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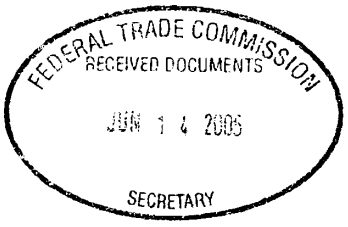

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ELECTRONIC DELIVERY (W/O ATTACHMENTS)

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex A)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Dear Sir or Madam:

American Share Insurance ("ASI") welcomes this opportunity to comment on the Federal Trade Commission's ("FTC" or the "Commission") proposed rule (the "Proposed Rule") concerning disclosures for non-federally insured depository institutions under the Federal Deposit Insurance Corporation Improvement Act ("FDICIA" or the "Act"). The FDICIA requires that depository institutions lacking federal deposit insurance provide certain disclosures to consumers, in periodic statements and advertising, that the institution does not have federal deposit insurance and that, if the institution fails, the federal government does not guarantee that depositors will get their money back.[1]

At the outset, ASI takes this opportunity to affirm its support for reasonable and responsible efforts to ensure that members of non-federally insured credit unions receive adequate notice regarding the insured status of their deposits. ASI played an active role during the development and subsequent amendment of the FDICIA (in 1991 and 1994, respectively), and has invested significant resources to educate and advise its member institutions about the requirements of the Act and their responsibilities

[1] 12 U.S.C. § 1831t.

thereunder. 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 that have operated for 13 years under a cloud of regulatory uncertainty.

ASI believes the overall goal of the Proposed Rule should be to implement regulations that will protect consumers without unnecessarily burdening privately insured credit unions. As the Commission recognized in its Notice of Proposed Rulemaking ("NPR"), many of the depository institutions impacted by the Proposed Rule are small entities.[2] Contrary to the views of the Commission expressed in the NPR,[3] ASI believes the Proposed Rule would impose a significant economic burden on these entities and potentially give rise to consumer harm and confusion.

Further, ASI believes that aspects of the Proposed Rule could have a significant anticompetitive effect by impeding the growth of, or even eliminating, private insurance as a competitive alternative to the federal insurance offered by the National Credit Union Share Insurance Fund ("NCUSIF"), which is administered by the National Credit Union Administration ("NCUA"). Competition from ASI has resulted in significant innovations and benefited consumers by providing meaningful choice in how credit unions can safely and responsibly insure their members' deposits. By weakening the economic health of privately insured credit unions and effectively precluding credit unions that are federally insured from converting to private insurance, certain provisions of the Proposed Rule threaten to reduce or eliminate ASI as a competitive alternative to federal insurance.

To reiterate, ASI agrees in principle with the need for consumers to be informed of the insured status of their deposits. In many respects, the Proposed Rule achieves that aim through a sensible

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[2] Disclosures for Non-Federally Insured Depository Institutions under the Federal Deposit Insurance Corporation Improvement Act (FDICIA), 70 Fed. Reg. 12,823, 12,826 (proposed Mar. 16, 2005) (to be codified at 16 C.F.R. pt. 320).

[3] Id.

regulatory approach. Unfortunately, certain provisions in the Commission's Proposed Rule would impose a burden so onerous, and so unjustified, as to irreparably harm credit unions that are privately insured and improperly impede future conversions of federally insured credit unions to private insurance. These concerns are discussed in detail below. Our comments also reflect what ASI believes to be a reasoned alternative approach for regulating disclosures made by non-federally insured credit unions under the Act.

BACKGROUND

I. ASI

ASI provides primary share (deposit) insurance exclusively to state-chartered credit unions. It is a credit union-owned, private share guarantor licensed by the Ohio Department of Insurance and regulated by the Ohio Departments of Commerce and Insurance. ASI is authorized to provide share insurance to credit unions chartered by nine states, and is the nation's largest non-federal insurer of consumer deposits. In more than 30 years of doing business, ASI has never defaulted on an obligation to pay an insured share.

As of December 31, 2004, 196 state-chartered credit unions were primary insured by ASI. These credit unions represented approximately $12.9 billion of insured shares. During the last four years alone, primary share insurance coverage has increased from $6.2 billion to $12.9 billion.

ASI's insured credit unions are primarily small depository institutions. In the most recent year, more than one-third of the credit unions had total assets of less than $5 million; nearly one-half had total assets of less than $10 million. Approximately 89% of the ASI-insured credit unions had total assets of less than $150 million, which means that substantially all of ASI's insured credit unions would qualify as small businesses under the relevant thresholds.

II. The Nature of Private Insurance and Credit Unions

In 1970, Congress established the NCUSIF to insure member accounts at federally insured credit unions. Shortly thereafter, due to concerns over dual-regulation and federal encroachment of states' rights, the credit union industry began to develop and support a private alternative to federal share insurance. ASI was chartered in May 1974, and since that time has supported the strong dual chartering and dual insurance system that is inherent in the credit union movement. Allowing credit unions to choose either federal or state charters creates a healthy competition between charters and provides an incentive for regulators (both federal and state) to maximize efficiency in their examinations, reduce costs, and take innovative approaches to regulation while maintaining high standards for safety and soundness.

For similar reasons, private insurance provides state chartered credit unions with a competitive alternative to the federal insurance offered by NCUSIF and administered by NCUA.[4] ASI has been a leading innovator in this regard, offering competitive benefits such as: (i) $250,000 of share insurance per individual account; and (ii) flexible, risk-based deposit premiums.

By their nature, credit unions are financial cooperative organizations of individuals who have a common bond, such as place of employment or residence or membership in a labor union or association. Credit unions are member-owned institutions that are entirely operated by and for their members. Many such credit unions have made the conscious choice, with the consent of their members, to avail themselves of the benefits of private insurance. There is no basis to suggest that such decisions were or are being made without members being aware that their deposits were or are not federally insured or

[4] Currently, nine states have approved ASI to provide private deposit insurance; they include: New Hampshire, Maryland, Ohio, Indiana, Illinois, Alabama, Idaho, Nevada, and California. Other states have statutory language permitting private deposit insurance subject to regulatory approval; such as: New Jersey, Pennsylvania, Louisiana, Oklahoma, New Mexico, Colorado, Montana, and Washington.

backed by the federal government.[5] Indeed, the nature of credit unions, as well as the existence of NCUA rules governing conversions from federal to private insurance,[6] would suggest otherwise. Moreover, most credit union members have been receiving the disclosures required by the FDICIA for more than a decade. Given this, ASI believes the risk that members of privately insured credit unions are misinformed about the insured status of their deposits is extremely low.

It is therefore imperative that the Commission, in exercising its regulatory authority, not impose unreasonable burdens on privately insured credit unions as to effectively deny consumers the choice of private insurance. Because of ASI's long-standing association with privately insured credit unions, and as the nation's only primary private insurer of credit unions, we believe ASI is uniquely qualified to assess the burdens imposed by the Proposed Rule on privately insured credit unions, and to advance reasonable regulatory alternatives that will protect consumer interests while at the same time preserving the economic integrity of privately insured credit unions and private insurance as a competitive alternative to federal insurance through the NCUA.

COMMENTS

I. FTC's Scope of Authority

A threshold consideration, before turning to ASI's comments regarding specific provisions of the Proposed Rule, is whether the rulemaking procedures being followed by the FTC in this matter are

[5] In 2003, the GAO conducted a comprehensive study on compliance issues under the Federal Deposit Insurance Act. Federal Deposit Insurance Act, GAO Rep. No. 03-971 (Aug. 2003). Notably, that report contained no evidence that members in privately insured credit unions were unaware that their deposits were not federally insured or that if the institution failed, the federal government would not guarantee that depositors get their money back. In a comment letter submitted to the GAO, the Commission criticized the report because it "does not assess whether there would be any negative impact on consumers if the disclosure provisions [of the FDICIA] are not enforced ...." Letter from Shira Pavis Minton, Acting Secretary, Federal Trade Commission, to Richard J. Hillman, Director, Financial Markets and Community Investments, General Accounting Office 1 (Aug. 18, 2003) (included in GAO Rep. No. 03-971, App. IV). Exhibit 1 attached hereto.

[6] See discussion at II.C, infra.

appropriate. The Commission has chosen, without explanation, to promulgate the Proposed Rule pursuant to a more streamlined informal rulemaking process, eschewing public hearings in favor of a simplified notice and comment period. ASI believes a more formal rulemaking process is warranted, in particular given the concerns addressed below and the potential detrimental effect the Proposed Rule could have on the hundreds of privately insured credit unions across the nation.

Language found in the NPR suggests that the Commission's rulemaking is being carried out pursuant to authority granted under the FTC Act. The NPR states, "The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate."[7] Proceeding under the FTC Act would be consistent with the Act's mandate that, "[c]ompliance with the requirements of this section, and any regulation prescribed or order issued under this section, shall be enforced under the [FTC] Act by the Federal Trade Commission."[8]

ASI believes that the FTC Act requires the Commission to engage in a more extensive and detailed rulemaking process than the informal procedures currently being followed.[9] Informal rulemaking procedures under the FTC Act are only appropriate "to make rules and regulations for the purpose of carrying out provisions of [the] Act,"[10] or, alternatively, where the Commission is developing interpretative rules or general statements of policy that do not have the force of law.[11] Neither situation would apply to the Proposed Rule. Furthermore, the Commission's own procedural rules governing

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[7] 70 Fed. Reg. at 12,823 (emphasis added).

[8] 16 U.S.C. § 1831t(g). In situations where Congress has intended the Commission to promulgate a rule under different procedures, such as the Administrative Procedure Act ("APA"), it has made this clear by explicit statutory provisions. See, e.g., 15 U.S.C. § 6102(b) (directing Commission to prescribe rules for the Telemarketing Act "in accordance with section 553 of title 5."); 15 U.S.C. § 6804(a)(3) (directing the Commission to prescribe regulations implementing the Gramm-Leach-Bliley Act "in accordance with applicable requirements of title 5 [of the APA] ....").

[9] We note that the Commission has publicly questioned its authority to regulate in this area at all, let alone under the FTC Act. See GAO Rep. No. 03-971 at 1-2.

[10] 15 U.S.C. § 46(g).

[11] 15 U.S.C. § 57a(a)(1)(A).

informal rulemakings recognize that such rulemakings "express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings and other proceedings...."[12] Not only has the Commission failed to conduct studies, investigations or hearings on the Proposed Rule, but the Commission's staff has expressly acknowledged that this rulemaking is beyond the Commission's expertise.[13]

In promulgating the Proposed Rule, the Commission's rulemaking should proceed under Section 18(b) of the FTC Act, which provides special rulemaking authority for issuing rules regarding "unfair or deceptive acts or practices," also known as "trade regulations."[14] Section 18(b) would require, among other things, that the Commission conduct an informal hearing with the opportunity for oral presentations on all of the relevant issues.[15] We believe the factual circumstances relating to the Proposed Rule are complex and warrant a more detailed and informed review.

If the Commission concludes that a more formal rulemaking process is inappropriate, ASI would recommend that at a minimum, the FTC hold discretionary hearings to provide an opportunity for interested parties to address the issues and concerns raised in this and other comments submitted in response to the Proposed Rule.

II. Proposed Rule § 320.5 - Disclosure Acknowledgement

Section § 320.5 of the Proposed Rule provides, in part, that:

> [D]epository institutions lacking federal deposit insurance are prohibited from receiving any deposit for the account of a new or existing depositor unless the depositor has signed a written acknowledgement indicating that the institution is not federally insured and, if the institution fails, the federal

[12] FTC General Procedures, 16 C.F.R. § 1.22(a) (2005).
[13] See GAO Rep. No. 03-971 at 30-33.
[14] 15 U.S.C. § 57a(b).
[15] 15 U.S.C. § 57a(b)(1). See also 16 C.F.R. § 1.13.

> government does not guarantee that the depositor will get back the depositor's money.

This provision, more so than any other provision of the Proposed Rule, could threaten to destabilize the community of privately insured credit unions, in particular to the extent it is applied to credit unions that converted to private insurance after the 1994 amendment to the Act, or that plan to convert in the future.[16] In effect, the Commission's proposal would reinstate the very regulatory regime that the Congress, in amending the Act in 1994, had determined was impossible for privately insured credit unions to comply with and therefore needed to be abolished. In drafting this provision, the Commission has failed, perhaps unintentionally, to heed basic principles of statutory construction. In adopting its final rule, it is vital that the Commission give careful consideration to revising this provision in order to avoid imposing what otherwise would be an oppressive burden on credit unions that converted to private insurance after 1994, or that plan to convert in the future.

A. Basic Principles of Statutory Construction Require the FTC to Examine the Legislative Intent in Adopting the 1994 FDICIA Amendments.

An agency's construction of a statute it administers is evaluated pursuant to the two-step inquiry announced by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.[17] The first step requires a court to apply "traditional tools of statutory construction" – including examination of the statutory text, structure and legislative history – to determine "whether Congress has directly spoken to the precise question at issue."[18] Indeed, courts "may examine the statute's legislative history in order to shed new light on congressional intent, notwithstanding statutory language that appears

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[16] Since 1994, 32 credit unions have converted from federal to private insurance. During that same period, an equal or greater number of federally insured credit unions merged with and into privately insured credit unions. The concerns raised herein would apply to both situations, however ASI's comments will refer to them collectively as conversions.

[17] 467 U.S. 837, 842-43 (1984).

[18] Consumer Elecs Ass'n v. FCC, 347 F.3d 291, 297 (D.C. Cir. 2003).

superficially clear."[19] If the "intent of Congress is clear," the inquiry ends; "[t]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[20]

When the statute is silent or ambiguous on the precise question in dispute, however, courts proceed to the second step of the Chevron inquiry to determine whether the agency's interpretation "is based on a permissible construction of the statute."[21] An agency interpretation is only accorded deference if it is "reasonable and consistent with the statute's purpose."[22]

B. An Examination of the Act and the Legislative History in Amending the Act in 1994 Reveals That Congress Did Not Intend for the Written Disclosure Acknowledgement to Apply to Credit Unions That Were Not Privately Insured at the Time the Act was Amended.

As originally enacted in December 1991, the FDICIA's "acknowledgement of risk" provision required a signed written acknowledgement from all privately-insured depositors:

> (3) ACKNOWLEDGEMENT OF RISK. – Receive deposits only for the account of persons who have signed a written acknowledgement that the institution is not federally insured, and that if the institution fails, the Federal Government does not guarantee that they will get back their money.[23]

This provision was to become effective on June 19, 1994. When it became clear in 1994 that credit unions would be unable to adequately comply with this provision, the Act was amended to provide a more simplified method of disclosure for current depositors. For new depositors, defined as "any depositor who was not a depositor at the depository institution before June 19, 1994," the written

[19] Am. Bankers Ass'n v. NCUA, 271 F.3d 262, 267 (D.C. Cir. 2001).
[20] Chevron, 467 U.S. at 842-43.
[21] Id. at 843.
[22] Atl. City Elec. Co. v. FERC, 291 F.3d 1, 8 (D.C. Cir. 2002).
[23] Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 151(a), 105 Stat. 2236, 2283.

acknowledgement requirement went unchanged.[24] For current depositors, however, the amended Act provided an alternative, and more simplified method for making the required disclosure:

> (B) Current depositors
>
> Receive any deposit after the effective date of this paragraph for the account of any depositor who was a depositor before June 19, 1994, only if –
>
> (i) the depositor has signed a written acknowledgement described in subparagraph (A); or
>
> (ii) the institution has complied with the provisions of subparagraph (C) which are applicable as of the date of the deposit.
>
> (C) Alternative provision of notice to current depositors
>
> (i) In general
>
> Transmit to each depositor who was a depositor before June 19, 1994, and has not signed a written acknowledgement described in subparagraph (A) –
>
> (I) a card containing the information described in clauses (i) and (ii) of subparagraph (A), and a line for the signature of the depositor; and
>
> (II) accompanying materials requesting the depositor to sign the card, and return the signed card to the institution.
>
> (ii) Manner and timing of notice
>
> (I) First Notice
>
> Make the transmission described in clause (i) via first class mail not later than September 12, 1994.[25]

[24] 12 U.S.C. § 1831t(b)(3)(A).
[25] 12 U.S.C. § 1831t(b)(3).

The Act required a second and third notice to be sent not later than 45 and 90 days, respectively, after transmission of the first notice.[26]

The 1994 amendment to the written acknowledgement requirement contains date limitations found nowhere else in the Act. As a result of Congress's deliberate decision to include those limitations, the statutory framework becomes entirely unworkable when applied to credit unions that converted to private insurance after the 1994 amendment or that plan to convert in the future. It would be impossible, for example, for any of these credit unions to provide the required notice "not later than September 12, 1994." Surely Congress recognized this fact, and if it had intended for the written acknowledgement requirement to have prospective effect beyond June 19, 1994, it could have done so with minimal effort. Because Congress failed to do so, it is reasonable to infer that Congress did not intend for the written acknowledgement to apply to credit unions that converted to private insurance after 1994 or that plan to convert in the future.

This inference gains footing when one considers that the Act's written acknowledgement requirement was largely a means for Congress to ensure that members in privately insured credit unions as of 1991 – credit unions which previously had not been subject to any disclosure requirements – were made aware of the insured status of their deposits. No such rationale would apply today considering that disclosures have been mandated for 13 years. Any prospective application of the written acknowledgement would, moreover, be wholly redundant given that the disclosures required by the written acknowledgement are identical to those disclosures required for signature cards. In short, there no longer is a need for the written acknowledgement requirement.

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[26] 12 U.S.C. §§ 1831t(b)(3)(C)(ii)(II)-(III).

The alternative conclusion – that Congress intended the simplified disclosure method to apply only to those credit unions that were privately insured as of June 19, 1994 and to apply the more onerous written acknowledgement requirements to credit unions that converted to private insurance after June 19, 1994 – would stand the 1994 amendment on its head. Yet this is exactly what the Commission's Proposed Rule would do. The whole purpose of the 1994 amendment, however, was to liberalize the requirement that credit unions obtain written acknowledgements from all depositors. On August 2, 1994, the conference report fully explained that the purpose of the amendment was to simplify the notice procedures under the Act:

> Section 340. Simplified disclosures for existing depositors
>
> This section establishes alternative customer notice procedures, in lieu of written customer acknowledgement, that a depository institution is not Federally insured and that customers may not get back their money if the institution fails. The Conferees believe that the alternative notice procedures are warranted for existing customers because many such customers do not visit the institution and thus cannot be asked to sign an acknowledgement in person, and some customers who receive mailed notices and requests do not respond. For existing depositors, institutions may either obtain a written acknowledgement or comply with the notification requirements specified in this section.[27]

Earlier, on June 13, 1994, Donald W. Riegle, Jr., Chairman, Senate Committee on Banking, Housing and Urban Affairs and Henry B. Gonzalez, Chairman, House Committee on Banking, Finance and Urban Affairs wrote to the Chairwoman of the FTC asking the FTC to defer enforcement of sub-section (b)(3) as originally enacted pending the imminent enactment of the amendment. The letter acknowledged that it would be impossible to obtain signatures from all depositors:

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[27] H.R. REP. NO. 103-652 (1994).

> Dear Chairwoman Steiger:
>
> On December 19, 1991, the Federal Deposit Insurance Corporation Act of 1991 (PL 102-242) was signed into law, adding Section 43 to the Federal Deposit Insurance Act (12 USC 1811 et seq). Section 43(b) of FDIA states that beginning June 19, 1994, non-Federally insured credit unions can continue to receive deposits only if all depositors have signed a written acknowledgment that their deposits are not guaranteed by the Federal Government. Section 43(g) names your agency with the responsibility for enforcing the provisions of this section of the FDIA.
>
> **It was determined that it was *impossible* to obtain signatures from 100 percent of the current depositors.**
>
> ***
>
> We would suggest that [the FTC] defer any further action on Section 43(b) until the [amendment] is finally signed into law. [emphasis added][28]

The legislative history makes clear that the intent of Congress in 1994 was to alleviate the "impossible" burden of complying with the Act's original written acknowledgement requirement. It is equally clear that Congress chose to adopt date limitations in the amended provision that effectively preclude its application to credit unions that converted to private insurance after 1994 or that plan to convert in the future. Taken together, these facts suggest that Congress did not intend for the written acknowledgement requirement to apply to credit unions that converted to private insurance after 1994. In no event would anything in the text of the Act or its legislative history support the Commission's approach of requiring all such credit unions to obtain a written acknowledgement.

C. The Written Acknowledgement Requirement is Unnecessary Because it is Largely Redundant to Existing NCUA Rules Governing Credit Union Conversions from Federal to Private Insurance.

[28] Letter from Senator Donald W. Reigle, Jr., Chairman, Senate Committee on Banking, Housing and Urban Affairs and Congressman Henry B. Gonzalez, Chairman, House Committee on Banking, Finance and Urban Affairs, to Janet Steiger, Chairwoman, Federal Trade Commission (June 13, 1994). Exhibit 2 attached hereto.

In 1987 the NCUA added 12 CFR Part 708, subpart B and C, which for the first time set forth the procedures and notice requirements for, *inter alia*, credit unions seeking to convert from federal insurance to private insurance and the forms to be used.[29] Before converting to private insurance, a credit union was – and still is – required to obtain approval by the affirmative vote of a majority of the credit union's members (*i.e.*, depositors) who vote on the proposition, provided at least 20 percent of the total membership participates in the voting.[30] Moreover, a credit union was – and still is – required to provide its members with written notice of the proposal to convert within 30 days of the date of the membership vote.[31] The notice informed members that the conversion would result in the loss of federal insurance.

In December 1997, the NCUA proposed changes to its conversion rules. Citing the disclosure requirements that 12 U.S.C. § 1831t(b)(1) imposes on credit unions that are not federally insured, the Board reasoned that similar disclosures need to be made to members of credit unions being asked to vote on a proposal to replace federal insurance with private insurance. It is important to note that the NCUA never proposed that credit unions seeking to convert first obtain a written acknowledgement from all existing depositors. Rather, the proposed rule, which was adopted without change as the final rule, added a sentence to the notices and ballots that are required to be sent to members of credit unions seeking to convert from federal to private insurance explaining that the insurance provided by the NCUA is backed by the full faith and credit of the United States government and that the private insurance the member will receive if the credit union converts is not backed by the United States government.[32]

The NCUA's rules were recently revised and now require converting credit unions to do the following:

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[29] See Mergers of Federally Insured Credit Unions, 52 Fed. Reg. 12,370 (Apr. 16, 1987) (to be codified at 12 C.F.R. pt. 708).
[30] 12 C.F.R. § 708.203(c) (2005).
[31] Id. at § 708.204(b).
[32] Id. at § 708b.302.

- Upon approving a resolution to seek conversion, the credit union board of directors must notify the Regional Director of the intended conversion and seek NCUA Board approval.[33] The credit union must use the form prescribed in 12 CFR § 708b.301(a), which requires the credit union to state that it is aware of the disclosure requirements of 12 U.S.C. § 1831t(b) and that the nonfederal insurer is authorized to issue share insurance in the state in which the credit union is located and is willing/able to provide insurance to the credit union. This notification must occur at least 14 days before notification of credit union members and at least 90 days before the proposed conversion date.[34]

- Not more than 30 days or less than 7 days before the vote, the credit union must hand deliver or mail to each member a notice that (1) informs members that NCUA insurance is backed by the full faith and credit of the United States government, while the private insurance is not guaranteed by either the federal or state government and (2) conspicuously states that if the conversion is approved and the credit union fails, the federal government does not guarantee the member will get his or her money back.[35] According to the NCUA, the notice requirement has been amended to make it "more consistent" with the disclosure requirements of 12 U.S.C. § 1831t(b).[36]

- At least 20 percent of the membership must vote on the conversion and approval requires a majority of the members that vote.[37]

- Within 14 days of receiving the certified vote, the NCUA will approve or disapprove the proposed conversion.[38]

- Upon approval by the membership and NCUA, the credit union must send a notice to its members that includes a conspicuous statement that the conversion will result in the loss of federal share insurance, and that the credit union will, at any time before the effective date of conversion, permit all members who have share certificates or other term accounts to close the federally-insured portion of those accounts without an early withdrawal penalty.[39]

The amended rules also require that the first page of all communications concerning conversion contains a conspicuous statement that accounts are currently insured by the NCUA and backed by the full

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[33] Id. at § 708b.203(c).
[34] Id.
[35] Id. at § 708b.204(a)-(b).
[36] See Mergers of Federally Insured Credit Unions, 70 Fed. Reg. 3,279, 3,282 (Jan. 24, 2005).
[37] 12 C.F.R. § 708b.203(d).
[38] Id. at § 708b.203(g).
[39] Id. at § 708b.204(c).

faith and credit of the United States government and that if the conversion is approved and the credit union fails, the government does not guarantee that the member will get his or her money back.[40]

The written acknowledgement requirement is largely redundant to these NCUA regulations and unnecessary to protect consumers, in particular given the numerous disclosures that are otherwise required by the Proposed Rule. Indeed, it is plausible, given the NCUA's exercise of regulatory authority over credit union conversions from federal to private insurance, that Congress concluded there was no need for credit unions that converted to private insurance after 1994 to also be burdened with having to obtain a written acknowledgement from each of its depositors.

D. The FTC's More Than 10-Year Delay in Promulgating Regulations Implementing the FDICIA, Along With the Actions of the NCUA Relating to Conversions That Occurred During That Time, Dictate That the Written Acknowledgement Requirement Not Be Retroactively Imposed on Credit Unions That Converted to Private Insurance After 1994.

For more than 10 years, the Commission intentionally fought against funding in their annual budgets for enforcing the provisions of the FDICIA.[41] Had the FTC acted promptly in promulgating these enforcement regulations, many of the issues and concerns raised by ASI with respect to the written acknowledgement requirement could have been avoided. Instead, approximately 60 federally insured credit unions have either converted to private insurance or merged with and into privately insured credit unions without the benefit of regulatory guidance from the FTC. Since June 1994, 32 have converted to private share insurance and as of December 31, 2004, represent approximately 46% of all shares and deposits in ASI primary insured credit unions.

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[40] Id. at § 708b.206(b).

[41] See, e.g., Hearing Before the House Subcommittee on commerce, Justice, & State, the Judiciary, & Related Agencies, House Comm. On Appropriations, 102d Cong. 1-2 1992 (statement of Janet D. Steiger, Chairman, Federal Trade Commission), attached as Exhibit 3 hereto. See also Fiscal Year 2004 Federal Trade Commission Budget Justification, at 12, attached hereto as Exhibit 4; Fiscal Year 2005 Federal Trade Commission Budget Justification, at 12, attached hereto as Exhibit 5.

In the absence of enforcement by the FTC, the NCUA proceeded to approve 27 conversions between June 1994 and June 2002 without even suggesting that the FDICIA might require written acknowledgements from all existing depositors. The NCUA first raised this argument in the second half of 2002, when one of the largest federally insured credit unions announced its intention to convert to private insurance. In order to convert, the NCUA required the credit union to make a representation that the credit union would comply with the Act. The credit union proceeded to follow the simplified notification procedures set forth in the 1994 amendment (even though the Act technically required that the first of three notices be sent by September 12, 1994), and thereafter the NCUA approved the conversion. Credit unions that have converted to private insurance since 2002 have likewise followed these simplified notice procedures.

For the FTC to impose, at this late date, new obligations on credit unions that converted to private insurance after 1994, especially in light of the actions taken by the NCUA, would potentially raise serious regulatory concerns. In Bowen v. Georgetown Univ. Hosp., the Supreme Court held that an agency may not promulgate retroactive rules absent express authority from Congress.[42] A rule is retroactive "if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[43] Underlying this prohibition against retroactive rules is the idea of fairness.[44]

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[42] 488 U.S. 204, 208 (1988). See also Sweet v. Sheahan, 235 F.3d 80, 89 (2d Cir. 2000) (courts are "prohibited from applying a regulation to conduct that took place before its enactment in the absence of clear congressional intent where the regulation would impose new duties with respect to transactions already completed").

[43] Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) ("[t]he critical question is whether a challenged rule establishes an interpretation that changes the legal landscape").

[44] See Sweet, 235 F.3d at 89 (retroactive rules "present problems of unfairness because it can deprive [parties] of legitimate expectations and upset settled transactions"). See also Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 835 (9th Cir. 1997) ("Fairness concerns dictate that courts must not lightly disrupt settled expectations or alter the legal consequences of past actions").

There can be little doubt that enforcement of the written acknowledgement requirement against credit unions that converted to private insurance after 1994 would be manifestly unfair.

E. Enforcement of the Written Acknowledgement Requirement Could Cause Significant Consumer Harm and Impair the Economic Health of Privately Insured Credit Unions.

As related above, the legislative history of the Act demonstrates that the 1994 amendment to the written acknowledgement requirement was necessary to relieve credit unions of a regulatory burden with which it was "impossible" to comply. Congress recognized that obtaining written acknowledgements from 100% of depositors was not feasible because many depositors "do not visit the institution and thus cannot be asked to sign an acknowledgement in person," and others "who receive mailed notices ... [but] do not respond."[45]

There is no basis to suggest that credit unions would meet with greater success in obtaining these written acknowledgements today than they did more than 10 years ago. In fact, credit unions might be less successful today given the advent of various alternative means for making transactions that reduce or eliminate the need for depositors to visit their credit unions. For example, Automated Clearing House ("ACH") is frequently used for the automatic deposit of paychecks, social security benefits, pensions, dividend and interest payments, and tax refunds. These payments are frequently arranged without the involvement of the depository institution. Similarly, Audio Response Units ("ARUs") allow depositors to use any telephone to transfer funds, inquire on deposits, withdrawals and ATM transactions, or to make credit card payments. In short, depositors can interact with their credit unions in a variety of ways that would not necessitate a visit to the credit union. Credit unions would thus be left, in most instances, with

[45] H.R. REP. NO. 103-652 (1994).

having to obtain written acknowledgements by sending out mailed notices. If past is prologue, those efforts would largely go unheeded.[46]

The result in not obtaining the required written acknowledgements, of course, is that consumers would unexpectedly find their accounts put on hold or, possibly, have their deposits returned to them. Other depositors might overdraw their accounts because a deposit, such as the automatic deposit of a paycheck, has been unknowingly refused. Still others, after having a deposit refused, might become unnecessarily concerned about the financial health of the credit union and withdraw all of their deposits. This could result in a self-fulfilling prophecy as more and more depositors withdraw their funds, thereby weakening the credit union's financial health and possibly causing a run on an otherwise healthy credit union. Even if a depositor run does not materialize, the credit union's ability to receive and lend money – that is, conduct daily operations for the benefit of its members – could be severely compromised if the credit union is forced to refuse deposits because members have not signed the required written acknowledgement.

F. The Commission's Written Acknowledgement Requirement Would Impose an Impermissible Burden on Federally Insured Credit Unions That Plan to Convert to Private Insurance in the Future, and Would Have Severe Anticompetitive Effects.

Credit unions that are federally insured are not subject to the FDICIA or the Commission's Proposed Rule. Rather, federally insured credit unions are subject to regulation by the NCUA. By law,

[46] From analyzing data regarding 18 of the largest credit union conversions since 1994, ASI has determined that on average, only 28% of each credit union's members actually voted on whether to convert from federal to private insurance, with 78% of voters voting to forego federal insurance in favor of private insurance. Thus, even when faced with the critical decision of whether or not to forego federal insurance, members have appeared largely ambivalent. It would strain logic, then, to assume that members would be more likely to respond to credit unions efforts to obtain written acknowledgements, an issue of considerably less importance.

the NCUA has authority to regulate the conversion of credit unions from federal to private insurance.[47] The NCUA's specific regulations are detailed above.

The Commission's proposed written acknowledgement requirement would impose a near absolute bar on credit union conversions to private insurance. For the same reasons advanced earlier with respect to privately insured credit unions, it would be impossible for federally insured credit unions to obtain written acknowledgements from 100% of their depositors prior to, or at the time of, conversion. Moreover, such a requirement would be redundant to, and substantially more onerous than, the notice requirements contained in the NCUA's regulations governing the conversion process. Indeed, the Commission's written acknowledgement requirement would call into question the continued relevancy of many of the NCUA's conversion rules.

Faced with the prospect of having to obtain written acknowledgements from 100% of its existing depositors, many federally insured credit unions would forego converting to private insurance, thus denying their members the benefits that private insurance can provide. With federally insured credit unions foreclosed from converting to private insurance, the competitive role of private insurance in the marketplace would be severely diminished. Again, members of federally insured credit unions would be harmed by this reduction in competition.

As drafted, the Proposed Rule would have a presumably unanticipated anticompetitive effect. It would also tend to preempt efforts by those 17 states that have chosen to provide consumers with a private insurance alternative.

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[47] Section 205(b)(1)(D) of the Federal Credit Union Act (12 U.S.C. § 1785(b)(1)(D)) provides that "no insured credit union shall, without the prior approval of the Board . . . convert into a noninsured credit union or institution." 12 U.S.C. section 1752(7) defines a noninsured credit union as "any credit union the member accounts of which are not [federally insured]." The NCUA is authorized to "prescribe such rules and regulations as it may deem necessary or appropriate to carry out the provisions of [the Act]." 12 U.S.C. § 1789(a)(11).

G. ASI's Proposal For Revising the Commission's Written Acknowledgement Requirement

As the foregoing makes clear, there are serious concerns regarding the FTC's authority to require non-federally insured depository institutions to obtain written acknowledgements from all new and existing depositors. Imposing such a requirement would, in effect, restore the statutory framework that Congress explicitly rejected in amending the Act in 1994 to provide for a more simplified notice requirement. We do not believe Congress intended the written acknowledgement requirement to have prospective application to credit unions that converted to private insurance after June 19, 1994 and, therefore, would recommend that the Commission exclude the written acknowledgement required in § 320.5 from the Final Rule.

Exclusion is warranted since the proposed written acknowledgement requirement is largely redundant to existing NCUA regulations that govern credit union conversions from federal to private insurance and would provide only negligible additional consumer protection. This is particularly true given the plethora of disclosures that must be made in periodic statements and account records, advertising, and at each location where the depository institution's deposits are normally received.

Furthermore, the written acknowledgement requirement has the greatest likelihood of creating unnecessary and unwarranted burdens and costs for privately insured credit unions. For credit unions that converted to private insurance after 1994 or that plan to convert in the future, compliance would be impossible regardless of absolute best efforts and intentions. Moreover, for credit unions that obtained written acknowledgements in accordance with the Act, many have since lost or otherwise destroyed those documents (absent any requirement that they be maintained). To require these credit unions to again seek written acknowledgements from their depositors would be entirely unreasonable and overly burdensome.

If the Commission concludes that some form of written acknowledgement is required, we would propose that the requirement have only prospective application as follows:

> § 320.5 – Disclosure Acknowledgement
>
> Except as provided in section 320.6, depository institutions lacking federal deposit insurance are prohibited from receiving any deposit for the account of a depositor that was not a depositor of the depository institution
>
> (i) at the effective date of this rule; or
>
> (ii) if after the effective date of this rule, at the time the institution converted to private insurance or otherwise became subject to the provisions of the Act
>
> unless the depositor has signed a written acknowledgement indicating that the institution is not federally insured and, if the institution fails, the federal government does not guarantee that the depositor will get back the depositor's money.

Alternatively, for credit unions converting insurance after the effective date of this rule, the Commission should consider adopting the simplified disclosure method for existing depositors that was part of the 1994 amendment. This would allow credit unions to discharge their duty under the statute by sending three separate notices to existing depositors after converting to private insurance.

If the Commission's written acknowledgement requirement is going to be considered for the Final Rule, ASI strongly requests that a hearing be held to present testimony or that interested parties be given opportunity to provide further comments on this subject.

III. Proposed Rule §§ 320.3, 320.4 - Conspicuous Disclosures

ASI supports the Commission's approach in §§ 320.3 and 320.4 of the Proposed Rule requiring that disclosures in periodic statements, account records, advertising and on the premises be made "conspicuously." This language tracks the language found in section 43 of the Act and is consistent with the approach adopted by the Commission in both advertising and non-advertising contexts across a broad

range of industries.[48] Commission precedent has established basic guidelines for determining whether disclosures are conspicuous by examining, among other things, the disclosure's prominence, presentation, placement and proximity to the claim it qualifies.[49] Put simply, to be conspicuous a disclosure must be easy to find, easy to read, and easy to understand. We believe the Commission's proposed language provides a clear standard with which credit unions can easily comply.

The "conspicuous" requirement set out in the Act and adopted by the Commission in the Proposed Rule provides credit unions with the flexibility necessary to include disclosures on those documents where the Act requires disclosures to be made – i.e., statements of account, signature cards, passbooks, etc. – as well as in advertisements across a variety of media. The frequency and placement of the disclosure will depend entirely on the format and context in which it appears.

Any effort to regulate the manner and form of such disclosures, as some commenters have proposed, would be overly problematic. To require, for example, that the disclosure in an online advertisement "be highlighted and segregated" from other information would prove unworkable and would contradict the approach adopted by the FTC in other advertising contexts.[50]

ASI also requests that the Commission clarify what is meant by "advertising." For example, a liberal interpretation of advertising might including listings in telephone directories, promotional items (such as key chains, clothing, pens and calendars), or signs attached to the building or buildings in which the credit union is located. The NCUA's and FDIC's rules provide for a long list of materials and media wherein certain disclosures required by the agencies need not be displayed. We would encourage the

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[48] See, e.g., Thompson Medical Co., 104 F.T.C. 648, 797-98 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. § 308.3 (2005).

[49] See, e.g., Dot Com Disclosures, available at http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom (May 3, 2000).

[50] See Dot Com Disclosures (stating that there is no set formula for a clear and conspicuous disclosure in advertising and then applying traditional factors to evaluate whether disclosures are likely to be clear and conspicuous in the context of online ads).

Commission to consider specific exemptions, such as those issued by the NCUA and FDIC, in promulgating its final rule.

IV. Proposed Rule § 320.4(a) – Disclosure Locations

Section 320.4(a) of the Proposed Rule states:

> 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 not 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.

ASI generally supports the disclosure requirements of this provision. Since 1991, ASI has supplied each of its privately insured credit unions with signage for posting at the credit union's principal place of business and at branch locations. ASI has also provided its credit unions with window and door decals that explain that the institution is not federally insured.

The Commission has expanded on the language contained in the Act by listing specific locations where disclosures are required. We believe the list of locations proposed by the FTC should be refined to exclude ATMs, branches servicing more than one credit union or institution and credit union centers. These changes are necessary to prevent consumer confusion and avoid potential conflicts with existing NCUA regulations.

A. ATMs

Requiring disclosures on ATMs raises several concerns. First, a substantial percentage of ATMs are not owned by the credit union whose members use them. Rather, ATMs are typically leased by

individual credit unions or are operated as part of shared networks.[51] In either case, the credit union would have limited or no ability to include on the ATM the disclosures required by this provision. Moreover, the inclusion of disclosures on ATMs that are part of an ATM network could give rise to consumer confusion since in most cases such ATMs would also be used by customers of federally insured credit unions or banks. Therefore, ASI would propose excluding ATMs from the scope of the final rule or, alternatively, limiting the disclosures required by this provision to ATMs that are owned by the privately insured depository institution and also located in an office or branch of the privately insured depository institution

A second basis for excluding ATMs from the scope of the final rule is that many ATMs are not equipped to handle deposits. Increasingly, depository institutions are setting up in grocery stores and other locations ATMs that only permit withdrawals.[52] Requiring that disclosures be made at these ATM locations would seem unnecessary and beyond the scope of the Act. If the Commission plans to otherwise include ATMs in the final rule, ASI requests that the Commission clarify the rule to specifically exclude ATMs that do not accept deposits.

B. Shared Branching

Requiring disclosures at "branches servicing more than one credit union" raises the prospect of consumer confusion and a possible conflict with existing NCUA regulations. Shared branching is an ever-expanding concept among credit unions nationally, and one that has worked well in many markets. In many cases, privately insured credit unions have been able to better serve their members' needs as a

[51] Co-op Network, who operates the largest network of credit union ATMS and retail point of sale terminals, has seen a steady increase in shared branch transaction volume since 2000. As of May 1, 2005, there had been over 4 million transactions in shared branches. Credit Unions: Stats available at http://www.co-opnetwork.org/public/CU/cu-stats.cfm.

[52] Industry statistics reveal that 57% of all ATM transactions are withdrawals, whereas only 15% are deposits. See ATM Facts and Stats available at http://www.atmmarketplace.com/research.htm, Exhibit 6 attached hereto. The percentage of deposits has been declining in recent years.

direct result of their participation or ownership in such shared branching networks. These shared branching networks also typically include both privately insured and federally insured credit unions. Thus, to require disclosures at a shared branching facility that likely serves more federally insured than privately insured credit unions, or a credit union center, could give rise to consumer confusion.

Furthermore, the NCUA previously considered – and ultimately rejected – regulations for shared branches that would have required essentially the same disclosure now being proposed by the Commission. NCUA Rule § 740.4(c) requires that, where a privately insured credit union shares a branching service center with federally insured credit unions, a notice must be posted listing all credit unions participating in the shared branching network that are federally insured.[53] As originally proposed, however, the regulation would have required that the notice list all participating credit unions identified by whether or not they were federally insured.[54] One of the reasons for rejecting this proposal, interestingly enough, was to avoid consumer confusion.[55] Therefore, in order to avoid a regulatory conflict and potential consumer confusion, the Commission should exclude "credit union centers, service centers, and branches servicing more than one credit union" from the scope of the final rule.

Finally, it is unclear that the FTC has authority to regulate the types of disclosures made at shared branching locations, given that many of these locations are federally insured credit unions. The FDICIA, and the Commission's authority thereunder, relates only to depository institutions that lack federal deposit insurance.[56] However, by requiring that disclosures be made at shared branching locations – including locations that are federally insured credit unions – the FTC is to an extent regulating those institutions and

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[53] 12 C.F.R. § 740.4(c) (2005).
[54] Organization & Operations of Fed. Credit Unions, 62 Fed. Reg. 11,779, 11,786 (proposed Mar. 13, 1997) (to be codified at 12 C.F.R. pt. 740).
[55] Organization & Operations of Fed. Credit Unions, 63 Fed. Reg. 10,743, 10,755 (Mar. 5, 1998) (to be codified at 12 C.F.R. pt. 740)
[56] 12 U.S.C. § 1831t(c); 70 Fed. Reg. at 12,823.

thereby exceeding its regulatory authority. To avoid such overreaching, the Commission should exclude shared branching locations and credit union centers from the scope of its final rule.

V. Proposed Rule § 320.3 – Disclosures in Account Records

ASI supports this provision of the Proposed Rule but believes the provision should be further clarified to exclude (i) deposit slips and receipts; and (ii) receipts or records generated from electronic transactions.

Under the Uniform Commercial Code, deposit slips and receipts cannot properly be considered "an instrument" evidencing a deposit. Section 3-104(b) of the U.C.C. defines "instrument" to mean a "negotiable instrument." Section 3-104(a) of the U.C.C. defines "negotiable instrument" to mean an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

> (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
> (2) is payable on demand or at a definite time; and
> (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

A deposit slip or deposit receipt would not fall within the U.C.C.'s definition of an "instrument" and, consequently, should not be subject to the disclosure requirements of § 320.3.

Furthermore, the Act and this provision of the Proposed Rule require depository institutions to include the required disclosures "on each passbook, certificate of deposit, or similar instrument

evidencing a deposit ...."[57] Basic rules of sentence syntax would suggest that the phrase "similar instrument evidencing a deposit" is meant to refer to documents that in substance are equated with passbooks and certificates of deposit. That is not the case with deposit slips and deposit receipts, which are of a fundamentally different character than passbooks and certificates of deposit. This provides an alternative basis for excluding deposit slips and deposit receipts from the disclosure requirements of § 320.3. Further clarification from the FTC on this point would provide greater certainty to credit unions that might otherwise needlessly expend resources to produce deposit slips and receipts containing the disclosures required by this provision.[58]

There likewise are practical considerations that warrant the exclusion of deposit slips from the scope of this provision. Many credit union members obtain deposit slips that come with checks provided by third party vendors. These third party vendors would not be subject to FDICIA or the FTC's implementing regulations, and so ensuring that their products contain the required disclosures would prove difficult if not impossible. The negative impact on credit union members could be significant if the credit union were prohibited from accepting deposits – for example, deposits made using ATMs – that were made using deposit slips that did not bear the disclosures required by this provision.

Many vendors may also be incapable, without significant cost, of adding the required FDICIA disclosures to their products. If forced to include the required FDICIA disclosures on documents sold to privately insured credit union members, vendors may choose not to make such sales or, alternatively, to charge higher prices. This would disadvantage members in privately insured credit unions and potentially give rise to anticompetitive harm.

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[57] 12 U.S.C. § 1831t(b)(1); 70 Fed. Reg. at 12,828.

[58] It should be noted that deposit slips for federal insured credit unions are statutorily exempt from the standard federal insurance disclosure requirements. See 12 C.F.R. § 740.5(c)(2).

ASI does not believe there exists any inherent risk in excluding deposit slips from the scope of §320.3. As required by FDICIA, disclosures must be made in all periodic statements, passbooks, certificate of deposits[59] and, under § 320.4, in all advertising and at each location where the credit union's account funds or deposits are normally received.[60] We believe these disclosure requirements are more than sufficient to notify credit union members of the potential risks associated with foregoing federal insurance, and that requiring disclosures on deposit slips would unnecessarily burden credit unions without materially benefiting consumers.

VI. Implementation Period

As the preceding discussion makes clear, certain provisions of the Proposed Rule would impose a substantial burden on privately insured credit unions, and would require a significant period of time for credit unions to come into compliance. Complying with the proposed written acknowledgement requirement would, in fact, be impossible. Even assuming that substantial modifications are made to this requirement, compliance could still take several months. Any implementation date should reflect this fact.

In the event the Commission adopts ASI's proposed modifications, we believe the effective date period for the final requirements (*i.e.*, the number of days between publication and the effective date of the rule) should be a minimum of 90 days, if not longer, in order to provide credit unions with sufficient time to come into compliance.

[59] 12 U.S.C. § 1831t(b)(1).
[60] 70 Fed. Reg. at 12,828 (to be codified at 16 C.F.R. § 320.4).

CONCLUSION

ASI supports and appreciates the Commission's efforts to promulgate practical and reasonable regulations for disclosures under the FDICIA. ASI's comments should confirm for the Commission that the Proposed Rule, as drafted, could have a profound negative impact on a significant number of its insured credit unions, and could marginalize private insurance as a competitive alternative to the federal insurance provided through the NCUA, thereby undermining the intentions of those states that permit private deposit as a comparable and competitive alternative to federal insurance. ASI's comments should also demonstrate that regulation in this area must take into account factors unique to credit unions and financial institutions in general.

Also relevant is the fact that significant time has elapsed since the Act was enacted and then amended. During that time, privately insured credit unions have operated in a regulatory vacuum while attempting to comply with the Act's disclosure requirements. The Commission should take care in adopting its final rule to avoid penalizing those efforts. ASI has attempted in its comments to advance reasonable regulatory alternatives to the Proposed Rule that we feel will adequately protect consumer interests while ensuring that private insurance remains an important part of the credit union landscape.

ASI appreciates the opportunity to provide these comments and remains 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.

Sincerely,

Dennis R. Adams
President/CEO
American Share Insurance