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Federal Reserve Board Proposes New Remittance Transfer Regulations Under Dodd-Frank Act

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On May 23, 2011, the Board of Governors of the Federal Reserve (the Board) published proposed rules to regulate foreign remittances.[1] The rules implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] (the Dodd-Frank Act) and mandate various disclosures and other consumer protections for remittances as a matter of federal law for the first time. The new requirements may improve transparency for senders of remittances, but their complexity and prescriptive nature seem likely to increase costs for providers.

Cash remittances from the United States to foreign households were estimated at some $12 billion in 2008, the last year for which totals are available. Such transfers have traditionally been regulated at the state level under state money transmitter statutes and Article 4A of the Uniform Commercial Code. The Dodd-Frank Act changed this balance by amending the Electronic Fund Transfer Act (EFTA)[3] to create new Section 919, which mandates the issuance of implementing rules under Regulation E. The proposed rules would apply to both financial and non-financial institutions and broadly define remittance transfers to include transactions that traditionally have not been governed by EFTA (such as consumer wire transfers). As discussed in more detail below, the rules require providers to deliver pre- and post-payment rate and fee disclosures (in both English and the sender's foreign language), investigate and correct errors, and provide cancellation rights and refunds at no additional cost to the sender.

The proposed rules are open for public comment until July 22, 2011.

Scope of proposed rules

"Remittance transfers" under the proposed rules involve a request by a "sender" to make an electronic transfer of funds to a "designated recipient" (who must receive the funds at a location in a foreign country) using a "remittance transfer provider." Thus, there are three basic elements to a "remittance transfer." First, the transfer must be by electronic means; simply mailing funds to a foreign location does not constitute a remittance transfer. Second, there must be a specific request for a funds transfer. Third, the sender must designate a recipient who will receive the funds. While the sender must be an individual "consumer," the recipient may be either an individual or a business. Accordingly, the proposed rules would not apply to business-to-business or business-to-consumer transactions. In addition, the proposed rules exempt transfers of $15 or less, which are similarly exempt from the Regulation E receipt requirements.

A "remittance transfer provider" includes both financial and non-financial institutions. However, the proposed staff commentary clarifies that payment networks are not remittance transfer providers, to the extent that such networks merely provide third-party payment and settlement services on behalf of the merchant or remittance transfer provider (as opposed to the sender). For example, the mere use by a consumer of his or her credit or debit card to make a purchase from a merchant in a foreign country is not a "remittance transfer." But, if the sender uses his or her debit or credit card to transfer funds to a designated recipient, such a transfer would be a "remittance transfer" and the payment card network would, in this case, be considered a "remittance transfer provider."

The proposed rules also clarify that where a foreign recipient is given access to funds to which the "sender" retains access, the transfer would not be a remittance transfer because it would not be known who is to withdraw the funds, thus, there would be no "designated recipient." For example, a person who deposits funds in a checking or savings account, to which a foreign person or entity has access, is not making a "remittance transfer" if the depositor retains access to the funds. Similarly, a person who sends a prepaid card to a foreign recipient, but retains the ability to withdraw funds from that prepaid card account, has not initiated a remittance transfer because the remittance transfer provider cannot identify the ultimate recipient.

A transaction is a "remittance transfer" regardless of whether the sender initiates the transfer from a "consumer account" or whether the remittance transfer is an "electronic fund transfer" (EFT), in each case as defined under Regulation E. Consequently, transactions that traditionally have not been subject to EFTA, such as cash-based remittances sent through money transmitters and consumer wire transfers made through banks, will nevertheless fall within the scope of the new rules. The proposed rules also apply to certain transfers not traditionally considered to be remittances, such as online bill payments in which a consumer requests a financial institution to send payment to a designated foreign recipient. Recognizing that compliance with the proposed disclosure requirements would be difficult, especially for recurring online bill payments, the Board specifically solicits comment as to whether such transactions should be exempt.

The Board acknowledges that the broad scope of Section 919 may also have created some uncertainty as to the continued scope of application of Article 4A of the state Uniform Commercial Code (the UCC). UCC Article 4A does not apply to a fund transfer "any part of which is governed by the [EFTA]." UCC Art. 4A-108. Prior to new Section 919, no part of a wire transfer was governed by EFTA and hence Article 4A governed. Because Section 919 applies certain parts of EFTA to remittance transfers that are not EFTs, Article 4A will no longer apply to *consumer* wire transfers. *Commercial* wire transfers are unaffected. Rejecting preemption and other approaches suggested during the rulemaking outreach process, the Board reasoned that the states were in the best position to amend UCC Article 4A should they wish to continue to have it govern consumer wire transfers. Alternatively, in the Board's view, wire transfer systems could achieve the same result by incorporating UCC Article 4A into their operating rules.

Disclosure requirements

The principal requirement under the proposed rules is for remittance transfer providers to give senders adequate disclosures about the remittance transfer. Specifically, the proposed regulations require two disclosures, with an option to provide a single, combined disclosure statement. The proposed disclosure rules are highly prescriptive as to the language employed (English or foreign language) and the content, timing, form, and prominence of required disclosures. The rules stipulate that the words employed by remittance transfer providers in disclosures must be the same as or "substantially similar" to specific phrases set forth in the rules. Model forms for disclosures are also attached to the rules.

The remittance transfer provider must give senders a pre-payment disclosure that sets forth information about the transaction, including the amount to be received by the designated recipient, fees and taxes, the applicable exchange rate, and the total transaction amount. The provider must also provide a post-payment receipt that includes the pre-payment disclosure information, as well as the promised date of availability, recipient and remittance transfer provider contact information, a statement of the sender's error resolution and cancellation rights, and instructions as to how to contact the state agency with jurisdiction over the remittance transfer provider as well as the federal Consumer Financial Protection Bureau with questions or complaints. Alternatively, the proposed rules allow providers to give senders, prior to payment for the remittance transfer, a single disclosure that combines the pre- and post-payment disclosure information. Due to concerns raised by focus group participants, the Board solicits comment as to whether remittance transfer providers using the combined disclosure form should also provide proof of payment. A notice of error resolution procedures and cancellation policies must also be provided to the sender upon request.

Because remittance transfers are often made by non-native English speakers, the proposed rules require the disclosures to be made in English as well as (1) each foreign language that the provider "principally" used to "advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at that office," or (2) the foreign language "primarily used" by the sender but only to the extent that such foreign language is "principally" used by the provider as described above. This requirement is applied on an office-by-office basis, and thus could impose substantial compliance costs on those providers that have many offices or branches and target a variety of non-English speaking customers. The Board's staff commentary includes a number of examples intended to help providers determine when languages are being "principally" or "primarily" used, but this exercise seems inherently subjective.

The proposed rules acknowledge that some remittance transfers will take place "entirely" over the telephone. In such cases, the provider must orally disclose the pre-payment disclosure information in the language primarily used by the sender, which could require providers to utilize representatives fluent in the sender's language. Providers must also mail or otherwise "deliver" the required post-payment receipt information (in English and, "if applicable," the foreign language primarily used by the sender) to the sender no later than one business day after the transaction. If the sender holds an account with the provider, the disclosures may be provided on or with the next scheduled periodic statement or within 30 days of payment if a periodic statement is not required.

Estimates of fees and converted amounts

One concern that the proposed rules were intended to address involves inaccurate or missing information regarding exchange rates, foreign currency amounts, and fees. Acknowledging that such information is not always available in advance of a transfer, the proposed rules permit providers to estimate such figures if the laws of the recipient's country, or the manner by which funds are converted in that foreign country, do not permit the provider to establish the figures in advance. In addition, until July 20, 2015, any insured depository institution may use estimates if (1) it cannot determine the exact rate, amount or fee, and (2) the remittance transfer is sent from the sender's account held by the institution.

The rules permit a remittance transfer provider to use estimates if it follows certain listed "approaches" that generally rely on publicly available information or recent transactions involving similar parties. For example, if the exchange rate is not known at the time of the transaction, the provider must give the sender an estimate of the exchange rate based on either (1) for international ACH transactions, the most recent rate reported by the country's central bank; (2) the most recent publicly available wholesale exchange rate; or (3) the most recent exchange rate offered by the person or entity that makes funds available "directly" to the recipient. Other information for which estimates are permitted includes the transferred amount, fees imposed by intermediaries, and taxes imposed by the recipient's country. To the extent that the provider makes an estimate that is not based on one of the listed approaches, the provider is not in violation if the recipient receives the same or a greater amount than it would have under one of the listed approaches.

Error resolution procedures

The proposed rules set forth error resolution procedures similar in important respects to those applied to EFTs under existing Regulation E. In general, a sender must give notice of an "error" within 180 days of the promised delivery date. This notice triggers the provider's duty to investigate and determine, within 90 days of receipt of the notice, if an error occurred. The provider must report the results to the sender within three days of completing its investigation and correct the error within one business day or "as soon as reasonably practicable after" receiving instructions regarding the sender's preferred remedy. In contrast to the Regulation E error resolution procedures for EFTs, there is no ability to "provisionally recredit" the sender and extend the time period for investigation.

An error can include an incorrect amount paid to the recipient (unless the difference is based on estimates), a computational or bookkeeping mistake, the failure to include or correctly apply third party fees or taxes, failure to deliver funds by the promised date, including fraudulent receipt of funds (person other than designated recipient picks up funds), or the sender's request for documentation regarding a transfer. The error resolution procedures do not apply to a mere inquiry into the status of a transfer or to transfers of $15 or less. Providers must retain documentation related to investigations for at least two years from the date of the error notice.

The Board recognizes the potential conflict between the error resolution procedures under Section 919 and those provided under existing regulations, including those for EFTs (Regulation E) and credit card transactions (Regulation Z). Thus, where the account holding institution is also the remittance transfer provider, the proposed Section 919 error resolution procedures would apply if the "error" in question would otherwise trigger both procedures. (If the error only triggers one of the procedures, then there is no conflict. For example, an error regarding an omission of an EFT in a periodic statement would only trigger the existing Regulation E error resolution procedures, and the Section 919 error resolution procedures would not apply.) On the other hand, if the institution is not the remittance transfer provider, then the existing Regulation E error resolution procedures would apply to the account holding institution and the new Section 919 procedures would apply to the remittance transfer provider. By contrast, where the error involves an incorrect extension of credit, Regulation Z error resolution rules would apply where the creditor is also the remittance transfer provider, rather than the proposed rules.

Cancellations and refunds

The proposed rules give senders a right to cancel a remittance transfer orally or in writing if made within one business day after payment is made, provided that the funds have not yet been picked up or deposited into an account of the designated recipient. The request to cancel must provide sufficient detail for the provider to verify the sender's identity and the transfer. The provider must issue a refund of the total amount, including any fees imposed, within three business days of receiving the cancellation notice, at no additional cost to the sender.

Liability for agents

The Board solicits comment on two alternative approaches to the responsibility of a remittance transfer provider for the acts of its agents. Under the first alternative, the provider would be strictly liable for the acts of its agent. Under the second alternative, the provider could avoid such liability if it establishes and maintains written policies and procedures to assure an agent's compliance with the regulations, including oversight practices, and the provider corrects any violation "to the extent appropriate" including error resolution procedures and remedies.

FOOTNOTES

1 76 Fed. Reg. 29902 (May 23, 2011). The proposed rules would arrange existing Regulation E provisions (12 C.F.R. §§ 205.1-20) under "Subpart A," and add the proposed rules as Sections 205.30-34 under a new "Subpart B."

2 Pub. L. 111-203, 124 Stat. 1376, § 1073 (2010).

3 Codified at 15 U.S.C. § 1693o-1.