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Re: Proposed Rule, Consumer Protections for Depository Institution Sales of Insurance
OCC: Proposed 12 CFR Part 14, Docket No. 00-16
FRS: Proposed 12 CFR Part 208, Docket No. R-1079
FDIC: Proposed 12 CFR Part 343
OTS: Proposed 12 CFR Part536

Ladies and Gentlemen:

Thank you for the opportunity to comment on the proposed rules issued by your respective agencies governing the sale of insurance by depository institutions (the "Proposed Rules"). The comments that follow reflect my own concerns with the Proposed Rules; however, they are shared by my clients, banks large and small who have engaged in the sale of insurance under authority in place prior to the Gramm-Leach-Bliley Act ("GLB"). For your information, I am the author of *Insurance Activities of Banks*, published by Aspen Law and Business in 1998, and a frequent author and lecturer regarding bank sales of insurance. I have been advising clients in this area for over a decade. In my estimation, the Proposed Rules deviate unnecessarily from existing guidelines and, if finalized in their current form, will effect an unnecessary hardship on depository institutions and the affiliated and unaffiliated insurance agencies that sell insurance on their behalf.

The thrust of my comments relate to the departure of the proposed rules from:

- the safe harbors contained in Section 104(d)(2)(B)(ix) and (x) of GLB;
- the exception from broker-dealer registration as to third-party brokerage arrangements contained in Section 201 of GLB and codified at 15 U.S.C. section 78c(a)(4)(B)(i);
- the Interagency Statement on Retail Sales of Nondeposit Investment Products and examination guidelines promulgated thereunder; and
- OCC Interpretive Letter 96-8.

I am quite concerned with the potential for contradictory requirements and the concomitant supervisory and preemption issues that may arise.

Insurance products run the gamut from complex products that are registered as securities to commodity-type products that may be sold through the mails. Some require suitability analysis; others do not. Some are susceptible to tying concerns; others are not. Some are confusable with a deposit; others are not. Under existing laws that will not be supplanted by the Proposed Rules, insurance products registered as securities are subject to the whole panoply of SEC and NASD rules; and all insurance products are subject to state unfair and deceptive trade practice acts. That does not mean that there should not be federal banking regulations; it just means that such rules need to address the differences in the products and need to be drafted to fill the gaps in existing law for the protection of consumers.

Definitions

The definitional section of the Proposed Rules is generally commendable. I have the following comments.

Define insurance to exclude registered products:

Variable annuities, variable life insurance, and certain forms of universal life insurance all are insurance for state regulatory purposes, but are investment products as well. They are securities subject to the requirements of the federal securities laws and, in the context of banking, are subject to the SEC's No-action Letter regarding Chubb Securities. They are further subject to the third-party marketing "push-out" provision of Section 201 of GLB cited above, which specifically addresses disclosures and place of sales. They are all within the ambit of the Interagency Statement on Nondeposit Investment Products and each of the agencies' examination guidelines released thereunder. That law is generally consistent.

The proposed rules change fundamentally, and I submit unnecessarily, the existing law and practice.

- First, as to the required disclosures of __.40(a)(1)-(3), the Proposed Rules change the language of the disclosures subtly, yet the change would require banking organizations and underwriters to destroy existing brochures, advertisements,

signage, acknowledgment forms, letterhead and business cards, to revise Internet sites and telemarketing scripts, and to rewrite policy statements and compliance manuals. To what end? To add a few words? To add new bullet points to the logo format disclosures? Will that enhance the protection of consumers? Will that cure some widespread misconception? It is worse than that. The new disclosures deviate from the requirements of (IX) of the "push-out" provisions of Section 201 of GLB relative to third-party marketing arrangements. Thus, there is not even consistency within GLB.

- Furthermore, the requirement of Section __.50 as to physical segregation of sales differs subtly from the "push-out" provision in (II) of Section 201. The "push-out" provision requires selling space to be "clearly marked and, to the extent practicable, physically separate from the routine deposit-taking activities of the bank." That is very different in practice from "physical segregation," as required by the proposed rule. An example of the difference is platform programs. As I understand the current law, a banking organization may sell investments products from the platform, but only if it rigorously complies with regulatory directives and takes all necessary action to eliminate customer confusion as to the nature of the product sold. Thus, an organization must assure that all references to FDIC insurance are cleansed from the space, that the platform is clearly marked with signage as to its dual purpose, that letterhead and business cards correctly identify the employee's status as a registered representative/insurance agent, that all disclosures are made and acknowledgments received, and that internal control procedures are in place. Sales from the platform are very common. It would appear that this provision of the Proposed Rules would eliminate that option.

- The requirement as to customer grievances is covered by the NASD customer complaint procedures.

- The requirement as to licensing is covered by NASD rules.

There is an abundance of existing law as to bank sales of these products. It is time-tested, and to my knowledge, effective. The Proposed Rules are inconsistent, will complicate compliance and examination inordinately, and do not appear to offer consumers any greater protection. As a result, registered products should be excluded from the proposed rules entirely.

Definition of covered person:

The definition of "covered person" and in particular the concept of acting "on behalf of" a depository institution is comprehensive and accurately reflects the way the insurance business is conducted. I have two comments in this regard:

- Oftentimes, financial institutions sell customer lists to insurers for the sale of insurance to customers. In this event, the institution will receive a fee for "cross-marketing," but it may not be identified in any way with the program. When the depository institution is invisible to the consumer, I suggest that the proposed rules should not apply. This type of activity could be included within the service exception. To that end, I suggest that examples be provided in the final rules as to specific service exceptions, and that the emphasis in this regard be on whether the depository institution is identified to the consumer.

- As to the use of the holding company or other affiliate corporate name or logo, I strongly believe that this activity should be within the definition of covered person when the corporate family uses the same or similar logo and name as the depository institution. I do not believe that consumers differentiate the depository institution from the rest of the affiliated group in these instances. For instance, "Wells Fargo" is Wells Fargo regardless of which is the insured institution. But, when Bankers Trust first acquired Alex Brown, they used separate names and separate logos and did not cross-market insurance. Bankers Trust was invisible to insurance customers. In my estimation, the fact of affiliation should not be the deciding factor, rather the use of the similar corporate name or logo should be.

Disclosures

The Proposed Rules bundle disclosures as to the nature of the product with disclosures as to tying. There should be separate sections dealing with these disclosures because the applicability differs, the timing may differ and the party giving the disclosure may differ.

The "minimum" disclosures:

- As to the disclosures on the nature of the product found at Section _.40(a) (1)-(3) (the "minimum disclosures"), it is lamentable that the language departs from that in the Interagency Statement, the safe harbor in Section 104 of GLB, the disclosures for investment products in 201 of GLB, and most state laws.

    - Focusing on the departure from the disclosures allowed to the states in safe harbor (x) of Section 104 of GLB, I question whether the legislative intent was to create federal disclosures that differ from what is permitted for the states. There is a certain irony to the fact that the disclosures in the Proposed Rules, had they been adopted by a state, would be susceptible to preemption since they depart from the applicable safe harbor. Worse yet, there exists a gray area between the proposed rule and the safe harbor. What happens if a state law uses most of the language of the safe harbor, but deviates slightly? Don't these rules pave the way for such departures? In my estimation, the

disclosures should mirror the safe harbor and thereby encourage uniformity of regulation.

- The industry has become accustomed to the three bullet points. These disclosures appear in too many forms to list and, as discussed above, continue to be appropriate for securities and mutual fund sales. Consumers recognize and understand them. While I realize that the proposed language is verbatim from Section 305 of GLB, I would ask whether any attention was paid to the differences from the safe harbor and the push-out-provision –those are verbatim from GLB as well.

- Notwithstanding the content of the disclosures, there are certain products that should not be subject to the minimum disclosures. Gratuitous disclosure may be confusing. In certain events, there may be so many inapplicable disclosures that consumers stop listening or reading and miss the important ones. I suggest that consideration in this regard be given to credit insurance and title insurance:

    - Banks have sold credit insurance for decades. I submit that it has never been confused with a deposit. The critical aspect of credit insurance is tying. The proposed rules require so many inapplicable disclosures that the antitying disclosures are completely lost. For that reason, I suggest that the minimum disclosures of Section __.40 (a)(1)-(3) not be applicable to credit insurance.

    - Title insurance also raises a serious tying issue when offered by banks; yet it has absolutely no similarity to a deposit. I again submit that the disclosure requirements be revised so that only meaningful disclosure is made –eliminate all disclosures except for the tying ones.

The tying disclosures:

- As to the tying disclosures set forth in Section _.40(a)(4), the language adopted from GLB is not informative and the second disclosure makes very little sense. The purpose of the disclosure is to make the consumer understand, not confuse him/her. The traditional disclosures should be used:

    - You may purchase insurance from any party;

    - Your decision will not affect the bank's credit decision or credit terms in any way.

  This is consistent with safe harbor (ix) of Section 104 of GLB, is consistent with OCC Letter 96-8, and with many state laws.

- These disclosures should initially be made by the lending officer at the time insurance is offered, solicited or sold, and the acknowledgment should be obtained from the person selling insurance at the time the sale is made.

- Further, consider adding a short form tying disclosure to be included with the bullet-point disclosure, such as:

    - not a condition to an extension of credit from the bank.

- In addition, consideration needs to be given to the breadth of applicability of the tying rule. The prohibition in Section _.30 goes to the bank or a *subsidiary* as the insurance provider; the disclosures in Section _.40(a)(4) target the bank and any *affiliate*; the safe harbor of (viii) of Section 104 speaks to *any particular* insurer, agent or broker, as did OCC Interpretive Letter 96-8; and Section _.40(b)(1)(ii) requires the disclosures to be made whenever insurance is offered, sold or solicited in connection with a loan. That leaves a lot of unanswered questions. Do the disclosures have to be made if the lending officer mentions a particular *unaffiliated* agency or just affiliated? What if the insurance is provided directly by an *insurer*, not an agency? For instance, many banks provide mortgage customers with the name of the title insurance company, and the loan officer can provide the forms. Technically, the bank is not acting as an agent and has not offered, sold or solicited the product; yet, it has directed the customer to the insurer and will receive a fee for the service. These vagaries also come into play under state law. The Proposed Rules need to be clear and provide guidance to institutions. Moreover, there will be preemption issues to the extent of any gray area between the safe harbors, state law and these rules.

Meaningfulness of disclosures:

- As to the written acknowledgment, the proposal is generally workable. However, there are numerous direct response programs in existence. In these programs, insurers mail brochures to bank customers for commodity type products. Usually, the corporate logo of the depository institution is used or there is an introductory letter. The product is purchased by the customer through a return postcard. The sale is completed when the form is returned. There is no underwriting involved in these policies. As a result, there really exists no gap between disclosure and sale of the product. There is no possibility of oral disclosures, and there is no meaningful way to obtain a prepurchase acknowledgment form. The Proposed Rules should provide guidance in this regard.

- It is unfortunate the logo format that has been an industry standard for years is suddenly insufficient. There must be five bullet points now, instead of three. Why? Do the extra words solve some mystery? Do they alleviate some lingering confusion? Are they worth having institutions discard brochures, letterhead, business

cards, acknowledgment forms and the like? Stay with the existing logo format, under the same rules.

- In response to your request for comment on supplying examples of conspicuous disclosure, I strongly believe that you should. Bankers are begging for direction in typestyle, boxing, bulleting and the like. The suggested examples are appropriate and helpful, except I suggest deleting the requirement of a plain language heading. Those would be used on acknowledgment forms, but not typically for disclosures.

Where Activities May Take Place

- As discussed above the requirement as to physical segregation needs to focus specifically on platform programs. If they are no longer permitted, say so. If the old rules apply, say so. Please do not leave this critical issue unresolved.

- As to referral fees, I suggest you consider applying the limitations to all unlicensed depository institution employees. Creating a separate category for deposit-taking personnel is senseless. Limitations on referral fees exist to disincentivize an untrained person from beginning the sales process. Loan officers are equally susceptible, as are trust officers. State laws prohibit commission splitting anyway, so this is an area where I believe the Proposed Rules should provide consistent guidance.

Implementation

The comments on the proposed rules are due October 5. The regulations are to be effective in the middle of November. Yet in their current form, they require reprinting of virtually all sales tools and signage, board of directors approval of revised policy statements, rewriting of compliance manuals, and retraining of sales agents and loan officers. Please consider a grace period.

Thank you for your consideration of these comments. My concerns, to a great extent, go to the language of Section 305 of GLB, and I hope the agencies find flexibility in connection with final rulemaking. Your proposals as to electronic commerce are commendable, as are many aspects of the Proposed Rules that were not scripted by GLB. If I can provide any additional explanation, please contact me at the number provided below.

Yours very truly,

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