

July 9, 2015

Mr. Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Comments on Proposed Rule – Part 745, RIN 3133–AE49

Dear Mr. Poliquin:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the National Credit Union Administration's (NCUA or Board) proposed share insurance rule. CUNA represents America's credit unions and their more than 100 million members.

The proposed rule would make necessary changes required by the Credit Union Share Insurance Fund Parity Act (CUSIFPA or H.R. 3468), which CUNA strongly supported. We thank NCUA for adopting most of the suggestions in the proposed rule that we made in our January 27, 2015 letter to NCUA General Counsel Mike McKenna. Nonetheless, we are concerned that NCUA remains reluctant to extend full insurance parity with the Federal Deposit Insurance Corporation (FDIC) to federally insured credit unions.

Background

H.R. 3468 specifically addresses interest on lawyer trust accounts (IOLTA) to provide pass-through insurance coverage when the attorney administering the IOLTA is a member of the federally insured credit union, regardless of the membership status of the individual beneficiary owners of the account funds. The law also provides pass-through insurance coverage to "other similar escrow accounts," further clarifying NCUA's authority to extend share insurance to the owners of funds in any account established by a member. We appreciate NCUA specifically addressing prepaid funeral accounts and realtor escrow accounts in the proposed rule as we suggested; nevertheless, we believe the proposal falls short of what is possible under the law.

Our key concern is that the proposed rule would not extend share insurance coverage to prepaid and stored value cards. We believe, even in the absence of enactment of the CUSIFPA, NCUA has this authority and should exercise it; we urge the Board to do so in the final rule.

NCUA's past legal reasoning for not providing insurance on IOLTAs is instructive as to the agency's current position on prepaid and payroll cards. The reasoning is simple but deficient because it confuses ownership of funds with member account status:

The clients, not their lawyers or law firms, own the funds in an IOLTA account. The lawyers or law firms are merely the agents holding the funds in trust for their clients. While NCUSIF insurance coverage might cover clients as the beneficial owners of the funds, 12 C.F.R. § 745.3(a)(2); see, e.g., OGC Op.

*96-0841 (Sept. 17, 1996), OGC Op. 94-0119 (Feb. 9, 1994), the NCUSIF insures only member accounts. Therefore, client funds in an IOLTA account are insured by the NCUSIF only for those clients who are members of the credit union.*¹

NCUA's reasoning surmises that a member agent of a credit union can establish accounts for nonmembers of the credit union. Unless specifically instructed, NCUA historically would not consider an IOLTA a member account of the person whose membership is required to open the account; thus, insurance could not be extended to clients that are not members. As you will see in the next section, the Federal Credit Union Act (Act) does not preclude—and frankly supports—the NCUA Board defining a prepaid or payroll master account as a member account: A person or business must be a member to establish these accounts; therefore, it should logically follow that these are member accounts.

NCUA has precedence for extending deposit insurance to nonmembers and for using nonmembers as the basis for providing additional insurance coverage for certain types of accounts. NCUA's rules and Office of General Counsel (OGC) Opinions currently allow the NCUSIF to provide insurance coverage directly to nonmembers in the case of joint tenancy or to use nonmember beneficiaries as the basis of increased insurance coverage for payable on death accounts (POD).

NCUA Board Authority to Define Membership Account Insurance

The Act supports a position giving the NCUA Board authority to prescribe the insurance scheme for all member accounts. Furthermore, the Act's definition of "member account" gives the NCUA Board wide latitude in defining a member account.² In granting the NCUA Board authority, the Act reads:

The Board may define, with such classifications and exceptions as it may prescribe, *the extent of the share insurance coverage provided for member accounts*, including member accounts in the name of a minor, in trust, or in joint tenancy.³

¹ OGC Op. 08-0840 (Oct. 8, 2008).

² The terms "member account" and "account" mean a share, share certificate, or share draft account of a member of a credit union of a type approved by the Board which evidences money or its equivalent received or held by a credit union in the usual course of business and for which it has given or is obligated to give credit to the account of the member, and, in the case of a credit union serving predominantly low-income members (as defined by the Board), such terms (when referring to the account of a nonmember served by such credit union) mean a share, share certificate, or share draft account of such nonmember which is of a type approved by the Board and evidences money or its equivalent received or held by such credit union in the usual course of business and for which it has given or is obligated to give credit to the account of such nonmember, and such terms mean share, share certificate, or share draft accounts of nonmember credit unions and nonmember units of Federal, State, or local governments and political subdivisions thereof enumerated in section 207 of this Act, and such terms mean custodial accounts established for loans sold in whole or in part pursuant to section 107(13) of this Act: Provided, That for purposes of insured State credit unions, reference in this paragraph to "share," "share certificate," or "share draft" accounts includes, as determined by the Board, the equivalent of such accounts under State law [.] 12 U.S.C. § 1752(5).

³ 12 U.S.C. § 1787(k)(1)(C).

It is clear from the plain language of the Act that the NCUA Board has authority to prescribe insurance for member accounts where funds are held for nonmembers.⁴ Again, the section mentions member accounts and not member funds.

This interpretation is simple and based on a plain reading of the statute. If an account is opened at a credit union, it must be a member account.⁵ The NCUA Board has the authority to define the extent, classification and exception of insurance coverage provided for member accounts as authorized by section 1787(k)(1)(C). Thus, the NCUA Board can define the insurance coverage for payroll cards or other accounts established by credit union members that hold nonmember funds.

Insurance Parity with FDIC

The authority outlined above allows the NCUA Board to extend insurance to member accounts holding nonmember funds. In 2006, Congress added language to the Act requiring the NCUA Board to establish NCUSIF levels for accounts “consistently with actions taken by the Federal Deposit Insurance Corporation.”⁶ This language further encourages NCUA to extend share insurance coverage to prepaid and payroll cards.

Section 1821(a) determines the maximum amount of deposit insurance payable on FDIC-insured accounts, including with respect to pass-through deposit insurance and aggregation of deposits. Section 1787(k)(1)(A) gives NCUA the ability to provide pass-through NCUSIF prepaid cards, payroll cards and other similar member accounts for a person or entity whose funds are on deposit in order for NCUSIF coverage to be consistent with that of FDIC.

The legislative history states that Congress intended for the amendments to give federally insured credit unions deposit insurance parity with FDIC-insured institutions in all respects: “Credit unions are provided with complete parity in coverage with other insured depository institutions.”⁷

Prepaid and Payroll Cards and Future Products

We cannot predict if the future of financial services rests with prepaid and payroll cards, but we know now that credit unions are prevented from offering these products because the funds must often be insured. The Electronic Payroll Coalition (EPC) core principles for payroll cards requires that “employers must select a program that maintains payroll funds in an FDIC or NCUA insured account on a pass-through basis to the individual cardholder.”⁸ The U.S. Treasury also requires that federal benefits funds deposited on stored value cards are insured by the FDIC.⁹ As these cards gain more traction, we anticipate that consumer

⁴See § 1781(a) where the Act defines eligibility requiring the Board to insure member accounts. (a) Eligibility. The Board, as hereinafter provided, shall insure the member accounts of all Federal credit unions and it may insure the member accounts of (1) credit unions organized and operated according to the laws of any State, the District of Columbia, the several territories, including the trust territories, and possessions of the United States, the Panama Canal Zone, or the Commonwealth of Puerto Rico, and (2) credit unions organized and operating under the jurisdiction of the Department of Defense if such credit unions are operating in compliance with the requirements of title I of this Act [12 U.S.C. §§ 1752 et seq.] and regulations issued thereunder.

⁵ Credit unions can accept some nonmember deposits, but that is not relevant for purposes of this discussion.

⁶ 12 U.S.C. § 1787(k)(1)(A).

⁷ H.R. Rep. No. 109-67, at *30 (2005); see id., at *22. Emphasis added.

⁸ <http://www.afponline.org/PressReleases.aspx?id=18851>.

⁹ 51 FR 59024, 59026 (Sept. 23, 2011). Also see 75 FR 80335, 80337 (Dec. 22, 2010) where the U.S. Treasury proposed allowing these stored value cards to be insured by the NCUSIF.

protection regulators will require additional consumer protection requirements, including fund insurance requirements.¹⁰ For these reasons, it is important for NCUA to ensure its insurance rule permits coverage of these accounts.

Further, we believe credit unions could use these accounts to fulfill more completely their statutory mission. Unbanked consumers use prepaid, payroll and other stored value cards, and facilitating the ability of credit unions to offer these cards would be a significant step toward bringing the users of these cards into the mainstream financial services system.¹¹ An insurance rule that locks credit unions out of the prepaid card business and from providing other products currently in development could prevent credit unions from offering products that their members need, leaving these consumers with fewer financial services options.

Conclusion

NCUA's recent efforts to modernize member business lending (MBL) through the proposed MBL rule, the agency's recent fixed assets final rule that reduces regulatory burden, and the agency's ongoing efforts to study field of membership for future updates gives CUNA and credit unions hope that NCUA realizes the cumulative impact of burdensome and outdated regulation. These ongoing rulemaking efforts could have a real impact on providing credit unions freedom from outdated regulatory practices that shackle growth and limit services to members on many fronts.

In the same vein, H.R. 3468 should further encourage NCUA to modernize insurance regulations, allowing credit unions to grow and remain competitive in an ever-changing marketplace where products and services are developed and moved to market quickly. An intractable and overly prescriptive approach in this rulemaking is likely to shut many credit unions out of future business lines, which will lead to the loss of members who may be loyal to credit unions but need modern products and services to meet financial needs. Furthermore, lack of vision in updating the insurance regulation is likely to cause as much long term risk to the credit union system as any economic force, as the inability to offer modern products and services to credit union members will ultimately lead to a credit union system that is a noncompetitive afterthought in the financial services marketplace.

As with field of membership, the NCUA should not restrain itself to an overly conservative interpretation of the Federal Credit Union Act. Boldness by NCUA will reward credit union members with the opportunity to obtain the most novel financial products and services available. For these reasons, we encourage NCUA to adopt an approach, consistent with the Federal Credit Union Act, that ensures insurance parity with the FDIC so that credit unions are not stifled in the marketplace.

¹⁰ See *CFPB Proposes Strong Federal Protections for Prepaid Products* (Nov. 13, 2014), available at: <http://www.consumerfinance.gov/newsroom/cfpb-proposes-strong-federal-protections-for-prepaid-products/>; see also Preamble to the Proposed Rule—Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), at 17 (Nov. 13, 2014), available at: http://files.consumerfinance.gov/f/201411_cfpb_regulations_prepaid-nprm_preamble.pdf.

¹¹ A 2013 survey by the FDIC found that only about 8% of all U.S. households use prepaid cards, although 22% of these households do not have bank accounts. Federal Deposit Insurance Corporation, 2013 FDIC National Survey of Unbanked and Underbanked Households at 7 (Oct. 2014), available at: <https://www.fdic.gov/householdsurvey/2013report.pdf>.

Again, we thank the NCUA for making many of the changes we suggested in our January 27 letter. Nevertheless, we urge the NCUA to use its authority to write an insurance regulation that provides parity with the FDIC insurance regulation. The agency should exercise its full authority to interpret the Federal Credit Union Act's requirements so that it adapts to a modern world and an ever-changing financial products landscape.

If you have questions or would like to discuss our comments further, please do not hesitate to contact me at (202) 508-6705.

Sincerely,

A handwritten signature in cursive script that reads "Lance Noggle". The signature is written in black ink and is positioned below the word "Sincerely,".

Lance Noggle
Senior Director of Advocacy and Counsel