AFSA
American Financial Services Association
919 Eighteenth Street, NW • Washington, DC • 20006
phone 202 296 5544 • fax 202 223 0321 • email afsa@afsamail.org
www.americanfinsvcs.org

The Market Funded Lending Industry

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October 5, 2000

Via Hand Delivery

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW
Washington, DC 20551

Attention: Docket No. R-1079

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Attention: Comments/OES

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

Attention: Docket No. 00-16

Manager, Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Attention: Docket No. 2000-68

Re: Proposed Rulemaking on Consumer Protections for Depository Institution Sales of Insurance

Ladies and Gentlemen:

This comment letter is submitted on behalf of the American Financial Services Association ("AFSA") in response to the Joint Notices of Proposed Rulemaking (the "Proposal") published by the Board of Governors of the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency (the "OCC"), and

the Office of Thrift Supervision (collectively, the "Agencies"), to implement Section 47 of the Federal Deposit Insurance Act, which was added by Section 305 of the Gramm-Leach-Bliley Act (the "GLB Act").

AFSA is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA's mission is "to assure a strong and healthy broad-based consumer lending services industry which is committed to: (1) providing the public with a quality and cost effective service, (2) promoting a financial system that enhances competitiveness, and (3) supporting the reasonable delivery and use of credit-related products." Organized in 1916, AFSA represents about 360 companies operating more than 10,000 offices engaged in extending $200 billion or about 15 to 20 percent of all consumer credit in the United States. AFSA's members include credit card issuers (many of whom are federally-insured depository institutions), independently-owned consumer finance companies, diversified financial services companies, and automobile finance companies. They provide a broad range of financial products and services to consumers throughout the United States, including credit card, checking account, and deposit account services, home mortgage loans, home equity loans, retail installment financing, automobile and mobile home financing, and lines of credit.

AFSA supports the policies and goals of consumer protection regulation set forth in Section 305 and appreciates the opportunity to comment on the Proposal. However, to implement appropriately the goals of Section 305, we respectfully request that the final rule (the "Final Rule") adopted by the Agencies modify the Proposal with respect to credit insurance as described below.

This Letter focuses solely on the portions of the Proposal which would affect the sale of credit insurance in connection with credit products offered by AFSA's members. We respectfully submit that the Proposal not be adopted as published because it could greatly impede the ability of consumers to obtain credit insurance and could fundamentally alter the way in which credit insurance is offered in connection with credit products, such as mortgages and other consumer loans. It is our belief that this is not the result that Congress intended in enacting

Section 305 nor the intent of the Agencies in publishing the Proposal. Thus, as discussed more fully below, we recommend that:

(1) the Final Rule explicitly exclude credit insurance from its scope by expressly stating that credit insurance is not an "insurance product" for purposes of GLB Act § 305 and the Final Rule;

(2) if the Final Rule is applied to credit insurance, that oral disclosures not be required for the solicitation or sale of credit insurance;

(3) if the Final Rule is applied to credit insurance, then oral disclosures should not be required unless there is an oral solicitation or sale of the credit insurance; and

(4) if the Final Rule is applied to credit insurance, then the antitying disclosure should be considered timely provided if given orally before the credit insurance enrollment becomes effective.

I. Credit Insurance Should Be Explicitly Excluded From The Scope Of The Final Rule.

The GLB Act does not define the term "insurance product" for purposes of Section 305. Therefore, the Agencies have the discretion to define the term in accordance with the purposes underlying the statutory provision. Consistent with these observations, the Proposal does not include a definition of "insurance product," and the Agencies specifically invited comment on whether the Final Rule should include a definition of "insurance product" and whether there are other sources for determining whether a product comes within the scope of the Final Rule. We respectfully submit that the Agencies explicitly find that credit insurance is not an "insurance product" under the Final Rule.

The concerns of Congress in enacting Section 305 are not implicated by the sale of credit insurance. The legislative history of Section 305 indicates that Congress was concerned about consumer protection relating to sales of insurance that occurred on a depository institution's premises and by sales of products that were likely to confuse consumers regarding their deposit or investment nature when offered by a depository institution. The Senate Committee on Banking, Housing and Urban Affairs indicated that "the Committee is concerned

about past instances in which depositors have purchased unsuitable investment products without understanding their nature, and wants to take reasonable steps to prevent misunderstanding and confusion when bank customers receive unsolicited sales presentations or see advertisements for securities and investment products for purchase through the bank." *See* S. REP. NO. 106-44, at 17 (1999). Credit insurance, offered only in connection with extensions of credit, does not create a risk of consumer misunderstandings regarding whether it is an investment with uninsured risk or an FDIC-insured deposit.

Also, because credit insurance by its very nature is a special kind of insurance that is offered only in connection with credit transactions, banking and credit laws regulate it as a credit-related product. Indeed, the Board regulates credit insurance as a part of the consumer credit transaction and has determined and implemented appropriate consumer disclosures with respect to credit insurance under Regulation Z, 12 C.F.R. § 226.1 *et seq.*, which implements the Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* Regulation Z requires that, in order to exclude credit insurance premiums from the finance charge, a creditor must disclose in writing to the consumer that the credit insurance coverage is not required, disclose the premiums for credit insurance written in connection with a credit transaction, and receive the consumer's affirmative written request for the insurance. *See* 12 C.F.R. § 226.4(d). These disclosures appropriately recognize the special credit-related nature of credit insurance and provide adequate information to consumers about the product. Because the Regulation Z disclosures provide greater and more appropriate consumer protection than the Proposal's disclosures in the context of credit insurance, the disclosures under the Proposal are not necessary for credit insurance.

Moreover, the federal banking laws historically have treated credit insurance as a banking product instead of a typical insurance product. National banks historically have been authorized to underwrite credit insurance, but have not been authorized to underwrite general insurance products. The OCC recognized in 1983 that because credit insurance is so "clearly incidental to the business of banking" under 12 U.S.C. § 24 (Seventh), that national banks are authorized to underwrite such insurance. *See* OCC Letter No. 277, [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441 (1983) (authorizing the underwriting and reinsurance of credit-related life insurance); *see also* Corporate Dec. #98-28, 1998 OCC Ltr. LEXIS 39, at *7 (credit-related insurance products "constitute a component of outstanding credit relationships"

and are "an integral part of credit transactions"). Similarly, the Board historically has permitted bank holding companies to engage in the underwriting of credit insurance under the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.*, because the underwriting of such credit insurance is "so closely related to banking as to be a proper incident thereto." *See* 12 U.S.C. § 1843(c)(8); 12 C.F.R. § 225.28(b)(11)(i). Thus, as federal banking agencies already have recognized that credit-related insurance products are an integral part of credit transactions, we urge that the Agencies similarly recognize that the credit-related nature of credit insurance does not create the same concerns with respect to customer confusion as other investment and insurance products that Section 305 seeks to regulate.

Congress expressly recognized the special credit-related nature of credit insurance in Section 302 of the GLB Act regarding the insurance underwriting activities of national banks. Section 302(a) provides that "a national bank and a subsidiary of a national bank may not provide insurance in a State," except that they may provide "authorized products." "Authorized products" are those products that as of January 1, 1999, the OCC had determined that national banks were authorized to provide. By excluding credit insurance as an authorized product, Congress preserved the ability of national banks to underwrite credit insurance. Because Congress has recognized the inherent credit nature of credit insurance, we urge the Agencies to similarly exclude credit insurance from the scope of the Final Rule.

II. Oral Disclosures Should Not Be Required For The Solicitation Or Sale Of Credit Insurance.

If the Agencies do not accept our view that credit insurance should be excluded from the Final Rule, then we urge the Agencies not to require that oral disclosures be provided for the solicitation or sale of credit insurance. As indicated above, the Board requires and has determined that it is sufficient that important consumer disclosures regarding credit insurance, including that such credit insurance is not required, as well as other important consumer protection disclosures, be given to the consumer in writing. We believe that providing consumer disclosures in writing is the best way to ensure the timeliness, accuracy and consistency of such disclosures. Simply as a practical matter, it is more difficult to control the manner and content of oral disclosures than written disclosures. Moreover, in light of the credit-related nature of credit insurance, we believe that it may in fact be confusing to consumers to orally receive the

disclosures required by the Proposal when such disclosures do not appear to be reasonably related to credit insurance. We note that Section 305(c)(1)(E) of the GLB Act provides the Agencies with flexibility in prescribing the disclosures to make "necessary adjustments . . for purchase in person, by telephone, or by electronic media to provide for the most appropriate and complete form of disclosure and acknowledgments." Thus, we believe that, to ensure the disclosures required by the Proposal are provided completely, consistently, and in a manner that avoids consumer confusion, they should be required to be provided to the consumer only in writing in connection with the sale or solicitation of credit insurance.

III. Oral Disclosures Should Not Be Required If No Oral Solicitation or Sale.

Proposed Section __.40(b)(1)(i) states "The disclosures required by paragraph (a) of this section must be provided orally and in writing before the completion of the initial sale of an insurance product or annuity to a consumer." Proposed Section __.40(b)(2)(ii) provides an exception to the oral disclosure requirement for certain electronic transactions. However, the Proposal contains no similar exception for other transactions conducted without personal solicitation where oral disclosures are not practical, such as in connection with direct mail transactions and take-one applications.

If the Agencies do not accept our view set forth above that credit insurance should not be covered by the Final Rule or that oral disclosures should not be required for the sale or solicitation of credit insurance, we urge that the Agencies not adopt the aspects of the Proposal that require both oral and written disclosures in all instances other than electronic transactions. Rather, we respectfully recommend that the Agencies adopt a modified requirement that oral disclosures be required only when there is an oral solicitation or sale by the depository institution or a covered person acting on behalf of the depository institution.

As described above, credit insurance typically is sold through written documents, many times in direct mail transactions. Implementing the requirement for oral disclosures in the Final Rule for these types of transactions would impose an enormous and new administrative burden for compliance with the Rule. Credit insurance companies would be required to contact consumers via telephone after the consumer had submitted the credit insurance application, even though that application contained a written disclosure of the exact information that would need to

be provided orally. Contacting every consumer in these transactions in which there is no oral contact with the consumer would be very time consuming and expensive. It also would be irritating to consumers to receive a call merely to orally disclose what they had already been told in writing. It would be especially problematic to be required to provide oral disclosures in those instances in which the consumer simply could not be reached easily by telephone. In addition, if the consumer could not be reached by telephone to receive the oral disclosures, then the consumer would not be enrolled for the credit insurance that they had attempted to purchase.

The requirement for oral disclosures in these types of transactions could fundamentally alter the manner in which credit insurance is sold. If a depository institution must provide an oral disclosure to the consumer before the completion of the sale of the credit insurance, credit insurance would no longer be able to be sold solely on a direct mail basis or through other channels for which it is impracticable to give oral disclosures. It should be beyond dispute that Congress did not intend that disclosure rules under Section 305 should alter the fundamental ability to sell credit insurance solely in written transactions. Indeed, it simply is unimaginable that oral disclosures would not be required in electronic transactions, but would be required in paper transactions where providing oral disclosures is also impracticable.

In sum, we urge that the Agencies do not require depository institutions to provide oral disclosures unless there is an oral solicitation or sale of the credit insurance.

IV. The Final Rules Should Permit Antitying Disclosures To Be Provided Orally Before The Credit Insurance Enrollment Becomes Effective.

Proposed Section __.40(b)(1)(ii) states "The disclosures required by paragraph (a)(4) of this section must also be made orally and in writing at the time the consumer applies for an extension of credit in connection with which an insurance product or annuity will be solicited, offered, or sold." This proposed requirement is entirely unworkable in connection with a typical credit insurance transaction.

In the event that the Agencies do not accept our view that credit insurance should not be covered by the Rule, that oral disclosures should not be required for the sale or solicitation of credit insurance, or that oral disclosures not be required unless there is an oral solicitation or sale of credit insurance, we urge that the Agencies do not implement the requirement in the

Proposal that the antitying disclosures be provided orally at the time the consumer applies for an extension of credit in connection with credit insurance transactions. As indicated above, credit insurance transactions typically are conducted entirely through written documents in connection with loan applications and other written materials that the consumer mails to the creditor. The credit insurance company simply has no ability to provide timely oral disclosures to a consumer who obtains an application from the creditor, completes the application at home, and mails the form to the creditor. It will be impossible for the credit insurance company to provide an oral disclosure at the time of application in this instance.

If the Agencies adopt the requirement that these disclosures be provided orally, we urge that the Agencies permit depository institutions to provide the disclosures orally *after* the creditor receives the consumer's application for an extension of credit as long as the disclosure is provided before the insurance enrollment becomes effective. This would allow the consumer to receive the information before being enrolled for the credit insurance. Although providing disclosures orally at a later time would still place a tremendous burden on the operations of the depository institution, it will provide credit insurance companies with at least some method with complying the disclosure rule.

* * *

In conclusion, we believe strongly that the Proposal would negatively impact the credit insurance business. We urge the Agencies not to adopt the Proposal in its current form, but to implement the suggestions set forth in this Letter.

Once again, we greatly appreciate this opportunity to comment on the important issues raised by the Proposal. If you have any questions concerning these comments, or if we can otherwise be of assistance, please do not hesitate to contact the undersigned or James A. Huizinga of Sidley & Austin at (202) 736-8681.

Sincerely yours,

Robert E. McKew

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