American Insurance Association

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October 3, 2000

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

Re: Consumer Protections for Depository Institution Sales of Insurance
Docket No. 2000-68

Ladies and Gentlemen:

The American Insurance Association is pleased to provide its views in response to your request for public comment on your proposed rule regarding consumer protections for depository institution sales of insurance (the "Proposed Rule"). 65 *Federal Register* 50882 (August 21, 2000). The Proposed Rule implements § 47 of the Federal Deposit Insurance Act ("FDI Act"), as amended by § 305 of the Gramm-Leach-Bliley Act ("GLB Act").

AIA is a trade association of major property and casualty insurance companies, representing more than 375 insurers that provide all lines of property and casualty insurance throughout the United States and write more than $60 billion in annual premiums.

Section 305 of the GLB Act requires the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision to adopt consumer protection regulations, which the agencies jointly determine to be appropriate, applicable to retail sales practices, solicitations, advertising and offers of insurance products by depository institutions and persons engaged in such activities at offices of, or on behalf of, depository institutions. Many AIA members will be subject to the Proposed Rule because they often sell insurance products at offices of, or on behalf of, depository institutions. Insurers will increasingly become subject to the Proposed Rule as they continue to affiliate and enter into marketing relationships with banking organizations.

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Overview

AIA believes that the Proposed Rule generally conforms to the requirements of § 305 of the GLB Act. However, we believe that there are certain aspects of the Proposed Rule that could lead to the possibility of confusion among consumers, insurers and depository institutions. Below, we recommend ways in which these provisions could be clarified. In addition, in certain instances, the Proposed Rule seems to go well beyond the language of § 305 and the scope necessary to protect consumers. Further, in certain instances, the Proposed Rule could have unintended adverse effects on the operations of insurers and depository institutions. We have also provided comments to the questions on which you have requested comment.

Section 536.20 Definitions

Definition of "consumer"

The AIA believes that the term "consumer" should be limited to an individual who obtains, applies to obtain or is solicited to obtain insurance products primarily for personal, family or household uses. It is not appropriate to extend coverage of the Proposed Rule to small businesses who have insurance needs that are quite different from the needs of consumers. It is our view that § 305 of the GLB Act was intended to address the sale of insurance to consumers for personal use, not to businesses. In this regard, the Interagency Statement on Retail Sales of Nondeposit Investment Products, which serves as the model from which § 305 of the GLB Act was based, applies only to retail, not business, customers. We see little reason for, or benefit to, extending the Proposed Rule to small businesses. The potential for confusion among businesspersons would appear small. In addition, applying the Proposed Rule to small businesses raises a number of additional concerns that were not addressed in the Proposed Rule. For example, what would be the definition of a small business? Accordingly, the AIA believes that the Proposed Rule should not consider small businesses to be consumers.

Definition of "you"

The AIA believes that you should not adopt the proposed definition of "you." There is nothing in § 305 of the GLB Act that refers to these terms and we see little benefit to such a definition. In fact, the manner in which the definition is used in the Proposed Rule is confusing in certain instances. This confusion arises in connection with provisions that appear to apply to all business conducted by insurers even when the transaction being engaged in has no connection with a depository institution or its customers. Accordingly, the AIA believes that you should delete the concept of "you," and replace it with the language used by § 305 of the GLB Act, which applies the requirements to "a

depository institution or a person selling, soliciting, advertising or offering insurance products at an office of or on behalf of a depository institution."

Section (2) of the definition of "you" provides that a person's activities are on behalf of the depository institution if the depository institution receives commissions or fees, in whole or in part, derived from the sale of an insurance product as a result of cross-marketing or referrals by the depository institution or an affiliate.

The AIA believes that the Proposed Rule should not apply to a person merely because an affiliate of the depository institution engages in cross-marketing or referred consumers to the insurer. Such a result would mean that persons engaged in transactions that have no connection with a depository institution would become subject to the Proposed Rule simply because an affiliate of the depository institution received a fee for cross-marketing or referring prospects to the insurer. The requirements of § 47(a)(1)(A) of the FDI Act apply to a depository institution, or a person engaged in insurance activities on the premises of the depository institution or on behalf of the depository institution. We see no basis in § 47 or in the purposes of that section to apply the requirements of the Proposed Rule to insurers whose insurance activities are conducted in connection with an affiliate of the depository institution, but not the depository institution itself. Accordingly, we recommend that Section (2) of the definition of "you" be amended to delete "or its affiliate."

The AIA also believes that **Section (2) of the definition of "you"** should be amended to clarify that the terms "cross-marketing" or "referrals" do not include the transfer of a list by the depository institution to a person engaged in insurance activities. If there is no apparent connection between the insurer and the depository institution (i.e., the insurer does not mention the name of the depository institution or otherwise identify where the prospect's name came from), there is no possibility that a consumer would be confused. Accordingly, there would be no need for the Proposed Rule to apply. In fact, absent such a connection, the disclosures called for by the Proposed Rule could be confusing to a consumer who would have no idea as to why they were being made when no depository institution was involved in the proposal. Accordingly, we request that the Proposed Rule be amended to indicate that a person is not engaged in activities subject to the Proposed Rule if the depository institution only supplies a prospect list to the person, regardless of the terms of the financial arrangement.

Section (3) of the definition of "you": Use of depository institution's logo

The AIA believes that a person should not be regarded as acting "on behalf of" a depository institution merely because documents evidencing the transaction contain the depository institution's logo. Diversified financial companies often use a common logo for all members of the corporate family. In the insurance industry, the logo is usually recognized by the public as that of the insurer rather than that of the affiliated depository institution. We believe that applying the Proposed Rule to an insurer simply because the insurer's logo is the same as that of the affiliated depository institution is inappropriate if there is little likelihood for confusion among consumers. The AIA believes it is unreasonable to apply the Proposed Rule to an insurer simply because the company shares a logo with a depository institution.

A blanket application of the Proposed Rule to persons using a common logo may be inconsistent with the First Amendment to the U.S. Constitution. In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), the Supreme Court held that a regulation limiting commercial speech must directly and materially advance the government's interest, and be no more extensive than necessary to serve the governmental interest the restriction is designed to serve. 447 U.S. at 564-5. We believe that the Proposed Rule establishes a requirement that reaches far beyond that necessary to address the potential for confusion among consumers. There is nothing in the Proposed Rule that supports the view that consumers would likely be confused merely because an insurer has the same logo as its affiliate depository institution. The Proposed Rule is also over inclusive because it would subject all transactions an insurer engages in to the Proposed Rule simply because the person has the same logo as that of the depository institution. Absent evidence of the likelihood of confusion, we believe the provision would not be consistent with Central Hudson and recent court decisions. See U.S. West, Inc. v. Federal Communications Commission, 182 F.3d 1224 (10th Cir 1999).

The AIA suggests that you amend the Proposed Rule to provide that a person using the same logo of the depository institution will be subject to the Proposed Rule only if the insurance transaction engaged in is likely to mislead the consumer into believing that the insurance product is a deposit or is guaranteed by the depository institution, the FDIC or the U.S. government.

You also ask whether the provision relating to name and logo in **Section (3) of the definition of "you"** should also apply to the use of the name or logo of the holding company or other affiliate of the depository institution. The AIA sees no reason for extending the coverage of the Proposed Rule to situations where the holding company's or other affiliate's name or logo is used. There is virtually no possibility that consumers will be confused if the person engaged in the insurance transaction also uses the holding company's or other

affiliate's name or logo. In fact, we believe that consumers could be confused if the insurer were required to comply with the Proposed Rule because they would not ordinarily associate the holding company or other affiliate with a depository institution. Accordingly, we recommend that you not extend the coverage of the Proposed Rule to cover the use of the name or logo of the holding company or affiliate.

For the same reasons, we believe that you should not extend the Proposed Rule to persons engaged in activities at an off-premises site that identifies or refers to the holding company or other affiliate of the depository institution, or uses the name or logo of the holding company or other affiliate.

The Proposed Rule should reference the GLB definition of insurance

The AIA believes that the Proposed Rule should, at a minimum, reference the definition of the term "insurance" which appears in § 302(c) of the GLB Act. This definition was carefully crafted by Congress to provide a comprehensive definition that would specify what types of activities engaged in by banking organizations should be regarded as "insurance." The AIA believes that it is appropriate that you refer to this comprehensive definition of insurance for purposes of the Proposed Rule in order to ensure that all insurance activities involving consumer products are covered by the protections of § 305 of the GLB Act.

Section 536.30 Prohibited Practices

Section 536.30(a) provides that a covered person may not engage in a practice that would lead a consumer to believe that an extension of credit is conditioned on the purchase of insurance from the depository institution or an affiliate. This provision presents an example of how the use of the term "covered person" in the Proposed Rule can be confusing. First, § 47(b) of the FDI Act refers only to depository institutions and does not mention other parties. We see nothing in that subsection that applies the restrictions of section 106(b) of the Bank Holding Company Amendments of 1970 to parties other than depository institutions. Accordingly, we recommend that **§ 536.30(a)** of the Proposed Rule be amended to delete reference to parties other than depository institutions, as provided for in § 47(b).

The Proposed Rule can be interpreted to apply to a person engaged in insurance activities regardless of whether the person is conducting the transaction on the premises of the depository institution or on behalf of the depository institution. The AIA believes that in the event the provision is not limited to depository institutions, it should be clarified to ensure that it applies to a person only if the person is engaged in insurance activities on the premises of the depository institution or on behalf of the depository institution.

In addition, the AIA believes that **§ 536.30(a)** should be clarified to apply only to extensions of credit by the depository institution, and not to extensions of credit by nondepository institutions. Section 106(b) of the Bank Holding Company Amendments of 1970 applies only to extensions of credit by a depository institution. While we believe the statute is clear, we suggest that the Proposed Rule be clarified so as to avoid any possibility that it could be interpreted to apply to extensions of credit by parties other than depository institutions.

Section 536.30(b) prohibits a covered person from engaging in certain practices or engaging in advertising that could be misleading. While the AIA is generally supportive of the language of the provision, we believe that certain clarifications should be made.

First, we request that you clarify that the provision applies only to activities by a depository institution, or by a person at an office of the depository institution or on behalf of the depository institution. Second, we see no reason why **§ 536.30(b)(2)** should contain the words "that principal may be lost." Section 47(c)(1)(A)(ii) of the FDI Act does not use this term. Moreover, the term "the product may decline in value" covers the same possibility, thereby rendering the additional language surplusage. Finally, the disclosure provisions contained in § 536.40(b)(3) make reference only to the possibility of a decrease in value (as provided for in § 47(c)(1)(B) of the FDI Act), and not of loss of principal. While we recognize that the "Interagency Statement on Retail Sales of Nondeposit Investment Products," issued by the agencies on February 15, 1994, makes reference to the possibility of loss of principal, we see little reason why both points (i.e., loss of principal and value) need be mentioned in **§ 536.30(b)(2)**. We believe you should include a reference only to the possibility of loss of value, which is what Congress provided for in § 47(c)(1)(A)(ii).

Section 536.30(c), which relates to the prohibition on domestic violence discrimination, appears to be drafted such that it applies the Proposed Rule to all transactions engaged in by a covered person, regardless of whether or not they are conducted on the premises of, or on behalf of a depository institution. The provision provides that a covered person is required, in connection with any underwriting or other specified business it may conduct, to abide by the provision regardless of whether or not the transaction is conducted on the premises of the depository institution or on behalf of the depository institution. We do not believe you intended this result. Accordingly, we request that you clarify that § 536.30(c) applies only to insurance transactions conducted by the depository institution, or by a person on the premises of the depository institution or on behalf of the depository institution.

Section 536.40 Disclosure Requirements

Section 536.40(a) requires covered persons to provide consumers with certain disclosures regarding the nature of the insurance product being considered by the consumer. It is unclear whether this provision applies only to transactions conducted on the premises of the depository institution and on behalf of the depository institution, or to all transactions conducted by an insurer. The provision has the potential to be interpreted to apply to all transactions conducted by a covered person, regardless of whether or not there is a nexus to the depository institution. We request that you clarify that the provision applies only to transactions on the premises of a depository institution or conducted by a person on behalf of a depository institution.

In addition, we believe that the disclosures required under the Proposed Rule should take into account the type of insurance product being offered to consumers. We have been informed by our members that it is their experience that consumers are confused when depository institutions offering property and casualty insurance, such as an automobile insurance policy, state that the insurance policy is not a deposit and is not insured by the FDIC or the bank. Consumers do not typically confuse property and casualty insurance with an insured deposit. Accordingly, we recommend that persons subject to the Proposed Rule not be required to provide the disclosures in § 536.40(a)(1), (2), and (3) when the product being offered is property and casualty insurance.

Section 536.40(b)(1)(i) provides that the disclosures provided for in § 536.40(a) must be provided to the consumer orally and in writing before the completion of the sale. The requirement makes no provision for transactions that take place entirely by mail. It would be extraordinarily burdensome to require oral disclosures to consumers who conduct insurance transactions entirely through the mail. Accordingly, we request that you modify **§ 536.40(b)(1)(i)** to provide that a covered person would not be required to make the oral disclosures provided for in § 536.40(a) where the insurance transaction takes place entirely through the mail.

Section 536.40(b)(1)(ii) provides that the disclosures provided for in § 536.40(a)(4) must <u>also</u> be provided at the time the consumer applies for an extension of credit in connection with which an insurance product will be offered. The literal language of **§ 536.40(b)(1)(i)** suggests that the language contained in § 536.40(a)(4) must always be provided to the consumer in connection with an insurance transaction, regardless of whether an extension of credit is applied for. Because under **§ 536.40(b)(1)(ii)** the language contained in §536.40(a)(4) must also be given <u>again</u> when an extension of credit is applied for and insurance is to be offered, the Proposed Rule appears to require that the same disclosure be provided twice. We believe this is an unintended result, and request that you clarify that the disclosure provided for in § 536.40(a)(4) need be provided only when the consumer requests an extension of credit and insurance will be offered.

Section 536.40(b)(5) provides that a covered person must obtain a written acknowledgment from the consumer that the consumer has received the disclosures. The AIA believes that for practical reasons, you should modify this provision to reflect the manner in which insurance business is conducted.

There is nothing in § 47 of the FDI Act that requires that consumer acknowledgments be in writing. Section 47(c)(1)(F) provides only that an acknowledgment be obtained from the consumer. We believe that in the context of a telephone solicitation, an oral acknowledgment from the consumer should be permitted. Covered persons should be required to maintain appropriate records to document receipt of the acknowledgment. Some companies undoubtedly will choose to tape the telephone conversation, while others will choose other means of documentation. This decision, however, should be left to the covered person and not be specified in the Proposed Rule.

If a written acknowledgment from the consumer is required, we recommend that the Proposed Rule be modified to recognize that a covered person cannot require a person who receives the disclosure material in the mail to return the acknowledgment. It would be unfair to treat a covered person to be in violation of § 536.40(b)(5) in circumstances where the covered person has no control over the consumer. This problem is ameliorated if, in connection with transaction conducted by telephone, acknowledgments may be received orally. However, if the transaction takes place entirely by mail, it is inappropriate to penalize the covered person for its failure to obtain the acknowledgment from the consumer. In this regard, the insurer should not be required to cease processing an insurance transaction simply because it has not received the consumer's acknowledgment. The AIA suggests that you permit a covered person to satisfy § 536.40(b)(5) if it has made reasonable attempts, perhaps two mailings to the consumer, to obtain the consumer's acknowledgment.

Electronic Transactions

The AIA appreciates the fact that the Proposed Rule makes reasonable accommodations for e-commerce. We believe that flexibility is called for in this area in view of the dynamic nature of the world of electronic commerce. In this regard, we suggest that you provide as much flexibility as possible in the Proposed Rule so as not to stifle innovation and creativity arising from rapidly evolving technology.

FTC Guidance

You have asked if you should specify the type of detail that is provided in the Federal Trade Commission's guidance on online advertising and sales. The AIA believes that you should not adopt similar guidance. While such detail may be appropriate for entities that are not subject to the type of supervision and regulation that governs depository institutions and the insurance industry, we believe that such detail is unnecessary in view of the extensive oversight of depository institutions and insurers and agents.

The AIA appreciates the opportunity to provide its comments on the Proposed Rule. If you have any questions, please do not hesitate to call.

Sincerely,

C.A. Berrington /APR

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Senior Vice President
and General Counsel

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