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June 1, 2009

HAND DELIVERY AND
ELECTRONIC DELIVERY (W/O ATTACHMENTS)

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

Re: Supplemental Proposed Rule for FDICIA Disclosures, Matter No. R411014

Dear Sir of Madam:

American Mutual Share Insurance Corporation (d/b/a American Share Insurance, hereafter "ASI" or the "Company") welcomes this opportunity to comment on the Federal Trade Commission's ("FTC" or the "Commission") supplemental proposed rule (the "Proposed Rule") concerning disclosures required of non-federally insured depository institutions under the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA" or the "Act"). The FDICIA requires that depository institutions lacking federal deposit insurance provide certain disclosures to consumers in periodic statements of account and advertising that, the institution is not federally insured and if the institution fails, the federal government does not guarantee that depositors will get their money back. [12 U.S.C. §1831t – Exhibit A]

ASI takes this opportunity to affirm its support of reasonable and responsible efforts to ensure that members of non-federally insured credit unions receive adequate notice regarding the insured status of their depository accounts. ASI played an active role during the development and subsequent amendments of the FDICIA in 1991, 1994 and 2006, and has invested significant resources to educate and advise its member credit unions about the requirements of the Act and their responsibilities thereunder. As an example, as part of ASI's risk management and examination functions we examine almost 60% of our privately insured credit unions annually representing over 75% of total insured deposits, and as part of each on-site examination our staff assesses the subject credit union's compliance with the FDICIA. In addition, we have noted that state credit union regulators also review all privately insured credit unions for compliance during their on-site examinations of the same institutions.

We believe it is important that the Commission promulgate reasonable and practical implementing regulations for the FDICIA and thereby provide needed guidance to privately insured credit unions. We further believe the overall goals of the Proposed Rule should be to implement regulations that will adequately inform consumers without unnecessarily burdening privately insured credit unions or conflicting with other existing statutes or regulations.

BACKGROUND

I. American Share Insurance

ASI provides primary (first-dollar) share (deposit) insurance exclusively to state-chartered credit unions in nine states (AL, CA, ID, IN, IL, MD, NV, OH and TX), and is the largest non-federal insurer of credit union member shares. The Company is a credit union-owned, share guaranty corporation licensed and dual-regulated by the Ohio Department of Insurance and the Ohio Department of Commerce under §1761 of the Ohio Revised Code. Since its chartering in 1974, ASI has never defaulted on a claim obligation to a holder of an insured share account, nor has any member of an ASI-insured credit union lost money in an ASI-insured account.

As of December 31, 2008, 162 of the 1,069 total state-chartered credit unions currently operating in the Company's nine approved states of operation, or 15.2%, of the institutions, had their members' depository accounts insured by ASI. These credit unions represented about $10.7 billion in total member shares or deposits as of December 31, 2008, resulting in an average share or deposit base of $66 million per credit union. Nationally, the average state-chartered credit union reported total shares of approximately $102 million for the same period-end. Based on this data, it is clear that ASI's credit unions are generally smaller than the average state-chartered credit union.

As of year-end 2008, 141 of our 162 ASI-insured credit unions reported less than $150 million in total assets, or 87%, which means that substantially all of ASI's insured credit unions would qualify as small businesses under the relevant thresholds.

II. Private Deposit Insurance for Credit Unions

In 1970, Congress added Title II to the Federal Credit Union Act establishing the National Credit Union Share Insurance Fund ("NCUSF") for the purpose of insuring member deposit accounts at federally chartered credit unions. [12 U.S.C. §1781] Shortly thereafter, states began to pass laws mandating insurance for state-chartered credit unions which led to concerns over dual regulation and federal encroachment of states' rights given that the NCUSIF was the sole choice of account insurance for such credit unions. In reaction to these concerns, the credit union movement began to develop and support state-level private alternatives to federal share insurance, and ASI was chartered in May 1974 to provide such an alternative to state-chartered credit unions to Ohio's credit unions. Over the years, ASI's reach has broadened as eight other states have taken the initiative to approve ASI as an acceptable form of deposit insurance.

Allowing credit unions a choice in chartering and insurance has proven healthy for the credit union movement since the early 1970s, and we believe it currently affords credit unions a choice between a federal program facing significant losses due to failures in large corporate credit unions,

with that of a private mutually owned share insurer such as ASI, that insures only retail or natural-person credit unions.

As noted above, state-chartered credit unions in select states have rights under their respective state laws to offer their members the benefits of non-federal share insurance. To secure a change in share insurance, a converting federally insured credit union must comply with rules promulgated by the National Credit Union Administration ("NCUA"), the statutory agency assigned to manage the NCUSIF. [NCUA Rule §708b] During a share insurance conversion, a federally insured credit union must, at a minimum: (1) secure membership approval through written ballot or in person at a requisite special membership meeting; wherein, at least 20% of the membership must vote on the proposition to convert insured status; (2) achieve a simple majority of the voting members to approve the conversion; (3) provide full and transparent disclosures to members regarding the change in insured status during the voting period, with a disclosure as to the absence of federal share insurance similar to that required under the FDICIA: (4) conduct such votes using an independent entity qualified in such matters; (5) receive NCUA's approval following the independent certification of the membership vote; and, (6) allow all members the right to withdraw their funds up to the federally insured limits during a 30-day grace period prior to the effective date of conversion without penalties should the members take exception to being privately insured.

COMMENTS

Having worked closely with Congress throughout 2005 and 2006 as the Financial Services Regulatory Relief Act of 2006 ("FSRRA") was being drafted and debated, ASI agrees that the language of all sections of the Proposed Rule track exactly with the FSRRA's Section 505 – *Amendments Relating to Nonfederally Insured Credit Unions.* [Pub. Law 109-351 – Oct. 13, 2006 – Exhibit B] Accordingly, our concerns are not with the actual language of the Proposed Rule, but with the FTC's supplemental discussion and explanations with respect to one specific section of the Proposed Rule, or §320.4 – *Disclosures in advertising and on the premises.*

In Part II – *Proposed Amendments and Comment Analysis* of the Proposed Rule commentary text, the FTC provides supplemental discussion and explanation with respect to three specific subjects; only one of which we wish to comment on, and that is: *(A) Depository Locations - ATMs, Service Centers, and Shared Facilities.* The March 13, 2009 Proposed Rule §320.4(a) states in part:

> **320.4 Disclosures in advertising and on the premises.**
> (a) *Required Disclosures*. Depository institutions lacking federal deposit insurance must include clearly and conspicuously a notice disclosing the institution is not federally insured:
> (1) At each station or window where deposits are normally received, its principal place of business and all its branches where it accepts deposits or opens accounts (excluding automated teller machines or point of sale terminals), and on its main Internet page; and..."

Under *Discussion* at Part II (A), page 10846 of the Federal Register (dated March 13, 2009), the explanatory statement interprets §320.4(a) by stating that, "...the revised Proposed Rule would require disclosures at credit union centers and service centers to the extent they contain stations or windows 'where deposits are normally received.'" The statement continues by adding that:

> "We do not expect that such a disclosure at shared facilities would cause confusion or contradict existing disclosures required by the NCUA. To the contrary, it would appear the FDICIA disclosure, coupled with the NCUA disclosures, would help to clarify which participating institutions are federally insured and which are not. In addition, the fact that the shared facility itself may not be owned by the...privately insured institution or may not be subject to FTC jurisdiction does not control the ability of the institution itself to ensure that the disclosures are made. For example, the depository institutions could arrange for the posting of the required disclosure through their contract with the shared facility."

Contrary to this explanatory statement, we believe requiring a disclosure stating: "**This institution is not federally insured**" will create confusion at shared branching facilities and directly conflicts with NCUA Rule Part §740.4(c) governing disclosure of insurance of accounts of members conducting business in a shared branch facility within a federally inured credit union.

Overall, ASI has serious concerns with the FTC's explanatory statement of the requirements of §320.4 – *Disclosures in advertising and on premises* of the Proposed Rule as it relates to the posting of a notice of the lack of federal share insurance by privately insured credit unions at "...credit union centers and service centers to the extent they contain stations or windows 'where deposits are normally received.'" Our specific comments and observations follow.

I. The Current Shared Branching Network has Changed and it Will Pose Barriers to Unreasonable Requirements and Interpretations of the FDICIA.

Since the passage of the FDICIA in 1991, the role of shared branching has changed dramatically, and its reach has expanded nationally. Today approximately 1,600 credit unions, or 20% of all credit unions nationwide, participate in one of the three operating shared branching networks (CUSC, COOP and FSCC), providing consumers access to their respective credit unions at over 3,700 locations nationwide. This is much different from the credit union service center model that was prevalent just a few years ago, which has since been replaced with the shared branching network model. Systems are in now place that allow members of one network to interface with members of the other. Network credit unions can participate under contract: (1) as an "issuer," or a credit union whose members can perform transactions at other credit unions; or, (2) as an "acquirer," wherein other credit unions' members are allowed to conduct services at the participating credit union's facilities; or, (3) both. Most credit unions contract as both, so they can serve others and their members can be served by other credit unions. The shared branching network has truly facilitated better member service and a source of fee income for participating credit unions. Basic services afforded visiting members include deposit-taking, withdrawals and the processing of credit card and loan payments. However, based on our review, credit union members cannot open an account with their credit union at a shared branch facility.

The expansion of shared branching networks has allowed credit unions to offer limited services remotely through other network member credit unions at a small transactional cost as compared to building their own facilities or joining in the ownership of a common service facility. As we mentioned above, the earlier concept of credit unions banding together to share in the cost and ownership of a stand-alone "credit union center" or "service center" has gradually been replaced with branches owned by other individual shared branching network participating credit unions; the vast majority of which are federally insured credit unions. As of year-end 2008, of the 1,600 credit unions nationwide participating in one of the three shared branching networks, only 25 are privately insured. These shared branching networks pose issues that make the posting of the subject share insurance disclosures impracticable and compliance improbable.

II. Shared Branching Disclosures Should be Treated Like ATM Disclosures for the Purposes of Compliance.

In March 2005, the FTC issued its first proposed rule since the FDICIA was enacted in 1991. [March 2005 Proposed Rule - Exhibit C] In this proposal, the FTC presented the following language in part at §320.4:

> "Depository institutions lacking federal deposit insurance must include conspicuously a notice disclosing that the institution is not federally insured:
>
> (a) at each location where the depository institution's account funds or deposits are normally received, including, but limited to, its principal place of business, its branches, its automated teller machines, and credit union centers, service centers, or branches servicing more than one credit union or institution."

As a comparison, regarding advertising of insured status on credit union premises, Section 151(b)(2) of the FDICIA originally stated: [Exhibit D]:

> "ADVERTISING; PREMISES – Include conspicuously in all advertising and at each place where deposits are normally received a notice that the institution is not federally insured."

Following the receipt of over 150 comment letters on the FTC's March 2005 initial proposed rule, it was concluded that changes were needed in the original statute to facilitate more effective rulemaking. After a year of Congressional debate, the FSRRA was passed and signed into law by President Bush on October 13, 2006. In Section 505 of the FSRRA, the Congress clearly decided to statutorily exempt ATMs and POS terminals from the definition of "premises" and exclude any reference to the FTC's March 2005 expanded definition of "premises" or "...credit union centers, service centers, or branches servicing more than one credit union..." ASI contends that the 2006 FSRRA amendment to the FDICIA to specifically exempt privately insured credit unions from having to post a notice that: "This institution is not federally insured." on ATMs and POS terminals was in part due to three facts: (1) privately insured credit unions didn't own the ATMs or POS equipment; (2) consumers from federally insured banks and credit unions also used these common deposit-taking facilities; and, (3) posting the signage would confuse customers of other participating financial institutions. We believe the same defenses exist for not posting such signs in federally insured credit unions that are part of the same shared branching network as

privately insured credit unions. Since new accounts cannot be opened at a shared branch facility, the shared branching service takes on characteristics of nothing more than a manned ATM.

III. The FDICIA is Limited to Disclosures at Branches Owned or Controlled by Privately Insured Credit Unions.

In dialogue regarding the March 2005 FTC proposed rule and the following legislative changes to the FDICIA through the FSRRA, the issue of NCUA's share insurance disclosure requirements arose. In reviewing the NCUA's requirements, the concept of "teller stations" and "drive-up windows" first surfaced. NCUA §Rule 740.4(b) requires the official sign (federal share insurance disclosure) be posted "...at each station or window where insured account funds or deposits are normally received in its principal place of business and in all its branches..." [Emphasis added.] It is clear that the NCUA requires disclosure at teller stations and windows that exist within the physical facilities of the federally insured credit union only, not shared facilities, which it addresses elsewhere therein. The absence of the word "in" in the FTC's March 2005 initial proposed rule and the Proposed Rule is what is causing the greatest confusion. We contend that to read Proposed Rule §320.4(a)(1) as including shared branch facilities misinterprets the spirit of the law as amended by the FSRRA which was drafted to seek parity with the required federal share insurance disclosure requirements. Further, based on the result of our field examinations, we believe that the large majority of our privately insured credit union currently comply with the spirit of the FDICIA and the FSRRA by placing the required disclosures at windows and stations in their owned or leased main offices and branches.

IV. Privately Insured Credit Unions Cannot Control Shared Branching Contracts and Disclosures at Federally Insured Credit Unions.

Given that privately insured credit unions do not hold controlling interest in the nation's shared branching networks, and that they represent a minority in number of the participating credit unions nationwide, they cannot effectuate the type of contractual changes envisioned by the FTC's *Discussion* statement that "... the fact that the shared facility itself may not be owned by the uninsured or privately insured institution or may not be subject to FTC jurisdiction does not control the ability of the institution itself to ensure that the disclosures are made. For example, depository institutions could arrange for the posting of the required disclosure through their contract with the shared facility." Shared branching network contracts are individually entered into between credit unions and their shared branching network, and most are standardized. Some contracts actually state that the network is subject to NCUA regulations. Accordingly, a privately insured credit union only has the power to effectuate change in its specific agreement, and not that of others, such as federally insured credit unions. This is not a practical remedy and the matter cannot be solved by contract.

V. Requiring FDICIA Disclosures in Federally Insured Credit Unions Conflicts with NCUA Rules and Regulations.

NCUA is empowered under federal law with authority to regulate all federally insured credit unions, and it also recognizes that federally and privately insured credit unions participate in shared branching networks. In April 2009, the NCUA revised its Rule §740.4(c) governing the required insurance disclosures at federally insured credit union facilities, and facilities operated by a non-credit union entity (service center), where deposits are received from members of both privately insured and federally insured credit unions. The new signage effectively informs all consumers that not all credit unions participating in the shared branching network are federally insured. [NCUA

Rule §740.4(c) - Exhibit E] It is presumed that the privately insured member was advised of the shared branching network services through print or electronic advertising from their credit union that includes the requisite FDICIA advertising disclosure language, and given that they take note of the new NCUA notice, it would appear that adequate notice has been given and the spirit of the Act sufficiently addressed.

VI. Requiring the FDICIA Disclosures in Federally Insured Credit Union Branches Will Confuse Consumers.

The revised NCUA Rule §740.4(c) in part states that tellers in a branch of a federally insured credit union may accept deposits from members of a non-federally insured credit union if the teller displays a conspicuous sign next to the official (NCUA) sign regarding share insurance coverage that states:

> "This credit union participates in a shared branch network with other credit unions and accepts share deposits for members of those credit unions. While this credit union is federally insured, not all of these other credit unions are federally insured. If you need information on the insurance status of your credit union, please contact your credit union directly."

We believe that this is adequate notice under the FDICIA for consumers, particularly in a shared branch that is not owned by a privately insured institution; and, is in fact, a federally insured institution's branch. Any additional disclosure at branches of federally insured credit unions participating in a national shared branching network would confuse the consumer who would be exposed to multiple notices. The NCUA carefully considered other forms of notice, and concluded that the above format is one that is most likely to be "noticed and absorbed." We believe the FTC would agree that disclosure that is not readily ascertained by the consumer is of no value.

VII. Mandatory FDICIA Disclosures Adequately Assure Consumers Awareness of the Lack of Federal Insurance of Accounts.

Under the FDICIA, a member of a privately insured credit union already receives adequate disclosure as to the absence of federal share insurance. The disclosure regarding the lack of federal deposit insurance as required by the Act is currently included on all advertising (as redefined by FSRRA), and conspicuously displayed at the teller stations, windows and main and branch offices of privately insured credit unions where deposits are normally received, all periodic statements of account, account records, signature cards, certificates of deposit and acknowledgments of disclosure cards.

CONCLUSIONS

ASI supports and appreciates the Commission's efforts to promulgate practical and reasonable regulations for consumer disclosures under the FDICIA (as amended), and consider the Proposed Rule as drafted to sufficiently address the spirit and intent of the Act and the amendments resulting from the passage of the FSRRA in 2006. Based on our comments, and the information we have provided, we believe we are making a reasonable request that the Commission consider the following:

(1) Apply §320.4 of the Proposed Rule only to the branches owned or controlled by privately insured credit unions, thus, recognizing that shared facilities are functioning like a manned ATM; or,

(2) Make a determination in the explanatory statement for §320.4 of the final rule that NCUA's disclosure is adequate in shared branches that are branches of federally insured institutions and in credit union service centers that serve both federally insured and privately insured institutions.

Without this course of action, we believe privately insured credit unions would be unable to ensure compliance with the disclosure as envisioned by the Commission. This would eventually impede many of our insured credit unions from continuing participation in their respective shared branching networks, resulting in reduced member services for both privately insured and federally insured credit union members alike. In addition, the loss of access to shared branching networks would adversely impact the cost of operations, share and deposit growth and overall profitability of the affected credit unions.

We appreciate the opportunity to provide these comments and remain more than willing to respond further to any questions that the Commission or its staff may have for us with respect to any issues raised in connection with this rulemaking process.

Respectfully submitted,

DENNIS R. ADAMS
President/CEO
American Share Insurance

Attachments