September 30, 2003

VIA ELECTRONIC MAIL

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave, N.W.
Washington, D.C. 20551
regs.comments@federalreserve.gov

Re: Docket No. OP-1158

Dear Ms. Johnson:

The National Association of Insurance and Financial Advisors (NAIFA) together with the Independent Insurance Agents & Brokers of America (IIABA) hereby submit these comments regarding the Board of Governors of the Federal Reserve System's Proposed Interpretation and Supervisory Guidance concerning the anti-tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970. NAIFA and IIABA submit these comments because it is crucial that the Board of Governors clarify in its guidance that subsidiaries – while not obligated under Section 106 – *remain bound* by all state insurance laws, including anti-rebating laws.

NAIFA (formerly the National Association of Life Underwriters) is a federation of approximately 800 state and local associations representing over 70,000 life and health insurance agents and advisors. Originally founded in 1890, NAIFA is the nation's oldest and largest trade association of insurance agents and financial services professionals. NAIFA's mission is to improve the business environment, enhance the professional skills and promote the ethical conduct of agents and others engaged in insurance and related financial services who assist the public in achieving financial security and independence. IIABA is the nation's largest association of independent insurance agents, representing a network of more than 300,000 agents and agency employees nationally. Its members are small businesses that offer customers a choice of policies from a variety of insurance companies.

NAIFA and IIABA support the objective of Section 106 of the Bank Holding Company Act and agree that it is critical that banks be prohibited from unfairly exerting their market power to coerce consumers into purchasing one product in order to receive another product. The proposed exception would explicitly clarify that, under Section 106, a financial subsidiary of a national or state member bank will be construed as an affiliate of the bank, and not as a

subsidiary of the bank. Thus, a financial subsidiary of a national or state member bank would not be subject to the anti-tying restrictions of Section 106. The Board of Governors should, however, make plain in any published guidance or interpretation of Section 106 that subsidiaries remain subject to all applicable state laws, including anti-rebating laws.[1]

The Gramm-Leach-Bliley Act[2] ("GLBA") compels compliance with state laws and ensures that States retain the authority to *regulate the insurance activities of all persons*.[3] As Section 301 states explicitly, "[t]he insurance activities of any person shall be functionally regulated by the States."[4] The GLBA imposes only one restriction on the States' authority to regulate insurance sales activities. States are limited in their regulation of insurance sales activities to the extent that a state law "prevents or significantly interfere[s] with the ability of a depository institution, or an affiliate thereof, to engage… in any insurance sales, solicitation, or cross-marketing activity."[5] State anti-rebating laws unequivocally do not prevent or significantly interfere with insurance sales, solicitations, or cross-marketing activities undertaken by depository institutions. Thus, all state insurance laws, including those prohibiting rebating, remain valid and enforceable and subsidiaries *must comply with such laws*.

State prohibition of rebating is virtually ubiquitous, as such laws exist in 48 states. Anti-rebating laws make it unlawful for an agent to pay, allow, give or offer to pay, allow or give, directly or indirectly, any rebate of premiums payable, any commission, or any paid consideration or inducement whatever, not specified in the policy or contract of insurance. Anti-rebate laws are constructed to promote the public welfare because they protect insureds and assure the continued financial health of insurance companies. Without anti-rebating laws, consumers would be encouraged annually to cancel existing policies in favor of a new policy offered by the agent presenting the greatest discount from first-year commissions. Similarly, in the absence of anti-rebating laws, similarly situated insureds would suffer unjustified discrimination. Similarly classified policyholders with indistinguishable coverage would be charged different premiums for identical policies. Accordingly, ensuring that all entities are cognizant of the continuing vitality of the obligations set forth in anti-rebating laws is paramount.

While the guidance in its present form states that subsidiaries remain subject to Federal antitrust laws, it does not clarify that subsidiaries are additionally subject to all state laws, including state anti-rebating laws. This clarification is essential because the Proposed Interpretation itself uses

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1 *See, e.g.* ARIZ. REV. STAT. § 20-385; ME. REV. STAT. ANN. tit. 24-A, § 2162; N.Y. INS. LAW §§ 2324, 4224; TEX. INS. CODE. ANN. Art. 21.14 § 22.

2 Pub. L. No. 106-102, 113 Stat. 1338 (1999), codified at 15 U.S.C. 6801 *et seq*.

3 *See* H.R. Rep. No. 106-434 at 156 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 251.

4 GLBA § 301, 15 U.S.C. § 6711.

5 GLBA § 104(d)(2)(A), 15 U.S.C. § 6701(d)(2)(A). In addition, GLBA provides 13 safe harbors from preemption for state laws that are no more burdensome or restrictive than the safe harbors provided in the Act. Included within these thirteen exceptions are anti-tying prohibitions. GLBA § 104(d)(2)(B)(i); 15 U.S.C. § 6701(d)(2)(B)(i).

the example (discussed as permissible) of an insurance agency affiliate of a bank offering a discount on premiums the affiliate charges to customers that purchase more than one type of insurance.[6] If not structured appropriately, this exact arrangement may violate state anti-rebating laws. Similarly, the assertion that any financial product, including insurance products, may be combined in a combined-balance discount program is not properly qualified with a statement that state anti-rebating laws remain valid and apply to such programs.[7] The Federal Reserve Board itself has previously addressed state anti-rebating laws and concluded that these laws remain valid and enforceable.[8] The GLBA only strengthens this proclamation and the Board of Governors must make certain that all entities are aware that state anti-rebating obligations are valid and ongoing.

Accordingly, the Board of Governors should state unambiguously in its published guidance and interpretations of Section 106 that, although subsidiaries are not subject to the prohibitions of Section 106, they nonetheless remain bound by all applicable state insurance laws, including anti-rebating laws. We would be happy to answer questions or to provide any additional information.

Thank you for your consideration.

Sincerely,

William R. Anderson
NAIFA
Senior Vice President
Law and Government Relations

Maria Berthoud
IIABA
Senior Vice President
Federal Government Affairs

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6 *See* Board of Governors of the Federal Reserve Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, Proposed Interpretation and Supervisory Guidance at 7 (August 25, 2003).

7 *Id*., n.61 at 23.

8 *See* Board of Governors of the Federal Reserve System Banking Holding Companies and Change in Bank Control Final Rule, 12 C.F.R. § 225 (1997), Background and Summary of Final Action, n.22 and 23, at 76-77 (February 19, 1997).