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Managing Director

October 9, 2000

Manager
Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: Docket No. 2000-68

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Attention: Comments/OES

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1079

Communications Division
Office of the Comptroller of the Currency
250 E Street, S.W., Third Floor
Washington, D.C. 20219
Attention: Docket No. 00-16

Dear Sir or Madam:

The American Bankers Association Insurance Association (ABAIA)[1] appreciates the opportunity to comment on the proposed consumer protection regulation applicable to insurance sales by depository institutions and other persons that has been jointly issued by the federal banking agencies in response to Section 305 of the Gramm-Leach-Bliley Act ("Section 305"). ABAIA's members are actively engaged in the sale of insurance and annuities, and currently adhere to the sales practice standards set forth in the Interagency Statement on Retail Sales of Non-deposit Investment Products (the "Interagency Statement") and the Office of the Comptroller of the Currency's Guidance for National Banks on Insurance and Annuity Sales Activities ("Advisory Letter 96-8"), which are similar to, but not the same as, the proposed regulation.

[1] The American Bankers Association Insurance Association is a separately chartered trade association and non-profit affiliate of the American Bankers Association. ABAIA's mission is to serve as a forum for long-term national strategy among banking organizations on insurance matters, to propose legislation and regulations that permit banking organizations to participate fully in the business of insurance, to protect all existing insurance powers of banking organizations, and to monitor insurance developments at the state level with the support of the nationwide network of state banking associations.

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The ABA Insurance Association is an affiliate of the American Bankers Association

Our comments on the proposed regulation are divided into four parts. First, we request a delay in the enforcement of the final regulation to give depository institutions and other affected parties time to comply with the regulation. Second, we recommend changes to some of the proposed definitions. Principally, we recommend that the definition of "consumer" be limited to individuals, that the definition of "on behalf of" not include persons participating in cross-marketing and referral arrangements, and that the definition of "insurance" not include credit-related insurance products. Third, we recommend that the proposed disclosure requirements be modified to accommodate telephone and direct mail sales, and that they be clarified in several other respects. Finally, we request that the proposed provisions related to the location of insurance sales be clarified to exclude "platform" sales activities, and that the proposed provisions related to referral fees be clarified to apply only to tellers and not other branch personnel.

Effective Date

Section 305 directs the federal banking agencies to issue final consumer protection regulations by November 12, 2000. With an October 5, 2000, comment deadline, we assume a final regulation will be issued on or before that date. As proposed, however, the regulation would require depository institutions and other affected parties to change existing disclosure policies and practices, modify various systems and train personnel, all of which will take some time. Accordingly, we recommend that the agencies delay enforcement of the final regulation until 12 months after the regulation is issued to give depository institutions and other affected parties time to comply with the regulation.

Definitions

Consumer

You have asked if the proposed definition of "consumer" should be expanded to include all retail customers, including small businesses, or be limited to individuals who obtain or apply for insurance products or annuities primarily for personal, family or household purposes. ABAIA recommends that the definition of "consumer" be limited to individuals who obtain or apply for insurance products or annuities primarily for personal, family or household purposes. It is evident from the terms of Section 305 that Section 305 is aimed at individual consumers. For example, Section 305 requires that the disclosures be provided orally, and in writing, and that they be "conspicuous, simple, direct and readily understandable." Such detailed requirements may be appropriate for individuals who may not be financially sophisticated; they are not necessary for any business.

On Behalf Of

Holding Companies and Affiliates

You have asked if activities "on behalf of" an institution should include (1) the use of the name or corporate logo of the holding company or another affiliate, and (2) the sale, solicitation, advertising, or offer of an insurance product or annuity at an off-premises site that identifies or refers to the holding company or affiliate. ABAIA does not believe that either of these activities should be deemed activities "on behalf of" an institution. Section 305 is directed at the activities of depository institutions, not a parent holding company or any non-depository affiliate. Holding companies and other affiliates are separate legal entities.

Cross-Marketing and Referral Agreements

Section __.20(f)(2) of the proposed regulation provides that a person will be deemed to be acting "on behalf of" a depository institution if the institution receives commissions or fees, in whole or in part, derived from the sale of an insurance product or annuity as a result of cross-marketing or referrals by the institution or an affiliate. ABAIA believes that this provision should not be included in the final regulation.

In a typical cross-marketing or referral case, a depository institution will have no contact, whatsoever, with a consumer who purchases an insurance product or annuity. The depository institution will share a list of customers or make a referral of a consumer to an affiliate or other third party, and it will be the affiliate or other third party that will solicit and sell the insurance product or annuity to the consumer. The consumer will not be aware of any fee or commission arrangement between the depository institution and the affiliate or other third party. Nor should it matter to a consumer how fees or commissions are divided after the sale of an insurance product or annuity. The disclosures required by Section 305 are intended to shield a consumer from certain practices before, not after, the sale of insurance. Furthermore, it might be quite confusing for a consumer to receive disclosures regarding a depository institution with which the consumer has had no contact.

In this same context, you ask for comment on the application of the proposed regulation to an Internet transaction in which a depository institution refers customers from its website to the website of an insurer or insurance agency that may or may not be affiliated with the institution. Again, we believe that it would not be necessary for the insurer or insurance agency to provide the consumer with disclosures related to the depository institution in such situations, even if the institution receives income based upon sales by the insurer or agency. Once the consumer leaves the depository institution's website and goes to the website of the insurer or insurance agency, the consumer will cease to have contact with the depository institution.

Insurance

ABAIA agrees that there is no single definition of insurance, and that it would be better for the federal banking agencies not to define the term insurance in the regulation, but to look to a variety of sources in determining whether a product should be covered by the regulations. We recommend, however, that when you finalize the regulation, you clarify that certain products are NOT insurance for purposes of the regulation. Clearly, if you have the power to define what is insurance for purposes of the regulation, you also have the power to define what is not insurance for purposes of the regulation.

As a general matter, Section 305 is patterned after the Interagency Statement, which is directed at non-deposit investment products.[2] Accordingly, we believe that the regulation should apply only to insurance products that have investment features and not to property and casualty insurance, long-term health care insurance, employee benefit products and other similar forms of insurance. It is difficult to envision the case in which a consumer could confuse such insurance products with a savings or investment product. At a minimum, such products should not be subject to the disclosure requirements related to uninsured status. Under Section 305, that disclosure is necessary only "as appropriate," and it would not be appropriate for such products.

Additionally, we recommend that credit-related insurance products not be treated as insurance for purposes of the regulation.[3] Credit-related insurance has long been distinguished from other forms of insurance. The OCC has opined that credit-related insurance sales and underwriting are incidental to the business of banking and permissible for national banks under the terms of 12 U.S.C. 24(Seventh). Similarly, neither the Interagency Statement nor the OCC Advisory Letter 96-8 subject the sale of credit insurance to disclosure requirements like those required by Section 305.

Federal courts also have recognized the distinctive charter of credit-insurance. The Federal Court of Appeals for the District of Columbia has noted that "unlike other forms of insurance...credit insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life business... Moreover, Congress has specifically granted national banks all incidental powers necessary to carry on the business of banking... and as the record thoroughly establishes, credit life insurance is now commonplace and essential where ordinary loans on personal security are involved."[4]

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[2] 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.

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

[4] Independent Bankers Association of America v. Heimann, 613 F. 2d 1164 at 437, (DC Cir. 1979).

Even when federal and state laws have imposed limitations on the insurance activities of banking organizations, those limitations have not applied to credit-related insurance activities of banks. The insurance sales limitations imposed on bank holding companies by the Garn-St Germain Act did not apply to credit-related insurance.[5] Similarly, the insurance underwriting prohibition imposed by the Gramm-Leach-Bliley Act on national banks does not apply to credit-related insurance.[6]

Finally, credit insurance sales already are subject to appropriate consumer safeguards. The anti-tying provisions of Section 106(b) of the Bank Holding Company Act Amendments apply to credit insurance sales made in connection with an extension of credit. Regulation Z treats premiums for credit insurance as a finance charge, unless the creditor does not require the insurance, the premium is disclosed to the consumer and the consumer affirmatively requests the insurance.[7]

Disclosures

Federal Flood and Crop Insurance

The proposed regulation requires a covered person to tell a consumer that insurance products and annuities are not insured by any agency of the United States Government. We recommend that an exception to this requirement be established for federal flood insurance and federal crop insurance sold by a covered person.[8] These insurance products are insured by an agency of the United States Government.

Timing of Disclosures, In General

We believe that certain features of proposed Section __.40(b) may be confusing to consumers, and should be eliminated. One potential source of confusion for a consumer is the requirement that the anti-tying disclosure be given even in cases in which the consumer has not applied for an extension of credit. In such cases, tie-in sales simply are not possible, and a disclosure that suggests that they are may well confuse a consumer. Another potential source of confusion for a consumer is the requirement that the consumer receive and acknowledge the anti-tying disclosure twice, once when the consumer applies for the credit, and a second time just before the consumer purchases insurance. Since the intent of Section 305 is to protect, and not confuse, consumers, we urge you to eliminate these two potentially confusing features of the proposed regulation.

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[5] P.L. 97-320.

[6] Section 302 of the Gramm-Leach-Bliley Act.

[7] 12 C.F.R. 226.4(d)(1).

[8] Similar changes must be made in proposed Section ___.30(b).

Telephone and Direct Mail Sales

We recommend that the disclosure requirements in Section. __.40(b) be adjusted to accommodate telephone and direct mail sales activities. As we read the proposed regulation, a written disclosure must be provided to a consumer before a sale is completed even in cases in which an insurance product or annuity is sold over the telephone. Similarly, as we read the proposed regulation, an oral disclosure must be provided to a consumer when an insurance product or annuity is sold through the mail. Complying with these requirements would be difficult, if not impossible.

Section 305 gives the federal banking agencies the authority to adjust the disclosure requirements for purchases made "in person, by telephone, or by electronic media."[9] In the case of telephone sales, we recommend that the federal banking agencies waive the requirement for written disclosure. Alternatively, you could require the disclosure to be mailed to a consumer within three days of the sale, or you could clarify that the sale of an insurance product or annuity is not complete until the consumer receives the policy and require that the written disclosures be mailed to the consumer along with the policy. In the case of sales conducted through the mail, the only reasonable alternative is to waive the oral disclosure requirement. [10]

Anti-tying Disclosure

Section__.40(b)(1)(ii) of the proposed regulation provides that, in the case of credit applications taken over the phone, the written disclosure required by Section __.40(a)(4) of the proposed regulation (the anti-tying disclosure) may be mailed to the consumer within three days, excluding Sundays and legal holidays. We urge you to clarify when the three-day period for mailing the written notice commences. We would recommend that it start on the business day after the transaction. A next business day rule would accommodate processing and mail schedules.

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[9] 12 U.S.C. 1831x(c)(1)(E).

[10] We believe the use of the phrase "in person" in Section 305 gives the federal banking agencies the authority to make adjustments in cases that do not involve face-to-face contact between a covered person and a consumer. We also believe that a waiver for direct mail sales is comparable to your proposal to waive the requirement for oral disclosure when sales are conducted through electronic media.

Disclosures Must be Understandable

You have asked for guidance on whether the final regulation should provide specific methods for calling attention to the material contained in the disclosures. We admit to being a little puzzled by this request. The statute expressly requires the disclosures to be "conspicuous, simple, direct, and readily understandable," but it does not require that they be "designed to call attention to the nature and significance of the information provided." Nonetheless, we recommend that the final regulation not elaborate on this phrase since specific federal requirements could add to an institution's compliance burden and potentially conflict with state disclosure requirements.

Short Form Disclosures

It would be useful if the final regulation would clarify several aspects of proposed Section __.40(b)(3), which provides that a covered person may use certain "short-form" disclosures, "as appropriate." First, we recommend that the final regulation clarify that the short-form disclosures listed in Section __.40(b)(3) are merely examples, and that a covered person may use other short-form disclosures as long as the disclosures address each of the elements of the disclosure requirement. For example, phrases such as "MAY LOSE VALUE" and "NO BANK GUARANTY" should be acceptable. Second, we recommend that the final regulation clarify that a covered person may use a short-form disclosure to satisfy the anti-tying element of the disclosure requirement, and include an example of such a disclosure. Finally, we recommend that the final regulation clarifies that the short-form disclosures may be used whenever the disclosures are required, and that the phrase "as appropriate" is intended to mean that the disclosures used must appropriately satisfy all of the elements of the disclosure requirement. We believe that such clarifications are consistent with the terms of the statute.

Consumer Acknowledgment

Section __.40(b)(5) of the proposed regulation requires a covered person to obtain a written acknowledgment from a consumer at the time the consumer receives the disclosures required by Section __.40(a). In face-to-face sales or sales conducted through electronic media, compliance with this requirement is relatively straightforward. On the other hand, it is difficult to envision how an institution could comply with this requirement in the case of telephone sales or sales conducted through the mail. Accordingly, we recommend that the agencies waive the written acknowledgement requirement in such cases. As discussed above, we believe the federal banking agencies have the authority under Section 305 to make such an accommodation. An alternative to a waiver would be a requirement that a covered person send the acknowledgment form to a consumer, but not be expected to have received a form from every consumer.

Location and Referral Fees

Section __.50(a) provides that transactions involving insurance be physically segregated from areas where retail deposits are routinely accepted. In the final regulation, we urge the agencies to clarify that this provision is intended solely to segregate insurance sales activities from traditional teller windows, and does not apply to so-called "platform" programs under which branch employees, who are not tellers, will engage in a variety of activities including the origination of loans, the sale of insurance and annuities and, occasionally, the acceptance of deposits.[11] We believe that such an interpretation is consistent with the statute's use of the term "routine."

Section __.50(b) provides that persons who accept deposits in areas where deposits are routinely accepted may refer a consumer who seeks to purchase an insurance product or annuity to a qualified person and receive a one-time, nominal fee of a fixed dollar amount for each referral that does not depend upon the results of the transaction. In the final regulation, we urge you to clarify that this provision applies only to tellers, and does not prevent other bank employees who do not engage in the routine acceptance of deposits from accepting referral fees.

Your consideration of our views is appreciated.

Sincerely,

Beth L. Climo

[11] Currently, many banks have interpreted the Interagency Statement on the Sale of Non-Deposit Products and the OCC's Advisory Letter 96-8 to permit such programs, provided the employees have appropriate business cards, there is signage identifying the insurance agency, materials referencing FDIC insurance are removed from the platform area, etc.