ACLI Financial Security. For Life.

American Insurance Association

December 22, 2010

Jennifer J. Johnson
Secretary of the Board
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington D.C. 20551

Re: Docket No. R-1390; Regulation Z - Truth in Lending

Ladies and Gentlemen:

The undersigned associations, the American Council of Life Insurers ("ACLI") and the American Insurance Association ("AIA"), appreciate the opportunity to comment on the Board's proposed rule regarding Truth in Lending ("Proposed Rule" or "proposal").[1] ACLI is a national trade association with over 300 member companies representing more than 90 percent of the assets and premiums of the life insurance and annuity industry in the U.S. AIA represents approximately 300 major U.S. insurance companies that provide all lines of property-casualty insurance to U.S. consumers and businesses, writing more than $117 billion annually in premiums. Our members have a significant interest in the provisions of the Proposed Rule relating to disclosure of insurance offered in connection with extensions of credit.

We believe that the Board's Proposed Rule regarding disclosures of certain optional insurance available to consumers in connection with extensions of credit is inappropriate in view of comprehensive existing state insurance regulatory requirements, which include, among other things, extensive disclosures to consumers, review of forms, and market conduct examinations. Moreover, providing duplicative conflicting disclosures will frustrate the purpose of these state disclosure requirements and only serve to confuse consumers, not to provide transparency. We believe that state insurance authorities are in a better position than the Board to determine what disclosures are appropriate for citizens of their states that purchase these products.

In this regard, we believe that the Board's proposal conflicts with, and is preempted by, the McCarran-Ferguson Act (the "McCarran Act"), which recognizes the primary role of the states in regulating the business of insurance expressly delegated by Congress.[2] Accordingly, the ACLI and AIA urge the Board not to adopt the proposed changes to Regulation Z relating to the disclosure of optional insurance offered in connection with extensions of credit. We respectfully recommend that the Board consult and coordinate

[1] 75 *Fed. Reg.* 58539 (September 24, 2010).
[2] 15 U.S.C. § 1012.

with the state insurance regulators before making any changes to the current rule in light of their expertise and comprehensive handling of this issue.

BACKGROUND

The Truth in Lending Act ("TILA") was enacted by Congress "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."[3] The Board acknowledges Congress's objective in Regulation Z, which provides that "[t]he purpose of [Regulation Z] is to promote the informed use of consumer credit by requiring disclosures about its terms and cost."[4]

The Board is authorized to prescribe regulations to carry out the purposes of TILA.[5] One of the central disclosures creditors must make under TILA is the "finance charge," which is the cost of credit as a dollar amount.[6] TILA and Regulation Z provide that charges or premiums for credit life, accident, health or loss-of-income insurance written in connection with any consumer credit transaction be included in the finance charge unless:

1. The coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and
2. In order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.[7]

Regulation Z further provides that premiums for credit life, accident, health or loss-of-income insurance may be excluded from the finance charge if the following conditions are met:

1. The insurance coverage is not required by the creditor, and this fact is disclosed in writing.
2. The premium for the initial term of insurance coverage is disclosed in writing. If the term of insurance is less than the term of the transaction, the term of insurance also shall be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 226.17(g), and certain closed-end credit transactions

[3] 15 U.S.C. § 1601.
[4] 12 C.F.R. § 226.1(b).
[5] 15 U.S.C. § 1604(a).
[6] 12 C.F.R. § 226.4(a); 15 U.S.C. § 1605(a).
[7] 15 U.S.C. § 1605(b); 12 C.F.R. § 226.4(b)(7) (Regulation Z also includes disclosure of premiums for loss-of-income insurance written in connection with a credit transaction.)

involving an insurance plan that limits the total amount of indebtedness subject to coverage.

3. The consumer signs or initials an affirmative written request for the insurance after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.[8]

The current Regulation Z disclosures are directly responsive to § 105 of TILA and do not stray beyond the clear statutory language. Regulation Z does not currently require any specific format for disclosures required under § 226.4(d), nor does it provide model forms or samples.

PROPOSED CHANGES TO REGULATION Z DISCLOSURES

The Board now proposes changes to § 226.4(d) of Regulation Z that will affect the timing, format and content of required disclosures relating to certain categories of insurance coverage. The Board indicated that it was using its TILA § 105(a) authority to prescribe regulations to carry out the purposes of TILA to require the amended disclosures for certain insurance products.[9] The proposal requires creditors to provide disclosures in a minimum 10 point font and grouped together. The proposal requires disclosures relating to the possible need for the insurance product and the cost of insurance expressed as a dollar figure tailored to the amount of the loan using the maximum rate under the policy rather than a unit cost basis as is presently required. If the premium is based upon the outstanding balance or periodic principal or interest payment, the disclosure must be based upon the maximum outstanding balance or periodic principal and interest payment possible under the loan agreement.

The Board also proposes that creditors provide a statement as to the maximum benefit amount and a statement that the consumer will be responsible for any balance due above the maximum benefit amount. Moreover, the Board proposes that if there are eligibility requirements other than age or employment requirements, the disclosure must state in bold, underlined text that the consumer may not receive any benefits even if the consumer pays for the product, along with a statement that there are other requirements that the consumer may not meet and if the consumer does not meet other requirements the consumer will not receive any benefits even if the consumer purchases the product and pays the premium. Finally, Regulation Z currently requires disclosure of the term of the insurance if it is less than the term of the loan. The Board proposes to amend this requirement and require disclosure of the time period and age limit for coverage. The required disclosures must be substantially similar in headings, content and format to the proposed model form set forth in Appendices G and H to Regulation Z. The model forms require disclosures in a tabular and question-and-answer format. However, a fair reading of the tone of the language proposed in the model forms presents the products in a very negative light.

[8] 12 C.F.R. § 226.4(d).
[9] 75 *Fed. Reg.* at 58554.

THE MCCARRAN-FERGUSON ACT

The ACLI and AIA believe that the Board's proposal conflicts with the McCarran Act, which provides as follows:

> "*Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948*
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> (a) *State regulation.* The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) *Federal regulation.* No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as 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."[10]

Congress enacted the McCarran Act to allow the states to regulate the business of insurance "free from inadvertent preemption by federal statues of general applicability."[11] The Act reverses the usual rules for preemption, creating a "clear-statement rule . . . that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise."[12]

To determine whether the McCarran Act pre-empts the Board's proposal, it is necessary to consider the following:

1. Whether TILA "specifically relates to the business of insurance";
2. Whether state laws regulating the offering of credit life, accident, health and loss-of-income insurance were enacted "for the purpose of regulating the business of insurance";
3. If TILA does not specifically relate to the business of insurance, whether the Board's proposal invalidates, impairs or supersedes state laws regulating the offering of credit life, accident, health and loss-of-income insurance.

We submit that TILA does not specifically relate to the business of insurance. Moreover, the ACLI and AIA have concluded that the Board's proposal invalidates, impairs or supersedes state laws regulating the offering of credit life, accident, health and loss-of-

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[10] 15 U.S.C. § 1012.
[11] *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1488-89 (9th Cir. 1995).
[12] *United States Dep't. of the Treasury v. Fabe*, 508 U.S. 491, 507 (1993).

income insurance. Accordingly, the proposal, if adopted, would be preempted by the McCarran Act.

STATE LAWS REGULATING THE BUSINESS OF INSURANCE

The U.S. Supreme Court has stated that statutes aimed at protecting or regulating the relationship between an insurer and insured are laws regulating the business of insurance.[13] Virtually every state maintains comprehensive regulations affecting the offering of credit life, accident, health and loss-of-income insurance, which are the same categories of insurance that are subject to the Board's proposed disclosures.[14] States dictate the premiums that may be charged, the terms that insurance policies may possess, the content of disclosures that must be provided to prospective policyholders and requirements as to when disclosures must be provided to consumers. States also review and approve forms and disclosures prior to their marketplace introduction, undertake market conduct examinations once those products are offered, and monitor and respond to consumer complaints if they arise. States also regulate the licensing of agents and supervise all aspects of their activities in promoting and offering insurance to consumers.[15] Any person offering insurance to consumers, including a creditor, is engaged in the business of insurance and must be licensed under state law, and providing required insurance disclosures is an activity that comes within the scope of the insurance business. Accordingly, there can be little dispute that state laws that regulate every aspect of the offering of credit life, accident, health and loss-of-income insurance by insurers and their agents are in place for the purpose of regulating "the business of insurance."

TILA DOES NOT RELATE TO THE BUSINESS OF INSURANCE

There is little question that TILA does *not* relate to the business of insurance. The purpose of TILA is to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily various credit terms. Numerous courts have held that TILA does not relate to the business of insurance as contemplated by the McCarran Act.

> "Nowhere in TIL is there a provision that specifically relates the legislation to the business of insurance. . . . Although TIL does not exempt insurance transactions from its coverage, we cannot twist this omission into an affirmative provision that 'specifically relates' TIL to the business of insurance. Similarly, Congress' consideration of at least some aspects of the insurance business in the passage of TIL is insufficient. An express application of a federal statute to the insurance business is required before TIL would automatically defeat a McCarran Act defense.

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[13] "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the 'business of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

[14] *See* footnote 17, *infra*.

[15] *National Securities* at 460 ("The selling and advertising of policies and the licensing of companies and their agents are also within the scope of the statute." (Citations omitted)).

> We thus agree with the district court and others that TIL does not 'specifically relate' to such business."[16]

Because TILA does not relate to the business of insurance, the Board cannot rely upon the narrowly-focused language of § 105 as a basis for its regulatory intrusion into the area the McCarran Act has reserved for the states.

THE BOARD'S PROPOSAL INFRINGES ON STATE INSURANCE LAWS

The remaining question, therefore, is whether the Board's proposed disclosures relating to credit life, accident, health and loss-of-income insurance will "be construed to invalidate, impair, or supersede" state laws that regulate these products. As we have noted, virtually every state maintains insurance laws that comprehensively regulate the offering of credit life, accident, health and loss of income insurance. Typically, these laws are based upon the National Association of Insurance Commissioners ("NAIC") Consumer Credit Insurance Model Act and Consumer Credit Insurance Model Regulation (the "Model Act").[17] Section 6 of the Model Act requires that the following disclosures be made in writing to consumers in connection with credit insurance offered in connection with a credit transaction:

1. The purchase of consumer credit insurance is optional and not a condition of obtaining credit approval;
2. If more than one kind of consumer credit insurance is being made available to the debtor, whether the debtor can purchase each product separately or only as a package;
3. The conditions of eligibility;

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[16] *Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979); *see also Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037, 1043 (7th Cir. 1998); *Ben v. General Motors Acceptance Corp.*, 374 F. Supp. 1199, 1201 (D. Colo.1974); *Gerlach v. Allstate Ins. Co*., 338 F. Supp. 642, 649 (S.D.Fla. 1972); *In re Providence Washington Ins. Co.*, 89 F.T.C. 345, 354 (1976).

[17] To date, 37 states and the District of Columbia have enacted the Consumer Credit Insurance Model Act. *See NAIC Model Laws Regulations and Guidelines*, NAIC Model Regulation Service (October 2010) at http://www.naic.org/documents/committees_models_table_of_contents.pdf. The state statutes are as follows: *Alaska Stat. § 21.57.055; Ariz. Rev. Stat. Ann. § 20-1608; Ark. Code. Ann. § 23-87-110; Cal. Ins. Code § 1758.97; Colo. Rev. Stat. § 10-10-108; Conn. Gen. Stat. § 38a-650; Del. Code Ann. tit. 18 § 3706; D.C. Code § 31-5106; Ga. Code Ann. § 33-31-7; Ga. Admin. Code § 120-2-27-.09; Haw. Rev. Stat. § 16-6-2; Haw. Admin. Code § 431:10B-107; Idaho. Code Ann. § 18.01.61 s 023; 215 ILCS 5/155.56; Ind. Code § 27-8-4-6; Ky. Rev. Stat. Ann. § 304.19-070; Me. Rev. Stat. Ann. § 24-A s 2857; Md. Code Ann. Ins. § 13-108; Mich. Comp. Laws §§ 550.601 et seq.; Minn. Stat. § 62B.04(b); Miss. Code Ann. § 83-53-13; Mo. Rev. Stat. § 385.040; Mont. Code Ann. § 33-21-204; Neb. Rev. Stat. § 44-1707; Nev. Rev. Stat. 690A § 7; N.H. Rev. Stat. Ann. § 408-A:6; N.J. Rev. Stat. § 17B:29-6; N.M. Stat. Ann. § 59A-25-7; N.Y. Comp. Codes. R. & Regs., tit. 11, § 185.5.; N.D. Cent. Code § 26.1-37-07; Ohio Rev. Code Ann. § 3901-1-15(b)(4)(c); Or. Rev. Stat. § 743.377; Pa. Stat. Ann. tit. 40, § 63-106; R.I. Gen. Laws § 27-30-6; Utah Code Ann. § 31A-22-806; Vt. Stat. Ann. tit. 8 § 4107; Va. Code Ann. §§ 38.2-3724 & 38.2-3735; Wash. Rev. Code § 48.34.090; W.Va. Code § 114-6-5; Wyo. Stat. Ann § 26-21-107.*

4. If the consumer has other insurance that covers the risk, he or she may not want or need credit insurance;
5. Within the first 30 days after receiving the policy, the consumer may cancel the coverage and have all premiums paid refunded. The consumer may cancel the policy at any time thereafter during the term of his or her loan and receive a refund of any unearned premium;
6. A description of the insurance coverage, including the amount, term, exceptions, limitations and exclusions, the event insured, any waiting or elimination period, deductibles, applicable waiver of premium provision, to whom benefits will be paid and the premium rate; and
7. If the premium is financed, it will be subject to finance charges at the rate applicable to the credit transaction.

Thirteen other states have adopted laws that include provisions comparable to those in the NAIC Model Act.[18] States that have adopted the NAIC Model Act also mandate the manner in which required disclosures are to be provided. For example, the Model Act provides that in connection with consumer credit insurance offered contemporaneously with an extension of credit or offered through direct mail advertisements, disclosures shall be made in writing and presented to the consumer in a clear and conspicuous manner. In addition, in conjunction with the offer of credit insurance subsequent to the extension of credit by means other than direct mail advertisements, disclosures may be provided orally so long as written disclosures are provided to the debtor no later than the earlier of ten days after the offer or the date any other written material is provided to the debtor.[19]

The NAIC Model Act also specifies that the following information must be included in the policy delivered to the consumer:

1. The name and home office address of the insurer;
2. The name or names of the debtor or debtors, or in the case of a group certificate, the identity by name or otherwise of the debtor or debtors;
3. The premium or amount of payment by the debtor separately for each kind of coverage or for all coverages in a package, except that for open-end loans, the premium rate and the basis of premium calculation (*e.g.*, average daily balance, prior monthly balance) shall be specified;
4. A full description of the coverage or coverages, including the amount of term thereof and any exceptions, limitation and exclusions; and

[18] *Ala. Admin. Code § 482-1-117-.08; Fla. Stat. Ann. § 627.679(c); Iowa Admin. Code § 191-28.14; Kan. Stat. Ann § 16a-4-105; Kan. Att'y Gen. Op. 87-3; La. Rev. Stat. Ann § 6:969.25; Mass. Gen. Laws § 143.02; 209 CMR § 52.02; N.C. Gen. Stat. § 58-57-65; Okla. Stat. §§ 365:10-5-64; & 365:10-5-62; S.C. Code Ann. § 37-4-105; S.D. Codified Laws § 58-19-19; Tenn. Code Ann. § 56-7-906; Tex. Ins. Code § 1153.052; Wis. Stat. Ann. § 424.203.*

[19] *See, e.g., Del. Code Ann. tit. 18 § 3706(b).*

5. A statement that the benefits shall be paid to the creditor to reduce or extinguish the unpaid debt and, whenever the amount of insurance benefit exceeds the unpaid debt, that any such excess shall be payable to a beneficiary other than the creditor, named by the debtor or the debtor's estate.[20]

Further, the NAIC Model Act specifies what documents and material must be delivered to the consumer and their contents:

> "Unless the individual policy or group certificate of insurance is delivered to the debtor at the time the debt is incurred or at such other time that the debtor elects to purchase coverage, a copy of the application for the policy or a notice of proposed insurance, signed by the debtor and setting forth the name and home office address of the insurer, the name or names of the debtor, the premium rate or amount of payment by the debtor for the insurance, the amount of payment by the debtor for the insurance and the amount, term and a brief description of the coverage provided, shall be delivered at the time the debt is incurred or the election to purchase coverage is made. The copy of the application for or notice of proposed insurance shall also refer exclusively to insurance coverage and shall be separate and apart from the loan, sale or other credit statement of account, instrument or agreement, unless the information required by this subsection is prominently set forth therein. Upon acceptance of the insurance by the insurer and within 30 days of the date upon which the debt is incurred or the election to purchase coverage is made, the insurer shall cause the individual policy or group certificate of insurance to be delivered to the debtor."[21]

The NAIC Model Act also specifies the vehicles by which required disclosures may be made:

> "The application, notice of proposed insurance or certificate may be used to fulfill all of the requirements of subsections (a) and (d) of this section if it contains all of the information required by those subsections."[22]

In sum, it is readily apparent that states have implemented comprehensive laws that are highly specific as to the content, manner, timing and method of delivery of detailed information regarding the offering of insurance in connection with a credit transaction.

The U.S. Supreme Court has considered when a federal law invalidates, impairs or supersedes a state insurance law for purposes of the McCarran Act.[23] The Court

[20] *See, e.g., Del. Code Ann. tit. 18 § 3706(d).*
[21] *See, e.g., Del. Code Ann. tit. 18 § 3706(e).*
[22] *See, e.g., Del. Code Ann. tit. 18 § 3706(f).*
[23] *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

indicated that the term "invalidate" ordinarily means "to render ineffective, generally without providing a replacement rule or law."[24] In addition, the Court stated that the term "supersede" ordinarily means "to displace (and thus render ineffective) while providing a substitute rule."[25] The Court further concluded that federal law impairs state insurance law when it directly conflicts with state regulation, and when application of the federal law frustrates any declared state policy or interferes with a State's administrative regime.[26]

The ACLI and AIA believe that the Board's proposed disclosures have the effect of invalidating, impairing or superseding state insurance disclosures. The Board has stated its view that "consumers have limited understanding of credit protection products and that some of the current disclosures do not adequately inform consumers of the costs and risks of these products."[27] Moreover, the Board reported that many disclosures were in small font, not grouped together and in dense blocks of text. The Board indicated that it was concerned that consumers would find current disclosures difficult to comprehend.[28] As a result, the Board proposed a comprehensive disclosure scheme relating to credit protection insurance products to replace disclosures that, to date, virtually every state has concluded are appropriate for its citizens. The Board's conclusions and actions are in direct conflict with the requirements of state insurance authorities, who are authorized by state law to regulate, supervise and examine insurers that offer credit protection products. Moreover, the Board's proposed model form disclosures appearing at Appendices G-16 and H-17 clearly conflict with state disclosure requirements, which address the same types of products.

In effect, by proposing disclosure language that conflicts with state regulatory requirements, the Board has made a subjective determination that state mandated disclosures are inadequate and has substituted its judgment for that of the states, which the McCarran Act directs are the primary regulators of insurers. Because the use of model forms insulates creditors from potential liability for violations of TILA, it is anticipated that virtually all creditors will employ the Board's model forms if the Proposed Rule is adopted.

TILA cannot possibly be read as a basis for the proposal's deep intrusion into areas such as policy terms, coverage and exclusions, which are areas the McCarran Act clearly reserves for the states. Moreover, as numerous other commenters have advised the Board, the proposed disclosures themselves are confusing, ambiguous and incomplete. In addition, the language of the Board's proposed disclosures, which effectively dissuade consumers from purchasing these insurance products, will undoubtedly compound consumer confusion and misunderstanding.

Accordingly, the Board's action will inevitably displace state insurance disclosure provisions and render them ineffective. Moreover, by displacing state law, the Board's

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[24] *Id.* at 307.
[25] *Id.*
[26] *Id.*
[27] 75 *Fed. Reg.* at 58543.
[28] *Id.*

proposal, as currently framed, will frustrate declared state policy in this area and interfere with state administrative regimes, as evidenced by the multitude of existing state laws that establish and require enforcement over every aspect of these insurance products.

In view of the Board's lack of authority to regulate the business of insurance, and the manner in which the Board's expansive proposal inappropriately intrudes upon the authority of states to regulate the business of insurance and to determine the manner in which disclosures relating to credit protection insurance products should be presented to consumers, we conclude that the proposal is superseded by the McCarran Act.

Accordingly, the undersigned associations urge the Board not to adopt the Proposed Rule as currently presented. Instead, in view of their experience and authority in the area of insurance disclosures, we encourage the Board to consult and coordinate with state insurance regulators on this matter so that there is better cooperation and a more complete understanding of the comprehensive state consumer protection system already in place.

We appreciate the opportunity to comment on this important proposal.

Sincerely,

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