signaled that the investment risk disclosure was required only in connection with variable annuities, not fixed annuities. The relevant part of Section 305 reads as follows:

(A) IN GENERAL. – Requirements that the following disclosures be made orally and in writing before the completion of the initial sale …

(i) UNINSURED STATUS. – ….

(ii) INVESTMENT RISK. – In the case of a variable annuity or other insurance product which involves an investment risk, that there is an investment risk associated with the product, including possible loss of value. … (emphasis added)

Clearly, if Congress intended the disclosure to apply to fixed rate annuities, it would have said so. Since it did not, the federal banking agencies should not require the investment risk disclosure in connection with fixed rate annuities.

Privacy of Consumer Financial Information
A 2003 compliance survey found that privacy laws and regulations compose the second most costly regulatory burden after the Bank Secrecy Act.[5] Perhaps the following response of a community banker best sums up the reaction of many of our members:

> For most of us banks out here in the 'heartland', frankly, the current privacy notice hasn't been a big concern for either banks or our customers since the first year of enactment. We do our annual mailing - - and hear nothing back. I think the consumer is beginning to treat the mailing like junk mail since they now get them from every insurer as well as financial institution. For the average family, I'm sure they get a dozen or more per year.

Another institution pointed out:

> The only time we have really had any comments [from customers] were when the notice was first mailed out and that was mainly because of all the news media on the issue. Once the topic died down, we have really had not issues come up.

A major point of emphasis from our membership is the unnecessary burdens of the mandatory annual privacy notice. This requirement is seen as nothing more than a nuisance to most consumers, particularly since it must be sent even if there have been no privacy policy changes at the bank. ABA recommends that the annual privacy notice requirement for financial institutions be eliminated in 15 USC 6803 and replaced with a requirement that notices be disseminated to the customer after the initial notice in only those instances where the institution's privacy policy has changed. In the alternative, ABA recommends that the privacy regulations be amended to permit the posting of the institution's privacy policy on their website to fulfill the annual privacy policy requirement. The notification to the customer that the annual privacy policy is located on the institution's website should be permitted in any reasonable manner such as in bank statements, orally or on a sign in a branch or office.

Prohibiting Use of Interstate Branches Primarily for Deposit Production
Section 109 of Reigle-Neal Interstate Banking and Branching Act specifically deters the agencies from imposing any additional paperwork collection or regulatory burden in enforcing this provision. The agencies have been careful not to do so. ABA has no recommendations for regulatory burden reduction with respect to this law and implementing regulations.

Safeguarding Customer Information
The Agencies published Interagency Guidelines Establishing Standards for Safeguarding Customer Information last August 2003. ABA filed comments on the Interagency Guidelines by letter dated October 14, 2003, including suggestions for the reduction of the regulatory burden imposed by the Guidelines. A copy of ABA's comment letter is attached.

Electronic Fund Transfers – Reg E
The Federal Reserve Board currently has proposed rulemaking pending under Regulation E, and ABA will address any regulatory burden issues raised by the proposal in its final comments to the Board on that proposal, which are due November 19, 2004.

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[5] See "Nationwide Bank Compliance Officer Survey," ABA Banking Journal (June 2003)

We continue to recommend that Section 909, Consumer Liability for Unauthorized Transfers, of Electronic Fund Transfer Act be amended to increase from $50 to $500 the amount that a customer may be liable for unauthorized debit card transactions, if the customer has written the personal identification number (PIN) on the card. Every year, a number of customers admit that they have written the PIN on the card when they report the card stolen, even though security materials from the card issuer or bank urge them not to do so. Obviously, writing the PIN on the card renders completely ineffective this security feature, and is an open inducement to theft. As a practical matter, if such an amendment is adopted, the customer will rarely be liable for writing the PIN on the card unless the customer admits doing so, as it will be difficult for the bank to prove otherwise. However, the bank will at least be able to warn customers of the potential liability, which will discourage customers from writing the PIN on their cards.

Truth In Savings

The Federal Reserve Board proposed changes in Regulation DD on June 7, 2004. ABA filed comments on the proposal by letter dated August 11, 2004, including a discussion of unnecessary additional regulatory burden that ABA recommended not be adopted by the Board. For example, ABA opposes the proposed requirement that overdraft and other fees triggered by the customer be aggregated monthly for a running total throughout the year. The proposal is not only expensive to implement but these charges are already disclosed in each monthly statement and a year-to-date total would appear to be unnecessary as a consumer disclosure.

Additionally, the proposal would require banks promoting overdraft services to disclose "the circumstances under which the institution would not pay an overdraft." This is an example of a regulation that would impose considerable burden because it is difficult to achieve compliance. There are numerous and ever-changing reasons why the bank may refuse to pay. Listing all of them would be very difficult. Failing to list all of them could result in the bank becoming obligated to pay, if that reason was not specifically disclosed. Further, many banks do not disclose those reasons because they do not want fraudsters to take advantage of the system. Finally, listing the reasons for not paying implies a commitment to pay, absent one of those enumerated reasons. This suggestion is contrary to ABA's recommendation that banks make clear that they will not automatically pay overdrafts, so as not to mislead consumers. The suggestion that payment is not discretionary also may implicate other regulations such as Regulation Z.

Advertisement of Membership

FDIC regulations require disclosure of federal deposit insurance in any advertisement of deposit services or advertisements in which deposit services are implied. Since the revisions to the regulation with the placement of the Saving Association Insurance Fund under the FDIC in 1989, we have received very few questions or complaints about this regulation. Most of these have involved appropriate use of the FDIC logo or "Member FDIC" on the bank's or savings association's website, particularly if the customer may click through to other advertisements of uninsured products. However, FDIC has released several compliance guides on consumer protection, compliance and electronic banking that have been very helpful to bankers. ABA offers no recommendations for change.

Deposit Insurance Coverage
ABA has no recommendations for regulatory burden relief from deposit insurance coverage regulations. We commend the FDIC for having continued to streamline their deposit insurance rules over the last several years to make them more understandable both to financial institutions and consumers. For example, in the last several years, based on the comments received from ABA and others in response to an advance notice of proposed rulemaking in May 1996, the FDIC has:

- amended its recordkeeping rules for accounts held on behalf of others;
- adopted a six-month grace period upon the death of an account owner to allow time for restructuring the account ownership;
- substantially simplified the joint account rules to eliminate the first step of the two-step process;
- expanded beneficiary eligibility for payable-on-death (POD) accounts; and
- simplified its living trust rules in the manner ABA recommended to eliminate a condition that had made the provision virtually useless to consumers.

In addition, the FDIC continues to update its deposit insurance tools for bankers and consumers. It has revised its Electronic Deposit Insurance Estimator (EDIE) several times to make it more user friendly. It has also updated its various brochures on deposit insurance, including just this week translating them into Spanish, thus making it easier for financial institutions to help their customers understand the rules.

Notification of Changes of Insured Status
The regulation requires notice to customers if the holder of the deposit insurance changes or if deposit insurance is terminated. No bank or savings association has ever raised with ABA a regulatory burden issue with this regulation. ABA has no recommendations for changes.

Advertising – OTS
ABA has no recommendations for improvement.

Tying Restriction Exception – OTS
While ABA and its affiliate the ABA Securities Association have made detailed recommendations for changes to the Bank Holding Company Act anti-tying rules, in order to make bank and bank affiliate services more customer friendly and more competitive with non-BHC providers, we make no recommendations for improvement to the OTS rule.

Conclusion

As we wrote in our first letter, we note considerable doubt on the part of bankers that this exercise in regulatory burden reduction will be any more effective than the last five or six regulatory initiatives. Several compliance officers all reported the same reaction when asked for suggestions for burden reduction: they were too busy trying to comply with the existing burden to try to find ways it might be reduced. The industry earnestly hopes for a real reduction in the regulatory burden

under the Community Reinvestment Act, as a showing by the agencies that some positive results are possible. That, in turn, may spark some banker enthusiasm for this current effort.

If there are any questions about this comment, please call the undersigned.

Sincerely,

Paul Smith
Senior Counsel