



Property Casualty Insurers  
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Shaping the Future of American Insurance

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September 29, 2006

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex W)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Subject: Rebuttal Comments by ACLI to Letter dated June 15, 2006, of the National Consumers League on Proposed Revisions to FTC's Business Opportunity Rule, R511993

Dear Sirs/Mesdames:

On behalf of our member companies, the American Council of Life Insurers and the Property Casualty Insurers Association of America provide rebuttal comments in response to a letter submitted to the Federal Trade Commission by the National Consumers League dated June 15, 2006, in support of proposed revisions to the "business opportunity rule" (R511993).<sup>1</sup> To the extent that the League's comments may be construed as applicable to the life and property and casualty insurance industries, ACLI and PCI respectfully submit this letter to rebut comments of the League and to facilitate the FTC's rulemaking process. Many of the member companies of ACLI and PCI, either directly or through their affiliated and non-affiliated agents and broker-dealers, engage in legitimate business arrangements that are not pyramid schemes or work-at-home scams and that would be directly and adversely affected by the proposed revisions.<sup>2</sup>

ACLI, PCI, and their member companies have a substantial interest in rebutting comments of the League to the extent that they may be construed to apply to the life and property and casualty insurance industries:

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<sup>1</sup> 71 FR 19053-19096 (April 12, 2006)

<sup>2</sup> While ACLI and PCI object to the position advanced by the League as they may be construed as applicable to the life and property and casualty insurance industries, it otherwise takes no position regarding the comments of the League.

ACLI is the largest life insurance trade association in the United States, representing the interests of 377 member legal reserve life insurers. ACLI members account for 91 percent of the industry's total assets, 90 percent of life insurance premiums among legal reserve life insurance companies, and 95 percent of annuity considerations. ACLI members are leading providers of financial and retirement security products covering individual and business markets. They offer life insurance, annuities, pensions and 401(k) plans, long-term care insurance, disability income insurance, and other retirement and financial protection products. In offering these products, life insurers rely primarily on affiliated and non-affiliated insurance agents and broker-dealers who are subject to insurance licensing, training, and disciplinary regulations of the individual States. In addition, the Securities and Exchange Commission and the National Association of Securities Dealers regulate the distribution and sale of variable insurance and annuity products. In 2004, affiliated agents accounted for 36 percent, and non-affiliated agents accounted for 53 percent, of new individual life premiums, representing a total of 89 percent of new individual life premiums.<sup>3</sup>

PCI represents over 1,000 property and casualty companies that write 40.7 percent of the nation's automobile, homeowners, business, and worker's compensation insurance. PCI member companies range in size from large national companies to regional companies to companies writing in a single state. They market their insurance products through a variety of distribution channels, including agents and brokers.

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ACLI and PCI *strongly* support the goals of the proposed revisions as they pertain to the FTC's stated targets of the new rule: pyramid schemes and work-at-home scams. Our member companies are proud of our agents and broker-dealers and of the products that we offer to our customers, and we are strongly opposed to the illegal activities of rogue individuals and entities that might undermine the confidence of our customers. However, ACLI and PCI would like to address the League's seemingly blanket statement that "consumers would be best served by creating a new Rule for business opportunities, multilevel marketing plans and work-at-home plans that takes into account how they operate and focuses on the specific problems that need to be addressed." ACLI and PCI believe that, with respect to life and other insurance products, the proposed revisions exceed FTC's statutory authority, impinge on the authority of the States under federal law to regulate the business of insurance, and complicate existing oversight/enforcement efforts of the States, the Securities and Exchange Commission, and the National Association of Securities Dealers. ACLI and PCI urge FTC to modify the proposed rule (1) to exclude licensed insurance companies, licensed insurance agents, and registered broker-dealers because they are already subject to extensive federal and state laws and regulations, many of which preempt FTC's rulemaking authority, and (2) to apply only to the fraudulent transactions that FTC's has stated are the target of the revisions (*i.e.*, pyramid schemes and work-at-home scams).

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<sup>3</sup> LIMRA International Estimates, LIMRA International Product Research, cited by Insurance Information Institute at <http://www.iii.org/media/facts/statsbyissue/life>.

Outside of certain express exemptions, FTC’s jurisdiction to redress unfair trade practices is broad. When FTC’s jurisdiction is properly invoked, concerns as to whether its regulations are practical or unduly burdensome may be outweighed by the abuse that FTC seeks to deter. However, as a matter of federal law, this is not the case with respect to the regulation of the business of insurance.

The McCarran-Ferguson Act provides for the supremacy of state law in regulating the “business of insurance”, and it enforces this policy by preempting federal laws that encroach on state authority in this area. The McCarran-Ferguson Act specifically provides that “*the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.*”<sup>4</sup> As noted in an opinion of the Office of Legal Counsel of the U.S. Department of Justice, “the regulation of insurance is a field traditionally occupied by the [S]tates and therefore it cannot lightly be inferred that Congress intended to legislate in derogation of state regulations of corporations operating in this area.”<sup>5</sup>

With respect to the scope of the McCarran-Ferguson exemption, the U.S. Supreme Court has found that [s]tatutes aimed at protecting or regulating [the relationship between the insurance company and the policyholder], *directly or indirectly*, are laws regulating the “business of insurance.”<sup>6</sup> The recruitment of insurance agents and broker-dealers by an authorized insurer, and the placement of an insurer’s products through them, establishes a relationship between insurers and prospective policyholders.<sup>7</sup> Courts typically exempt activities that involve relationships between insurers and agents, provided the activity is closely linked to the insurer/insured relationship and involves the agent’s insurance dealings as such.<sup>8</sup> As noted in a decision of the U.S. Court of Appeals for the 10<sup>th</sup> Circuit, “in applying the McCarran [sic] Act, we see no reason to distinguish between a principal insurer and its agent.”<sup>9</sup>

As noted above, affiliated agents and non-affiliated agents and broker-dealers constitute a critical distribution channel for the life and property and casualty insurance industries. For the protection of consumers interacting with insurers and their agents in the conduct of the business of

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<sup>4</sup> McCarran-Ferguson Act, 15 U.S.C. § 1012 [emphasis added]

<sup>5</sup> *State Regulation of an Insurance Program Conducted by the Export-Import Bank of the United States*, 10 U.S. Op. Off. Legal Counsel 27, 29 (1986); *See also, Group Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), both of which are cited in Letter of Shira Pavis Minton, Acting Secretary, Federal Trade Commission, to Robert Corn-Revere, Esq, Davis Wright Tremaine LLP (Aug. 19, 2003); *United States Dep’t of the Treasury v. Fabe*, 508 U.S. 491 (1993).

<sup>6</sup> *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) [emphasis added].

<sup>7</sup> *E.g., see*, 1980 Nev. Op. Att. Gen. 199.

<sup>8</sup> *Legal Principles Defining the Scope of the Federal Antitrust Exemption for Insurance*, Op. Comp. Gen’l B-304, 474 (March 4, 2005), stating “[c]ourts tend to find that **activities between insurers and agents involving the terms of their contracts or the termination of their relationships constitute the business of insurance, provided that the activities are closely linked to the insurer/insured relationship and involve the agent’s insurance dealings.**” [emphasis added]

<sup>9</sup> *Commander Leasing Co. v. Trans-America Ins. Co.*, 477 F. 2d 77 (10<sup>th</sup>. Cir. 1973)

insurance, the licensing and license renewals of insurance agents are uniformly within the authority of State Insurance Commissioners. In addition, most jurisdictions require by law or regulation that agent applicants be competent, trustworthy, and of good moral character in order to obtain a license. Many states also expressly require appointing insurers to certify that they have investigated the applicant's character and background and have found the applicant to be qualified and worthy of a license. State Insurance Departments also stipulate education requirements for obtaining a license as an agent in life insurance as well as the continuing education requirements once the license has been obtained. States also generally require notice of the termination of an agent's appointment by an insurer with the requirements varying based on the reason for termination and the type of agent involved. All these requirements are aimed at protecting the public dealing with insurance companies through their agents and are thus closely linked to the insurer/insured relationship.

With respect to whether the trade practices of insurers and their agents and broker-dealers are “regulated by state law,” the authority to regulate trade practices in the business of insurance, for both insurers and agents, is currently vested in a State’s Insurance Commissioner. At present, 45 States, as well as the District of Columbia and Puerto Rico, have adopted the Model Unfair Trade Practices Act of the National Association of Insurance Commissioners, and an additional 5 States have adopted legislation and/or regulations based on the Model Act. The Model Act was expressly adopted to “regulate the business of insurance” and grants a State’s Insurance Commissioner exclusive authority to regulate trade practices in the business of insurance. Thus, the insurance exemption of the McCarran-Ferguson Act clearly applies to the proposed business opportunity regulations not only because they involve the regulation of the business of insurance, but also because the matter of unfair trade practices is already subject to extensive regulation by the States.

Also, State Insurance Commissioners, under the aegis of the NAIC, have established the National Insurance Producer Registry. NIPR has developed and implemented the Producer Database and Electronic Appointments/Terminations with data standards developed for the exchange among the States of license application, license renewal, appointment, and termination information. As a result, NIPR provides a vital communication network that links state insurance regulators with the persons and entities they regulate to facilitate the electronic exchange of producer information.

In conclusion, ACLI and PCI believe that, with respect to insurance and its business opportunities, the proposed revisions exceed FTC’s statutory authority, impinge on the authority of the States to regulate the business of insurance, and complicate existing oversight/enforcement efforts of the States, the Securities and Exchange Commission, and the National Association of Securities Dealers. ACLI and PCI urge FTC to modify the proposed rule (1) to exclude licensed insurance companies, licensed insurance agents, and registered broker-dealers because they are already subject to extensive federal and state laws and regulations, many of which preempt FTC’s rulemaking authority, and (2) to apply only to the fraudulent transactions that FTC’s has stated are the target of the revisions (*i.e.*, pyramid schemes and work-at-home scams).

We appreciate the opportunity to submit rebuttal comments on FTC's proposed revisions to its business opportunity rule. Please let us know if you have any questions or need additional information.

Sincerely,

cc: Deborah Platt Majoras  
Pamela Jones Harbour  
William Evan Kovacic  
Jon D. Leibowitz  
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Kathleen Jensen, PCI