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April 15, 2005

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

Re: Federal Trade Commission; Proposed Rule for FDICIA Disclosures, Matter No. R41104, 16 CFR Part 320; 70 Federal Register 12823, March 16, 2005.

Dear Sir or Madam:

The American Bankers Association ("ABA") appreciates the opportunity to comment on the Federal Trade Commission's ("Commission") proposed disclosure rules for non-federally insured depository institutions. Given that private insurance is an option for credit unions and that credit unions increasingly exercise this option, it is important that the Commission enforce the Section 43 disclosure requirements of the Federal Deposit Insurance Corporation Improvement Act ("FDICIA") informing consumers that their deposits in these institutions are not federally insured. The ABA agrees that these disclosures should be conspicuously displayed on all privately insured credit union materials and communications and at all locations.

The American Bankers Association, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks--makes ABA the largest banking trade association in the country.

Background

In 1991, Congress enacted FDICIA which, among other things, added a new section 43 to the Federal Deposit Insurance Act ("FDIA").[1] In part, section 43(b) mandates that depository institutions lacking federal deposit insurance affirmatively disclose that fact to their depositors or members.[2]

Specifically, section 43(b) requires non-federally insured depository institutions to: "(1) include conspicuously in all periodic statements of account, on each signature

[1] 12 U.S.C. 1831t
[2] 12 U.S.C. 1831t(b)

card, and on each passbook, certificate of deposit, or similar instrument evidencing a deposit a notice that the institution is not federally insured, and that if the institution fails, the federal government does not guarantee that depositors will get their money back (section 43(b)(1)), and (2) include conspicuously in all advertising and at each place where deposits are normally received a notice that the institution is not federally insured (section 43(b)(2))."

The Government Accountability Office ("GAO") in a 2003 study found that, in many cases, credit unions did not provide conspicuous disclosures that the institution was not federally insured and that the Federal Government did not guarantee their deposits. In conducting unannounced site visits to 57 privately insured credit union offices (49 main and 8 branch locations) in five states – Alabama, California, Illinois, Indiana, and Ohio – the GAO discovered that 37 percent of the credit union offices did not conspicuously post signage in their lobbies informing consumers that their deposits were not federally insured. GAO also found that other credit union materials – including brochures, membership agreements, signature cards, deposit slips, and newsletters – did not include language notifying consumers that the credit union was not federally insured as required by section 43. Fifty-nine percent of the material collected did not contain the appropriate disclosures and specifically, 20 of 32 signature cards and 19 of 20 deposit slips did not include the required language. Additionally, GAO uncovered that many credit union websites were non-compliant with section 43. Half of the 78 websites examined did not inform consumers that the credit union was not federally insured.[3]

ABA's Position

ABA supports the Commission's efforts to ensure that consumers are fully aware that their deposits in privately insured credit unions are not federally insured. To accomplish this objective, the Commission proposes that privately insured credit unions conspicuously display on all credit union materials and communications and at all locations the following statement -- "[Institution's name] is not federally insured. If it fails, the federal government does not guarantee that you will get your money back."

In order to effectively implement the Section 43 disclosure and this specific language, the ABA urges the Commission to address several issues prior to finalizing the proposed rule.

First, the Commission needs to define conspicuous. By conspicuous, ABA believes such disclosure should be highlighted and segregated from other information to assist the customer in understanding that their deposits are not federally insured and are at risk.

As a precedent, the National Credit Union Administration ("NCUA") recently adopted mandatory disclosures for any credit union that is converting from federal insurance to private insurance. The disclosure statement "must be in capital letters,

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[3] *Federal Deposit Insurance Act: FTC Best Among Candidates to Enforce Consumer Protection Provisions.* U.S. General Accounting Office, August 2003, GAO-03-971.

bolded, offset from the other text by use of a border, and at least one font size larger than any other text (exclusive of headings) used in the communication."[4]

Therefore, the Commission should require written disclosures to be in capital letters, bolded, offset from other text with a border, and in larger font than other text. This would ensure that the disclosure is clearly conspicuous.

Second, ABA supports the Commission's requirement (Section 320.4 of the proposed rule) that "[d]epository 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 ... and (b) in all advertisements, including, but not limited to, advertising in print, electronic, webpage, or broadcast media."

The Commission seeks guidance as to whether the list of locations in section 320.4(a) accurately describes the types of locations where deposits are normally received.

ABA believes that the Commission should adopt NCUA's definition of a service facility. A service facility "is defined as a place where shares are accepted for members' accounts, loan applications are accepted or loans are disbursed. This definition includes a credit union owned branch, a mobile branch, an office operated on a regularly scheduled weekly basis, a credit union owned ATM, or a credit union owned electronic facility that meets, at a minimum, these requirements. A service facility also includes a shared branch or a shared branch network if either: (1) the credit union has an ownership interest in the service facility either directly or through a credit union service organization ("CUSO") or similar organization; or (2) the service facility is local to the credit union and the credit union is an authorized participant in the service center."[5]

Moreover, the Commission should specify the location and size for signage about funds not being federally insured. NCUA currently requires, for example, that "[e]ach insured credit union must continuously display the official sign ... 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."[6] It seems that parallel requirement would be appropriate for a privately insured credit union, thus ensuring that signage is prominently displayed at each location informing consumers that their funds are not federally insured.

In circumstances where federally insured and privately insured credit unions are using the same shared branch, there is a strong possibility that customers using shared branch networks could become confused about the insurance status of their credit union. Ideally, deposit taking activities for privately insured and federally insured credit unions should be segregated to ensure there is no confusion. But where that is not possible, the NCUA does, in those circumstances, require that "immediately above or beside each official sign there must be another sign stating,

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[4] 12 CFR Section 708b.206(b)(2)
[5] *Chartering and Field of Membership Manual* National Credit Union Administration, March 2003.
[6] 12 CFR Section 740.4(a)

'Only the following credit unions serviced by this facility are federally insured by the NCUA."[7] Such disclosures for privately insured credit unions should also be required.

Furthermore, with respect to a privately insured credit union's webpage, the Commission should require the credit union to make all reasonable efforts to display the disclosure about not being federally insured without requiring the customer to scroll to see the disclosure. Once again, NCUA provides the precedent with respect to communications on a credit union's webpage about conversion to private insurance by stating "if the communication is on an internet website posting, the credit union must make reasonable efforts to make it visible without scrolling."[8]

Nonetheless, ABA does not believe that these disclosures go far enough. The Commission should require that a representative of a privately insured credit union must disclose orally when making a presentation, as well as in writing, that deposit accounts are not federally insured when providing information about accounts and at the time the account is opened.[9] This disclosure should be required for existing and new depositors.

ABA agrees in principle with the Commission's requirement (Section 320.5) that a depository institution lacking federal insurance cannot receive any deposit for the account of a new or existing depositor unless a consumer affirmatively acknowledges in writing that they understand their funds are not insured by the federal government.

However, to minimize undue regulatory burden, ABA believes a signature card for new depositors at an account opening after this regulation goes into effect would suffice, because the signature card would already contain the mandatory disclosure.

In addition, the proposed regulation's prohibition on receiving deposits from existing customers unless there is a signed written acknowledgement may pose operational problems. With direct deposit of payroll checks and tax refunds becoming increasingly prevalent as are pre-authorized ACH debits, consumers are less likely to frequent depository institution offices. For example, according to NACHA, 60 percent of consumers used direct deposits and more than 50 percent used pre-authorized payments for regular bills.[10] Therefore, without the signature, the institution would have to place a block on the account preventing the direct deposit of paychecks. The consumer could unwittingly be subject to not sufficient fund charges.

Moreover, communicating with existing depositors to obtain their signature, if they don't visit an office, poses logistical problems. It is problematic whether existing customers even read notices mailed to them by their institution. For example, an ABA survey of 1000 consumers in 2001 found that 42 percent do not recall receiving

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[7] 12 CFR Section 740.4(c)
[8] 12 CFR Section 708b.206(b)(1)
[9] Such practice would be consistent with disclosures for non-deposit investment products by the bank regulators that have been in effect since 1994.
[10] "Nacha Reports Record Use of E-Payments," *American Banker*, May 5, 2004, p. 12.

privacy notices from their financial institutions in the mail. Another 22 percent acknowledged receiving but not reading the notice.

It seems to ABA that if a privately insured credit union makes a good faith effort to contact existing members, this should suffice. The Commission should define within the regulation what would constitute a good faith effort.

Conclusion

While these disclosures will impose some minimal burden on privately insured credit unions, the social benefits from these disclosures will outweigh the cost. The lessons from the failures of Ohio Deposit Guarantee Fund and the Maryland Savings Share Insurance Fund, which were declared insolvent in 1985, and the Rhodes Island Share and Deposit Indemnity Corporation (RISDIC) in 1991 shows that private insurers lack the liquidity to withstand a large concentration of failures. In all cases, some depositors, if not all, in privately insured institutions were harmed.

Both Maryland and Ohio imposed restrictions on the amount of money that could be withdrawn after the insurance funds became insolvent -- $750 per month in Ohio and $1000 per month in Maryland. Ultimately, all insured depositors in both states were paid in full, as state legislatures provided the funding to cover the insurance fund. But depositors in Maryland received their final payment in 1989 – four years after the insolvency of the insurance fund.

In Rhodes Island, the Governor froze 350,000 accounts with $1.7 billion in funds, representing 10 percent of the state's deposit base, in 45 closed institutions insured by RISDIC. For over six months, depositors did not have access to their savings.

Additionally, the evidence from the Maryland shows that better informed consumers engaged in a silent run on privately insured institutions, thereby increasing the exposure of loss on each depositor, who had not fled the institution before its demise.

Today's privately insured state chartered credit unions are not insured by state-run funds with the backing of state governments, rather they are insured by a private entity, American Share Insurance ("ASI"). In the case of ASI's insolvency, it is unclear what would be the status of depositors at failed institutions insured by ASI.

If you have any questions, please contact the undersigned or John Rasmus at 202-663-5333.

Sincerely,

Keith Leggett
Senior Economist