



July 13, 2015

***Via Regulations.gov***

Gerald Poliquin  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, Virginia 22314-3428

Re: Share Insurance and Appendix; Proposed Rule  
RIN 3133-AE49

Dear Mr. Poliquin:

This letter is submitted by Visa Inc. (“Visa”) in response to the National Credit Union Administration’s (“NCUA”) proposed rulemaking (“Proposed Rule”) to amend its share insurance regulations to provide pass-through insurance for interest on lawyers trust accounts (“IOLTA”) and other similar escrow accounts.<sup>1</sup> The Proposed Rule implements recent amendments to the Federal Credit Union Act (“FCU Act”) by the Credit Union Share Insurance Fund Parity Act of 2014 (“Insurance Parity Act”). Visa’s comment is limited solely to the NCUA’s initial determination that prepaid card accounts do not constitute “other similar escrow accounts” for purposes of extending pass-through share insurance eligibility to prepaid card accounts that are not held by members of the credit union issuing the account.

Although Visa is a retail electronic payment system, rather than a prepaid card issuer, Visa plays a pivotal role in advancing payment products and technologies worldwide to benefit hundreds of millions of consumers including those who engage in transactions using payment cards, or other devices, that access prepaid accounts. Given Visa’s role in the prepaid card market, Visa has a strong interest in ensuring that consumers of financial institutions of all types, including credit unions, receive appropriate consumer protections when they use a payment product, including pass-through funds or share insurance for the underlying funds in a debit or prepaid account. As part of this commitment to protecting consumers, our Visa Rules since September 2014 have required that payroll card funds that are distributed via a U.S. Visa-branded payroll card must be federally insured to the payroll cardholder on a pass-through basis.<sup>2</sup> Similarly, a core component of our Visa Clear Prepaid card designation for consumer-reloadable prepaid products requires that the prepaid card program have deposit or share insurance for the benefit of the cardholder in order to be eligible for the designation.<sup>3</sup>

Visa appreciates the opportunity to share its views on this important issue and urges the NCUA to reconsider its position that prepaid accounts held by non-members of a federally

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<sup>1</sup> See 80 Fed. Reg. 27109 (May 12, 2015).

<sup>2</sup> Visa Rule 4.1.14.3 (available at <http://usa.visa.com/merchants/merchant-support/international-operating-regulations.jsp>).

<sup>3</sup> See <http://usa.visa.com/personal/personal-cards/prepaid-cards/visa-clear-prepaid.jsp>.

insured credit union should not be afforded the same protections as members of that credit union who hold the same type of account.

### **Prepaid Cards Generally**

Prepaid cards are innovative financial products designed to provide important financial services to consumers, and provide a critical alternative to traditional banking products. Although many consumers with accounts at a bank or credit union may also use prepaid cards, prepaid cards fill the gap between traditional deposit accounts and alternative financial services, such as check cashing for the unbanked and the underbanked. In addition, some consumers may use prepaid cards because these consumers may not qualify for traditional checking or savings accounts (or share accounts), or wish to avoid the fees often associated with such accounts. Although still a relatively small segment of overall payment card volume, the number of prepaid card users is growing rapidly, confirming the important needs and functions being served by prepaid products. As a result, prepaid cards are an important tool for financial inclusion and empowerment.

Prepaid cards actually encompass many distinct financial products, including cards that can be used for a variety of transactions at most of the same merchants that accept credit cards and debit cards. One prepaid product type is a general-purpose reloadable (“GPR”) card. GPR cards function like checking or share draft accounts, but without the checks or share drafts, and at a significantly lower cost. That is, GPR cards allow a user to “add” or “load” funds onto the card and then spend or withdraw the funds in many ways, including by making purchases at a wide variety of merchants. Other types of prepaid card products are used to disburse a wide variety of payments, including wages and commissions (in the case of a payroll card), government disbursements, rebates and incentives, insurance proceeds, disaster relief and tax refunds.

Prepaid cards offer significant benefits to consumers. Consumers choose prepaid cards and electronic payments for many of the same reasons that banked consumers choose to use credit cards and debit cards—access, convenience, security and reliability. Prepaid cards can provide consumers with immediate access to their funds whenever and wherever they need it. As with debit cards, consumers can have funds direct deposited to their prepaid card account, make purchases in stores and online, and shop or pay bills online without having to travel from home. If the need for cash arises, most prepaid card programs permit a consumer to obtain cash at an ATM, through cash back at a merchant or over-the-counter at a bank branch. Consumers can conduct all of these activities knowing that their funds are more secure than cash.

### **The NCUA’s Proposed Share Insurance Rule**

On December 18, 2014, President Obama signed the Insurance Parity Act into law.<sup>4</sup> The Insurance Parity Act amended the share insurance provisions of the FCU Act by requiring enhanced pass-through share insurance coverage for IOLTAs and “other similar escrow

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<sup>4</sup> Public Law 113-252, 128 Stat. 2893 (2014).

accounts.”<sup>5</sup> The term “other similar escrow accounts” is not defined in the Insurance Parity Act. The Proposed Rule seeks to implement the Insurance Parity Act’s establishment of pass-through share insurance through the National Credit Union Share Insurance Fund (“NCUSIF”) for IOLTAs and would further interpret realtor escrow accounts and prepaid funeral accounts as exhibiting similar characteristics as an IOLTA so as to constitute “other similar escrow accounts” that would also be eligible for pass-through share insurance.<sup>6</sup> Specifically, the NCUA has noted that IOLTAs, realtor accounts, and prepaid funeral accounts each have a “licensed professional or other individual serving in a fiduciary capacity and holding funds for the benefit of a client as part of some transaction or business relationship.”<sup>7</sup> Thus, these accounts would be eligible for pass-through insurance, regardless of the membership status of the clients or the principals.<sup>8</sup>

The NCUA has further determined, however, that prepaid card accounts, such as payroll cards, should not be considered escrow accounts similar to IOLTAs for share insurance purposes because it believes that the same fiduciary duties present in IOLTAs and the other named escrow account types “are typically not present in the prepaid card scenario.”<sup>9</sup> Nevertheless, the NCUA stated that “if funds in a prepaid card program deposited in a federally insured credit union qualify as a share account that can be traced back to a specific owner in a specific amount and the owner is a member of the credit union where the funds are kept,” those funds would be eligible for NCUSIF pass-through share insurance if the requisite procedures are met.<sup>10</sup> The NCUA also requested comment about prepaid card programs that may be sufficiently similar to IOLTAs.

**Prepaid Card Programs Exhibit Characteristics Sufficiently Similar to IOLTAs and Should be Deemed “Other Similar Escrow Accounts” Eligible for NCUSIF Pass-Through Insurance**

Prepaid card account funds are typically deposited in omnibus accounts in a bank or credit union in a master (or FBO) account held in the name of the prepaid card program for the benefit of the individual accountholders within the program. Individual cardholder funds are typically tracked on a subaccount basis and recorded by the prepaid card issuer, issuer processor or prepaid program manager. While an attorney-client relationship would not apply to prepaid card programs in the same way that such fiduciary relationship would apply in the case of an IOLTA, the account agreement and federal law including the Electronic Fund Transfer Act (by way of the Treasury Interim Rule on Federal Payments for prepaid card accounts receiving federal payments) impose the same or similar type of fiduciary obligations on the issuer with respect to disbursing and safeguarding funds in accordance with the instructions of the account holder. In that regard, Visa is in full agreement with the observation made by NCUA Board

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<sup>5</sup> See Sec. 2 of the Insurance Parity Act; 12 U.S.C. 1787(k)(5)(A).

<sup>6</sup> See Proposed § 745.14(c)(1).

<sup>7</sup> 80 Fed. Reg. at 27111; *see also* Proposed § 745.14(c)(1).

<sup>8</sup> See Proposed § 745.14(b).

<sup>9</sup> 80 Fed. Reg. at 27112.

<sup>10</sup> *See id.*

Member McWatters in voting to approve the issuance of the Proposed Rule that prepaid programs:

create a relationship of trust and mutual expectations and perhaps, evidence a legally enforceable duty and entitlement right between the holder of the credit union share account and the recipient of the prepaid card or stored value product that is *similar* to the relationship between an attorney and his or her client. It is reasonable to argue that the holder of a share account maintains deposited funds in trust for the benefit of the holder of a prepaid card or stored value product and that the holder may have a legally enforceable right to receive the funds evidenced by the card or product. When viewed from this perspective, prepaid card programs and stored products do indeed appear ‘similar’ to IOLTA accounts and ‘other similar escrow accounts.’<sup>11</sup>

In the case of payroll card accounts in particular, an employer entrusts the issuer or program manager to segregate payroll card funds in a manner that demonstrates employee ownership of funds and, therefore, the payment of wages to the employee.<sup>12</sup> In order to comply with wage and hour law requirements, including the Federal Fair Labor Standards Act, an employee’s wages must be paid finally and unconditionally, or “free and clear” from any subsequent restrictions or claims by the employer, the employer’s creditors, or the issuer or program manager. In effect, the issuer or program manager has a fiduciary duty to protect the underlying payroll card funds to ensure that the payment of wages has taken place.

For the reasons discussed above, Visa urges the NCUA to state in the final share insurance rule that prepaid card accounts constitute “other similar escrow accounts” eligible for pass-through share insurance through the NCUSIF, regardless of the membership status of the cardholder.<sup>13</sup>

**The NCUA Should Interpret Its Share Insurance Rules to Provide a Level Playing Field for Federally-Insured Credit Unions Offering Prepaid Card Programs and to Protect Cardholders**

As a practical matter, the NCUA’s historical position on non-member ineligibility for pass-through share insurance has placed federally-chartered credit unions considering the introduction of a prepaid card program to serve the unbanked or underbanked needs of the constituents within their community in a less favorable position as compared to banks. This is in part because a federally-chartered credit union will be unable to represent to its customers that share insurance will be available for all cardholders even if the credit union takes the necessary

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<sup>11</sup> Statement by Board Member J. Mark McWatters on the Credit Union Insurance Parity Act (April 30, 2015) at 2.

<sup>12</sup> See, e.g., *Chang v. Redding Bank of Commerce*, 29 Cal. App. 4th 673, 677 (1994) (“progress payments received by a general contractor pursuant to a contract which requires that they be paid to subcontractors are held by the contractor in trust for the benefit of the subcontractors.”).

<sup>13</sup> We further note that irrespective of any determination as to whether prepaid card accounts constitute “other similar escrow accounts” for purposes of this rule, the NCUA has established precedents for extending share insurance to nonmembers in connection with other account types in the case of joint tenancy and payable on death accounts.

steps to set up its prepaid card program to be eligible for NCUSIF insurance. For example, a credit union member seeking to purchase a GPR card for a friend or relative would be unable to purchase the card from his or her credit union branch if the member wanted to ensure that the underlying funds had federal insurance but the potential recipient was not also a member of the credit union. In this regard, we understand that some credit unions have had to turn members away and advise them to obtain prepaid cards from a bank issuer to ensure that the underlying funds are federally protected regardless of the membership status of the cardholder. Similarly, some interested credit unions that have considered the Visa Clear Prepaid designation for their GPR prepaid card programs as a means to signal their programs' robust consumer protections have expressed uncertainty as to the credit unions' eligibility for the designation because of their inability to ensure that all of their cardholders would be able to obtain pass-through share insurance.

We further note that the NCUA's proposed position on non-member eligibility for pass-through share insurance could also present federally-chartered credit unions offering prepaid card programs with compliance challenges under the Consumer Financial Protection Bureau ("CFPB")'s recent proposal on prepaid accounts ("Prepaid Accounts Rule"). This may be the case both from a Prepaid Accounts Rule and/or from an unfair or deceptive acts or practices perspective because of the credit unions' inability to provide NCUSIF insurance for all of their cardholders. Specifically, under Section 18(b)(2)(i)(B)(13) of the CFPB's proposal, financial institutions must disclose in their short- and long-form preacquisition disclosures if the prepaid account is not set up to be eligible for FDIC or NCUSIF pass-through deposit insurance, using language substantially similar to the clause set forth in the CFPB's model forms.<sup>14</sup> However, a federally-chartered credit union with a prepaid card program could face regulatory uncertainty as to what should be disclosed on its preacquisition disclosures regarding the availability of NCUSIF pass-through insurance because some prepaid accounts within the program (i.e., those held by members) would be eligible for pass-through insurance while others would not (i.e., non-member accounts). And, the absence of a statement indicating that NCUSIF pass-through share insurance is not available for the prepaid account in preacquisition disclosures could be misleading to a non-member who purchases or receives a prepaid card issued by a federally-chartered credit union who might otherwise assume that his or her funds are federally protected. To avoid putting federally-chartered credit unions and their cardholders in such an untenable situation and to provide parity with banks, Visa strongly encourages the NCUA to extend NCUSIF share insurance on a pass-through basis to all prepaid card programs offered by federally-chartered and insured credit unions as "other similar escrow accounts", regardless of the membership status of the cardholder.<sup>15</sup>

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<sup>14</sup> See 80 Fed. Reg. at 77300.

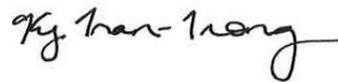
<sup>15</sup> At a minimum, Visa urges the NCUA to work with the CFPB in its final Prepaid Accounts Rule to clarify the disclosure obligations for federally-chartered and insured credit unions should the NCUA opt not to provide the same pass-through NCUSIF insurance protections for members and non-members of the credit union.

Gerald Poliquin  
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Thank you for the opportunity to comment. If you have any questions, please do not hesitate to contact me at 202-419-4109.

Sincerely,

A handwritten signature in black ink, appearing to read "Ky Tran-Trong". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ky Tran-Trong  
Associate General Counsel, Regulatory  
Visa Inc.