



**National Association
of Federal Credit Unions**

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NAFCU | Your Direct Connection to Education, Advocacy & Advancement

July 13, 2015

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

RE: Comments on Notice of Proposed Rulemaking for Share Insurance (RIN 3133-AE49)

Dear Mr. Poliquin:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally insured credit unions, I am writing to you regarding the National Credit Union Administration's (NCUA) request for comment on the proposed changes to Part 745 of NCUA's Rules and Regulations governing share insurance coverage. *See* 80 FR 27109 (May 12, 2015). NAFCU applauds NCUA for codifying the *Credit Union Share Insurance Fund Parity Act* (Insurance Parity Act) into Part 745. However, for reasons discussed in more detail below, NAFCU believes NCUA should adopt a less rigid definition of "other similar escrow accounts."

General Comments

On December 18, 2014, President Obama signed into law the NAFCU-supported Insurance Parity Act (Pub. L. No. 113-252). This Act amended the share insurance provisions of the *Federal Credit Union Act* (FCU Act) by providing enhanced, pass-through share insurance coverage for interest on lawyers trust accounts (IOLTA) and "other similar escrow accounts." As the title suggests, the legislative intent of the Act was to ensure that NCUA and the Federal Deposit Insurance Corporation (FDIC) treat IOLTAs and other similar escrow accounts in an equivalent manner, thereby eliminating any competitive imbalance between banks and credit unions. Through this proposal, NCUA seeks to amend Part 745, governing share insurance coverage, in order to implement this statute.

NAFCU supports NCUA's efforts to codify the Insurance Parity Act into Part 745, and it applauds Chairman Matz for her timely and proactive announcement in December 2014 that federal credit unions may immediately begin offering IOLTAs with share insurance coverage. Although NAFCU agrees with aspects of this proposal, NAFCU believes that NCUA's reliance on the existence of a "fiduciary capacity" unnecessarily restricts the relief Congress intended

with the Act's passage. As discussed below, NAFCU recommends NCUA adopt language in Part 745 that considers the presence of a fiduciary relationship *as evidence of* an "other similar escrow account," but *not as a determinative factor*. NAFCU suggests that NCUA consider including accounts that exhibit a relationship of trust and confidence for the benefit of another, though it may not rise to the requisite level of a fiduciary relationship.

Proposed Definition of "Other Similar Escrow Accounts"

NCUA's proposed rule would define an "other similar escrow account" as an "account where a licensed professional or other individual serving in a fiduciary capacity holds funds for the benefit of a client as part of a transaction or business relationship." The proposal provides prepaid funeral accounts and realtor escrow accounts as examples. NAFCU has solicited feedback from its membership and has identified two other types of accounts that fit NCUA's proposed definition of "other similar escrow accounts." These are public adjuster accounts and education disbursement accounts.

Public Adjuster Accounts

A public adjuster advocates on behalf of an insurance policyholder when appraising and negotiating an insurance claim. Typically, public adjusters are licensed by the state's department of insurance. During the insurance claims process, a licensed public adjuster is the only individual, aside from an attorney or the broker of record, that can legally represent the rights of the insure. Public adjusters owe a fiduciary duty to the insurance policyholder, and situations can arise where they are required to hold funds on behalf of a client.

NAFCU believes that public adjuster escrow accounts meet the proposed definition of "other similar escrow accounts," as there exists a licensed professional serving in a fiduciary capacity holding funds for the benefit of another in a transaction. NAFCU suggests that NCUA include "public adjuster accounts" within the enumerated examples of "other similar escrow accounts."

Education Disbursement Accounts

Recently, the U.S. Department of Education (DOE) issued a proposed regulation to revise rules related to the disbursement of Federal student aid by colleges and universities under Title IV of the *Higher Education Act* (HEA). See 80 FR 28484 (May 18, 2015). Currently, under the Department's regulations, program funds are disbursed by the Federal government to an educational institution in trust for the intended student beneficiaries. Generally, the institution first credits all amounts owed to it for costs, such as tuition, fees, and on-campus room and board, to the student's account at the university. Any remaining amount owed to the student is referred to as the student's "credit balance" and can be dispersed to the student in a variety of ways, including direct deposit into a student's credit union or bank account.

The DOE proposal requires a college or university that receives Title IV funds in trust for a student beneficiary to maintain those funds in an insured depository account. According to the proposal, the depository account must be insured by the FDIC or NCUA. The DOE states that

this new requirement will ensure that Federal funds will not be put at undue risk of loss. *See* 80 FR 28484, 28494 (May 18, 2015). The proposal also requires that an educational institution in control of Title IV funds maintain those funds in an interest-bearing account, unless one of the enumerated narrow exceptions applies.

As stated above, these education disbursement accounts involve the holding of funds in trust for the benefit of an individual student. The institution acts in a fiduciary capacity, as evidenced by its role as trustee for the student. In an effort for credit unions to be prepared for the new requirements under the DOE proposal, NAFCU recommends that NCUA include “education disbursement accounts” within the enumerated examples of “other similar escrow accounts.”

Less Rigid Definition of “Other Similar Escrow Accounts”

Although NAFCU recommends the inclusion of the above accounts because both clearly fall into the proposed definition of “other similar escrow accounts,” NAFCU urges NCUA to adopt a less rigid definition of “other similar escrow accounts.” NAFCU encourages NCUA to promulgate a definition that considers the presence of a fiduciary relationship *as evidence* of an “other similar escrow account,” but *not as a determinative factor*. This alteration would allow for the inclusion of accounts that, while perhaps not rising to a fiduciary level, exhibit trust and confidence and involve the holding of funds for the benefit of another as part of a transaction or business relationship. The descriptions of the accounts that follow are two examples of accounts that would fall within a broader definition of “other similar escrow accounts,” because both involve a likely legal obligation linking the holder of the funds to the genuine owner of the funds, and, at minimum, demonstrate a heightened level of diligence and responsibility between the owner and holder of the funds.

Prepaid Accounts

As the proposal notes, prepaid accounts are one of the fastest-growing financial products in today’s marketplace. In the proposal, NCUA contends that it “does not believe that prepaid card programs, such as payroll cards, should be considered escrow accounts similar to IOLTAs for share insurance purposes because the characteristics that define an attorney’s relationship with, and the fiduciary duties owed to, the attorney’s client are typically not present in the prepaid card scenario.” *See* 80 FR 27109, 27112 (May 12, 2015). NCUA goes on to state, “an IOLTA and a prepaid card program serve very different purposes and usually have completely different structures.” *Id.*

While NAFCU agrees that the prepaid account relationship does not rise to the level of an attorney-client relationship, it should be noted that very few relationships or transactions in the professional or business world would meet that extremely high standard. When the floor is set at the attorney-client relationship, which is one of the most sacred professional relationships, it is difficult for any other business relationship or transaction to meet that bar. NAFCU, however, believes that prepaid accounts and stored-value cards establish a *similar* relationship of trust and confidence between the holder of the account and the recipient of the prepaid product, which likely includes legally enforceable obligations. NAFCU recommends that NCUA include prepaid

accounts within the definition of “other similar escrow accounts” based on the *similar*, but not identical, characteristics that many prepaid card programs share with attorney-client transactions.

Landlord/Property Manager – Tenant/Client Accounts

Often, the landlord or property manager of residential real estate will require a prospective tenant to pay a security deposit as a condition of finalizing a lease agreement. The security deposit is held in trust to cover the costs of any repairs or cleaning needed due to the tenant’s occupancy. The tenant is repaid any unused portion of the security deposit. Although no explicit fiduciary duty exists between a landlord or property manager and tenant, there is a business relationship for the duration of the lease that necessitates responsibility, diligence and inquiry. In many respects, a tenant places his or her trust and confidence in a landlord or property manager to hold his or her security deposit for its intended purpose with the mutual understanding that any unused portion will be returned. In instances where that trust and confidence is violated, there are legal remedies available to the tenant under state property law.

A number of NAFCU’s member credit unions serve individuals who lease residential properties or engage the services of property managers. Prudent business practice requires the member or property manager to collect security deposits. Where credit unions encounter such members, they are placed at a competitive disadvantage to banks because security deposit accounts are uninsured. This is exactly the class of competitive disadvantage the Insurance Parity Act was intended to eliminate. The relationship that exists in these common transactions is similar to IOLTAs, despite the absence of a licensed professional or fiduciary duty. NAFCU recommends that NCUA include “landlord/property manager – tenant/client accounts” within its definition of “other similar escrow accounts.”

“Realtor Accounts”

Proposed Section 745.14(c)(ii) includes “realtor accounts” as an example of “other similar escrow accounts.” While NAFCU agrees that these accounts warrant pass-through share insurance coverage as “similar escrow accounts,” we have heard concerns from our members that the use of the word “realtor” would implicate only those real estate professionals licensed by the NATIONAL ASSOCIATION of REALTORS®, which is just one of many real estate licensing agencies. In addition to being overly narrow, the word “realtor” is a federally registered collective membership mark.

NAFCU recommends that NCUA instead describe these accounts as “real estate agent accounts” or “real estate-related accounts” in the final draft of Part 745. Either description would more accurately describe this class of escrow accounts and avoid potential litigation for trademark infringement.

Recordkeeping Requirements

Under the proposal, a credit union must satisfy Part 745’s existing recordkeeping requirements in order for pass-through share insurance coverage to extend to IOLTAs and “other similar

escrow accounts.” An IOLTA or other similar escrow account must be identified as such, and the account records of the insured credit union must indicate the existence of the relationship on which the claim for insurance was founded. The details of the relationship between the attorney or escrow agent and his or her clients and principals must be ascertainable from the records of the insured credit union, or from records maintained in good faith and in the regular course of business by the attorney or escrow agent.

NAFCU supports the proposed recordkeeping requirements, as they place sufficient responsibility on the attorney or escrow agent to maintain reliable records to ascertain the relationships they have with the genuine owners of the account funds.

Conclusion

NAFCU commend NCUA its timely codification of the Insurance Parity Act into Part 745. As the agency moves towards finalizing this proposal, we strongly recommend that NCUA adopt language which considers the presence of a fiduciary relationship *as evidence of* an “other similar escrow account,” but *not as a determinative factor*. For the reasons noted above, NAFCU supports the specific enumeration within Part 745 for prepaid funeral accounts, realtor escrow accounts (amended in accordance with either of the above suggestions), public adjuster accounts, education disbursement accounts, prepaid accounts, and landlord/property manager-tenant/client accounts.

NAFCU appreciates the opportunity to share its thoughts on amendments to the share insurance regulations. If you have any questions or concerns, please feel free to contact myself or Regulatory Affairs Counsel Alexander Monterrubio at amonterrubio@nafcu.org or (703) 842-2244.

Sincerely,

A handwritten signature in cursive script that reads "Alicia Nealon". The signature is written in dark ink and is positioned above the typed name and title.

Alicia Nealon
Director of Regulatory Affairs