Supplemental Comments of the Center for Economic Justice
In Response to Comments regarding
12/20/06 Draft of Proposed Amendments to the Model Unfair Trade Practices Act
for
Travel Underwriting of Life Insurers

Submitted March 5, 2007

The Center for Economic Justice (CEJ) urges the Life Insurance (A) Committee to adopt the December 20, 2006 draft revisions to the Model Unfair Trade Practices Act with provisions regarding life insurers' use of travel destination for underwriting and rating.

The comments on the December 20, 2006 draft by the actuaries and ACLI are a rehash of previous comments considered, thoroughly discussed by the working group and rejected. The ACLI comments mischaracterize the proposal and then criticize their mischaracterization. Once the ACLI's false assumptions and incorrect statements are corrected, their criticisms of the proposed model show no merit. The actuaries' arguments actually demonstrate the vital need for the proposed revisions as the actuaries argue for the ad-hoc, arbitrary practices against consumers that the proposed revisions specifically seek to stop and to replace with consistent actuarial analyses based on sound risk classifications.

We do ask consideration of the following statement in the drafting note, either at the end of the drafting note or before the last sentence of the drafting note:

Informational filings enable the commissioner to perform market analysis and to alert the filing insurer to any issues that may arise during a market conduct investigation or examination.

This additional sentence clarifies that an informational filing does not create a prior approval requirement and is consistent with the new paradigm for market regulation grounded in market analysis and targeted enforcement.

We next review and respond to the AAA, Alabama and ACLI comments.

AAA Comments of January 17, 2007

The actuaries argue against the section 3(c) provisions for filing of underwriting guidelines involving travel destinations with supporting actuarial analysis. The actuaries argue that "the actuarial analysis appropriate to such situations would also change rapidly and frequent re-filing could as a result be required by such a provision" and "the extended period for developing the analysis and obtaining regulatory review could leave an insurer unprotected and open to adverse selection during this period" and "practicality suggests that actuarial analyses be conducted only for those situations that actually arise in the insurer's course of business, and timing considerations would not allow the

contemplated actuarial analysis and regulatory review to be done in advance on a case-by-case basis."
The actuaries actually demonstrate why the proposed provisions are essential consumer protections. The actuaries want travel underwriting to be a case-by-case analysis – an intrinsically arbitrary approach that fails to provide any consumer protections and requires massive regulatory resources to monitor. Stated differently, the actuaries prefer no accountability. The absence of substantive analysis on this issue was apparent during the public hearing in September 2006, when the representative of the AAA was unable to provide any statistical or quantitative actuarial analysis to support the travel underwriting. It is precisely this type of result – denial of coverage or higher rates based on a feeling of an underwriter or actuary – that the proposed provision intends to rightfully stop and move insurers to a more disciplined analysis that guarantees fair treatment of consumers.

It is completely reasonable for consumers and regulators to expect that an insurer bases its underwriting guidelines and rating practices on an actuarial analysis and it is reasonable for the regulator to ask for that supporting analysis prior to the use of the guideline. There is no delay for the insurer with an informational filing. The only reason there would be a delay is if the travel underwriting is done on an ad hoc basis – as suggested by the actuaries – and the supporting analysis provided only if asked for by a regulator. This is precisely the type of industry practice the draft proposal intends to stop and rightfully so.

The actuaries' other comment is that, if asked to actually develop and file actuarial support for travel underwriting prior to use, insurers will not use travel underwriting and adverse selection will occur. While the draft provisions allow insurers to use future travel destinations for underwriting or rating, the decision is up to the insurer. However, it is implausible to claim that an insurer would use travel if it had to justify its use after the fact, but not use travel if it had to justify its use before the application of the guidelines or rate differentials. The actuaries' assumption is flawed, so the resulting arguments about adverse selection are without merit.

Alabama Comments

Alabama argues that the current model law prohibits unfair discrimination and no special provisions for life insurers' use of future travel destination for underwriting and rating are necessary. Alabama provides no basis for this opinion. In fact, the model law contains numerous provisions that address specific instances of unfair discrimination in addition to the general prohibition, thereby indicating that there are numerous practices that either warrant specific description or particular emphasis. Life insurers' use of future travel destinations is one of those instances because of inherently arbitrary nature of the practice. This is clearly an area that warrants particular guidance to not only protect consumers but to provide regulatory guidance to insurers in a difficult area.

Alabama argues that existing penalties in the model law are sufficient, but again provides no basis for the opinion. As we have pointed out in the previous comments, the existing penalties are so small that they fail to provide deterrence to unfair practices.

Alabama proposes to consolidate provisions for past travel and future travel with a general prohibition unless justified by sound actuarial practice. Again, Alabama provides no basis for this opinion. We disagree with the Alabama proposal because it fails to recognize the unique aspects of travel underwriting and rating from those of other risk classifications. The nature of the use of travel destinations for underwriting and rating is inherently arbitrary, as evidenced by insurers' past practices and is of a qualitatively different nature than other risk classifications for which risk classes are easily identified. Moreover, past legal travel activities should not be a basis for a denial of coverage or higher rates and it is unclear why Alabama would want to permit this use, even if an actuary could come up with some statistical justification.

ACLI Comments of January 23, 2007

ACLI argues:

The application-by-application filing requirement is likely to be unworkable and to give rise to a de facto prohibition of underwriting based on future travel, jeopardizing the risk classification process and granting traveler applicants preferential treatment.

ACLI mischaracterizes the proposal. There is no requirement for a supporting analysis to be filed on an *individual* basis each time an underwriting action on future travel is contemplated. The proposal is clear that the underwriting guidelines, rating plans and supporting actuarial analysis apply to classes of consumers and does not contemplate filings for individual consumer applications.

This premise is incorrect, so the resulting horrors claimed by ACLI are not applicable. The provisions do not require or even suggest an application-by-application filing requirement. There is nothing in the provision to indicate this and the discussion in the conference calls on this issue have clearly indicated no intent for an application-by-application requirement. Consequently, it is unclear why ACLI persists is making this unfounded claim. The provisions deal with underwriting guidelines – rules that underwriters use to determine eligibility – and rates – amounts charged consumers of a particular class and hazard. Both underwriting guidelines and rates apply to classes to individuals determined by their risk characteristics. The entire point of the provisions is to move insurers away from ad-hoc and arbitrary underwriting and rating practices to sound actuarial practices that focus on risk classes. The provisions will accomplish precisely what ACLI says it wants – enhancing the risk classification process and treating all applicants fairly.

The proposal does not provide preferential inconsistent treatment to travelers who, in fact, pose a higher mortality risk than other applicants. Applicants whose future travel

plans put the consumer at higher risk may be charged more in the same manner as an applicant with serious health risk factors may be charged more or denied coverage. Moreover, the proposal makes the treatment of future travel plans more consistent with the treatment of health risk factors by requiring the same demonstration of risk for future travel plans as for health risk factors and by requiring a consistent framework for the application of those risk factors in underwriting and rating. Insurers' current use of past travel is not based on actuarial analysis or risk analysis and insurers' current use of future travel plans is arbitrary. Consequently, the proposal does exactly the opposite of what ACLI claims – it makes the treatment of travel more consistent with insurers' treatment of other risk factors.

ACLI argues:

The 12/20/06 draft's application-by-application filing requirement is likely to be unworkable for administrative and practical reasons pertinent to both insurers and state insurance departments. It is unclear exactly what information is required to be filed and how the requirement will be enforced by the different insurance departments

These arguments are without merit as they continue to assume the discredited claim of "application-by-application filing." ACLI has argued that regulators can check what insurers are doing through market conduct exams, suggesting that if a regulator asked an insurer to justify its use of travel for underwriting or rating *after the fact* the insurer would be able to do so. Consequently, it is unclear why an insurer would know what information to provide to a regulator *after the fact*, but be unclear about what information to provide *before the fact.*

ACLI argues:

The new standard for underwriting based on future travel and the special monetary penalties for violations are striking additional examples of different treatment granted traveler applicants.

As stated in our earlier comments, the very small existing penalties for individual violations of the model, coupled with ad hoc nature of the violations of travel underwriting mean that these provisions are likely to be seen as simply a cost of doing business and not a deterrent to unfair practices. More substantial penalties are needed generally, but certainly in this particular set of issues to encourage compliance.

As stated above, the proposal does not provide preferential treatment for travel applicants, but just the opposite. It provides treatment of travel more consistent with insurers' treatment of other risk factors.

ACLI argues

Moreover, Subsection 4.G.(3)(a)(ii) requires underwriting on the basis of future travel to be based on "sound actuarial principles." It fails to expressly permit underwriting based on "actual or reasonably anticipated experience," giving rise to significant concern as to the standard's legal meaning and possible future interpretation by insurance regulators and the court

This comment raises concern among consumers. In the working group's past discussions is has been clear that sound actuarial principles include consideration of actual or reasonably anticipated experience and that the term "actual or reasonably anticipated experience" does not create or second or alternative standard to "sound actuarial principles." Now ACLI is suggesting that the two phrases do represent separate standards, which can only mean that "actual or reasonably anticipated experience" represents a lesser standard from the ACLI perspective. The ACLI argument, consequently, reinforces the wisdom of the working group to include one standard that is well understood by regulators and courts and that provides the best consumer protection.

ACLI argues

ACLI believes the 12/20/06 draft is likely to jeopardize life insurers' ability to fully and fairly classify risk and to best serve their existing and prospective customers.

ACLI's conclusion is premised on its discredited assumption that the provisions required application by application filing. As this assumption is incorrect, the arguments about resulting horrors are without merit.

ACLI argues:

The Connecticut and Massachusetts statutes, reflected in the attached ACLI proposal, strike the appropriate balance between prohibiting arbitrary travel underwriting and preserving life insurers' flexibility to underwrite most effectively.

The proposed draft provides the appropriate balance between fair treatment of consumers and insurers' ability to consider and use current information relating to a travel destination. The laws cited by ACLI do not strike that balance; rather, these laws are tilted heavily in favor of insurers and against consumers and do not provide consumers with essential consumer protections.

ACLI argues:

Laws based on the "sound actuarial principles or actual or reasonably anticipated experience" standard will provide a regulatory framework that will protect consumers against arbitrary underwriting based on travel while permitting insurers to make the most equitable, financially prudent underwriting decisions possible, as necessary to best serve their customers.

The evidence indicates that ACLI's claim is incorrect. States have a general provision in unfair trade practices laws that contain precisely the framework ACLI says will protect consumers – and which has failed to protect consumers from life insurers' unfair and arbitrary use of past and future travel destinations for underwriting and rating. There is no evidence to support ACLI's claims, but powerful evidence to refute it and to support the adoption of the draft provisions.

ACLI argues:

Enactment of both the Connecticut and the Massachusetts statutes was supported by consumer advocates, including the Anti-Defamation League .

Given the January 26, 2007 comment letter of the Anti-Defamation League, which calls for much stronger consumer protections than the proposed draft, let alone the cited laws, it is clear that the ADL seeks stronger consumer protections than contained in the Connecticut and Massachusetts laws.

In conclusion, CEJ urges the Life Insurance (A) Committee to adopt the working group's proposal.