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ACLI AMERICAN COUNCIL OF LIFE INSURERS
FINANCIAL SECURITY FOR LIFE

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By Hand

October 5, 2000

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

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

Ladies and Gentlemen:

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

The ACLI is the principal trade association for life insurance companies, and its 435 members represent approximately 73 percent of the life insurance and 87 percent of the long term care insurance in force in the United States. They also represent over 80 percent of the domestic pension business funded through life insurance companies and 71 percent of the companies that provide disability income insurance.

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 (the "Agencies") 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. As insurers that often sell insurance products at offices of, or on behalf of, depository institutions, many ACLI member companies will be subject to the Proposed Rule. In addition, as insurers and banking organizations continue to affiliate or enter into strategic marketing or other business relationships, more and more insurers will be subject to the Proposed Rule.

General Overview

The ACLI believes the Proposed Rule generally follows the requirements of section 305 of the GLB Act. However, we believe that there are certain aspects of the Proposed Rule that are ambiguous. These ambiguities could lead to the possibility of confusion among insurers and depository institutions. Accordingly, as presented below, we suggest ways in which these provisions could be clarified. In addition, the Proposed Rule contains provisions that seem to extend its coverage well beyond the language of section 305 and the scope necessary to protect consumers. Finally, in several instances, the language of the Proposed Rule could have significant adverse consequences on the operations of insurers and depository institutions. We believe these results are unintended. We are also providing comments on the questions you have raised.

Specific Comments

__.20(c) Definition of "consumer"

The ACLI 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. We do not believe it is appropriate to extend the coverage to small businesses, which have insurance needs that relate to their business rather than to their personal requirements. Insurance provided for business purposes is quite different from insurance sold to individuals for personal use. We believe the GLB Act was intended to address the sale of insurance to consumers for personal but not business use. The potential for confusion among business persons would appear remote given the nature of the products sold. In addition, applying the Proposed Rule to small businesses raises an entire new set of issues, starting with what constitutes a small business? Accordingly, the ACLI believes that the Proposed Rule should not be extended to small businesses.

__.20(e) Definition of "covered person" or "you"

The ACLI believes that the agency should not adopt the proposed definition of "covered person" or "you." There is nothing in section 305 of the GLB Act the refers to these terms, and we see no reason for such a definition. In fact, the manner in which the definition is used in the Proposed Rule is often confusing and adds an unnecessary level of complexity. As indicated below, this confusion arises out of certain provisions that appear to apply to **all business** conducted by an insurer, even where a particular transaction has no connection with a depository institution or its customers. Accordingly, the ACLI believes that the agency should delete the concept of "covered person" or "you," and replace it with the language of the statute, namely, "a depository institution or a person selling, soliciting, advertising or offering insurance products at an office of or on behalf of a depository institution."

__.20(e)(2) 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 ACLI sees no reason why cross-marketing or referrals by an **affiliate** of a depository institution should trigger the application of the rule to the insurer. Such a requirement would mean that transactions that have nothing to do 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 language of section 305 is very clear. The requirements 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. § 47(a)(1)(A) of the FDI Act. We see no basis in section 305 of the GLB Act nor in the purposes behind 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 __.20(e)(2) be amended to delete "an affiliate."

The ACLI also believes that **__.20(e)(2)** should be amended to clarify that the terms "cross-marketing" or "referrals" do not include the provision of a list by the depository institution to the person engaged in insurance activities. We see no reason why an insurer that simply receives a list of prospects from a depository institution should be subject to the rule. 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 could be confused, and there is no need for the disclosures to be made. In fact, absent such a connection, the disclosures could be perplexing to a consumer who would have little idea as to why the disclosures were being made when no depository institution is involved. Accordingly, we strongly urge 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.

The ACLI believes that a person should not be regarded as acting on behalf of a depository institution merely because documents evidencing the transaction use the bank's logo. It is quite common for diversified financial companies to establish a common logo that is used by all members of the corporate family. In the insurance industry, it is usually the case that the logo is recognized by the public as that of the insurer rather than that of the affiliated depository institution. We believe that a mechanistic application of the Proposed Rule to a person 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. It is an unreasonable burden to require a company to make the disclosures provided for under the Proposed Rule simply because the company shares the same logo with a depository institution. Again, this could cause more confusion than it would cure.

In this regard, a blanket application of the Proposed Rule to persons using the same logo as the depository institution may well run afoul of 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 in order to be upheld, 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 protect. 447 U.S. at 564-5. We believe that a blanket restriction based upon the use of a logo that is used by both the person and the depository institution would likely be suspect under this standard. There is nothing in the Proposed Rule that supports the view that a consumer would likely be confused merely because a person engaged in the insurance activity shares the same logo with an affiliate depository institution. Absent evidence of the likelihood of confusion, we believe the provision would not be consistent with recent court decisions. See U.S. West, Inc v Federal Communications Commission, F 3d (9th Cir 1999).

The Proposed Rule is also overinclusive because it would encompass all transactions in which an insurer engages simply because the person has the same logo as that of the depository institution. The ACLI believes that a person who uses the same logo of the bank should become subject to the Proposed Rule only if the insurance transaction is likely to mislead the consumer into believing the transaction involves an affiliated depository institution.

The ACLI also believes the reference to the term "corporate" logo or "corporate" name in **__.20(e)(3)** is potentially confusing. How does a "corporate" logo or name differ from the depository institution's "logo" or "name?" We believe the word "corporate" should be deleted in __.20(e)(3).

You also ask whether the provision relating to name and logo in **__.20(e)(3)** should also apply to the use of the name or logo of the holding company or other affiliate of the depository institution. The ACLI sees no basis for extending the coverage of the Proposed Rule to instances where the holding company's or other affiliate's name or logo is used. There is no potential that consumers will be confused if the person engaged in the insurance transaction uses the holding company's or other affiliate's name or logo. In fact, we believe consumers could be confused if disclosures are required because they would not ordinarily associate the holding company or other affiliate with that of the depository institution. Accordingly, we recommend that the agency not extend the coverage of the Proposed Rule in such a manner.

Similarly, for the same reasons presented in the preceding paragraph, we believe the agency 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.

Definition of the term "insurance"

The ACLI believes there is no reason for the Proposed Rule to provide a definition of the term "insurance." While we recognize that there is no single, comprehensive definition of the term, various state and federal laws (e.g. section 302 of the GLB Act) provide adequate definitions that enable depository institutions and others to "know it when they see it." Accordingly, we agree that the agency should look to the a variety of sources, including the GLB Act, state insurance laws, common usage, conventional definitions, state insurance authorities and court decisions in determining whether a product is subject to the Proposed Rule.

__.30 Prohibited Practices

Section __.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 conditional 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" 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 restriction of section 106(b) of the Bank Holding Company Amendments of 1970 to parties other than depository institutions. Accordingly, we recommend that **__.30(a)** of the Proposed Rule be amended to delete reference to parties other than depository institutions, as provided by § 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 ACLI 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 ACLI believes that **__.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 __.30(b) prohibits a covered person from engaging in certain practices or engage in advertising that could be misleading. While the ACLI is generally supportive of the language of the provision, we believe that certain clarifications should be made.

First, we request that the agency 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 **__.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 __.40(b)(3) make reference only to the possibility of a decrease in value (as provided for in section 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 no reason why both points (i.e., loss of principal and value) need be mentioned in **__.30(b)(2)**. We believe the agency should include a reference only to the possibility of loss of value, which is what Congress provided for in section 47(c)(1)(A)(ii).

Section __.30(c), which relates to the prohibition on domestic violence discrimination, appears to be drafted in a manner that applies the requirement to **all** aspects of a covered person's insurance business, regardless of whether or not the transaction relates to a consumer of a depository institution. The provision literally 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 this was intended, and therefore we request the agency clarify that __.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.

__.40 Disclosure Requirements

__.40(a) requires covered persons to provide consumers with certain disclosures regarding the nature of the insurance product being considered by the consumer. As drafted, it is not clear that this provision applies only to transactions conducted on the premises of the depository institution or on behalf of the depository institution. It could be interpreted as applying to all transactions conducted by a covered person, regardless of whether or not there is a nexus to a depository institution. We request 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.

__.40(b)(1)(i) provides that the disclosures provided for in __.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 is virtually impossible to make oral disclosures to consumers who conduct insurance transactions entirely through the mail. Accordingly, we request that the agency modify **__.40(b)(1)(i)** to provide that a covered person would not be required to make the oral disclosures provided for in __.40(a) where the insurance transaction takes place entirely through the mail.

__.40(b)(1)(ii) provides that the disclosures provided for in __.40(a)(4) must **also** be provided at the time the consumer applies for an extension of credit in connection with which the an insurance product will be offered. The literal language of **__.40(b)(1)(i)** suggests that the language contained in __.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 **__.40(b)(1)(ii),** the language contained in __.40(a)(4) must be given **again** 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 unintended, and request that the agency clarify that the disclosure provided for in __.40(a)(4) need be provided only when the consumer requests an extension of credit and insurance will be offered.

__.40(b)(5) provides that a covered person must obtain a written acknowledgment from the consumer that the consumer has received the disclosures. The ACLI believes that this provision should be modified to reflect the way in which insurance business is conducted as well as practical considerations.

There is nothing in section 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, the Proposed Rule should be modified to recognize that a covered person cannot force a person who receives the disclosure material in the mail to return the acknowledgment. It would be unfair to deem a covered person to be in violation of __.40(b)(5) in circumstances where the covered person has no control over the consumer. This problem is ameliorated, of course, if, in connection with transaction conducted by telephone, acknowledgments may be received orally. However, if the transaction takes place entirely by mail, it seems inappropriate to penalize the covered person for failure to obtain the acknowledgment from the consumer. In this regard, the insurer should not be required to cease processing the insurance transaction simply because it has not received the consumer's acknowledgment. The ACLI suggests that the agency permit a covered person to satisfy __.40(b)(5) if it has made reasonable attempts, perhaps two mailings to the consumer, to obtain the consumer's acknowledgment.

Electronic Transactions

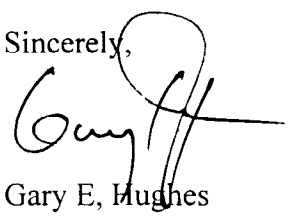
The ACLI appreciates the fact that the Proposed Rule makes reasonable accommodations for e-commerce. We believe that flexibility is called for in view of the dynamic nature of the world of electronic commerce. In this regard, we urge that the Proposed Rule provide as much flexibility as possible so as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

FTC Guidance

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

The ACLI appreciates the opportunity to provide its views on the Proposed Rule.

Sincerely,



Gary E, Hughes