

COMMENTS
to the
Consumer Financial Protection Bureau
12 CFR Part 1005
[Docket No. CFPB-2011-0009]¹
RIN 3170-AA15
Electronic Fund Transfers
(Regulation E)
Safe Harbors Relating to Remittances

by the
National Consumer Law Center
on behalf of its low income clients

as well as

Americans for Financial Reform
Consumer Action
Consumer Federation of America
Consumers Union
National Association of Consumer Advocates
National Council of La Raza

The **National Consumer Law Center**² ("NCLC") submits the following comments on behalf of its low-income clients, as well as **Americans for Financial Reform, Consumer Action, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, and National Council of La Raza**,³ all organizations that represent the interests of low

¹ 77 Fed. Reg 6310 (February 7, 2012).

² The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Consumer Banking and Payments Law* (4d ed. 2009), which has several chapters devoted to electronic commerce, electronic deposits, access to funds in bank accounts, and electronic benefit transfers. NCLC also publishes bimonthly newsletters on a range of topics related to consumer credit and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted trainings for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal with the electronic delivery of government benefits, protection of exempt benefits, predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s. NCLC's attorneys regularly provide comprehensive comments to the federal agencies on the regulations under these laws. *These comments are written by NCLC attorney Margot Saunders.*

³ **Americans for Financial Reform** is a coalition of more than 250 consumer, labor, civil rights, senior, community, business, academic, and other groups working together to hold Wall Street accountable and reforming our financial system so it serves our families and our communities. AFR played a leading role in strengthening and winning passage of the Dodd-Frank Consumer Protection Act, and is now focused on tough and effective implementation to fulfill the promise of that legislation, and on continuing efforts to transform our financial system.

and moderate income users of remittances. Recently the Consumer Financial Protection Bureau issued final rules⁴ which set out a comprehensive regulatory structure for the new consumer protections for remittances required as the result of amendments to the Electronic Funds Transfer Act (EFTA).⁵ These regulations are well-structured and fair. They will provide meaningful and important protections for the first time to remittance senders.

These comments address the two safe harbors that the CFPB has proposed.⁶ The first excludes some remittance transfer providers who do not provide these transfers in the normal course of business. The second provides exceptions to disclosure requirements for remittance transfers scheduled in advance. *In general, we agree with the proposed safe harbors, as well as the methods proposed to police their application.*

The primary thrust of our comments on the proposed safe harbors is to encourage the CFPB to require notice to consumers when these safe harbors are employed. For the first safe harbor, the notice should inform consumers that the provider is providing a remittance transfer to them as an accommodation, that this is not a service that it normally provides in the course of business, and thus that consumers will not have the benefit of certain consumer protections such as disclosures, error resolution procedures, and private remedies.

The second notice would be to consumers who have authorized remittance transfers in advance and thus would not be receiving the specific disclosures regarding the actual cost of the transfers or the exact amount to be received by the recipient. This notice would inform these consumers that this information will not be provided because the transfer is scheduled in advance.

Finally, we request that the CFPB clarify that any remittances which are not subject to the protections of these rules because of the safe harbor provisions would still be governed by Article 4A of the Uniform Commercial Code.

Consumer Action (www.consumer-action.org) is a national non-profit education and advocacy organization that has served consumers since 1971. Consumer Action (CA) serves consumers nationwide by advancing consumer rights in the fields of credit, banking, housing, privacy, insurance and utilities. CA offers many free services to consumers and communities. Consumer Action develops free consumer education modules and multi-lingual materials for its network of more than 10,000 community based organizations. The modules include brochures in Chinese, English, Korean, Spanish and Vietnamese.

Consumer Federation of America (“CFA”) is a nonprofit association of some 300 national, state, and local pro-consumer organizations created in 1968 to represent the consumer interest through research, advocacy, and education.

Consumers Union of United States, Inc., publisher of Consumer Reports®, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union’s publications and services have a combined paid circulation of approximately 8.3 million.

The **National Association of Consumer Advocates** (“NACA”) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA’s mission is to promote justice for all consumers.

⁴ 77 Fed. Reg. 6194 (February 7, 2012) (Final Rules on Remittances.)

⁵ New section § 919 of the Electronic Fund Transfer Act, 15 USC §1693q, Public Law 111-203, 124 Stat. 1376 (2010).

⁶ 77 Fed. Reg. 6310 (Feb. 7, 2011).

I. Safe Harbor for Remittance Transfer Providers Not in the *Ordinary Course of Business*.

We agree with the CFPB's framework for determining which providers do not provide remittance transfers in the ordinary course of business. The proposal is that providers who provide fewer than 25 remittance transfers in a year are not providers in the "normal course of business."⁷ We agree that 25 is the appropriate trigger number for this determination. We agree that using the Truth in Lending Act's (TILA) number of 25 transactions a year for the purpose of determining who is a creditor under that Act is a reasonable basis for this similar determination under the Electronic Funds Transfer Act.

We also agree with the CFPB proposal that, once an entity provides 26 remittance transfers within a year, it will be considered a provider in the normal course of business for the rest of that year as well as for the following year.

A. Recommended Notice of the Effect of Providing Remittances

There is one huge and important difference between the exceptions for persons who are not considered creditors under TILA, and the exception for those who do not in the normal course of business provide remittance transfers. Entities that make fewer than 25 extensions of credit a year probably do not appear to the public as creditors. Indeed, the exclusion was intended to exempt small, incidental creditors. As a result, consumers who deal with these entities are unlikely to have the mistaken belief that they are dealing with entities that extend credit as a normal part of their business.

However, the situation is quite different for remittance transfer providers who do not regularly provide these transfers. It is most likely that these remittance providers are financial institutions,⁸ which are providing the remittance transfers as an accommodation to existing customers. The only issue we have with the proposed safe harbor is that there are so many important consumer protections that the customer is *not* receiving from the provider who is making this accommodation that it is important that customers be informed that they are missing out on something by choosing this method of arranging the remittance transfer. If the provider is a financial institution it is unlikely that the customer would readily guess that the consumer protection rules applicable generally to remittance transfers would not apply to this particular transfer. The customer will have no way of knowing whether the financial institution has crossed the 25 remittance threshold.

Customers of insured financial institutions generally anticipate that all consumer protection rules will apply to their transactions with these institutions. If a particular transaction will not trigger standard consumer protection rules, consumers need to know this fact.

As a result, we suggest that the CFPB slightly change the configuration of the proposed safe harbor. It should be located in the regulations, rather than in the Official Interpretation. In

⁷ Proposed Supplement I to Part 1003 – Official Interpretations; Section 1005.30(f).2. 77 Fed. Reg 6310, 6332 (February 7, 2012).

⁸ We would propose that the same definition of "financial institution" be used for these purposes as is used for "insured institution" in § 1005.32(a) allowing these institutions to use estimates for the disclosures required by these regulations.

addition, the CFPB should require that insured institutions which provide remittance transfers as an accommodation to give customers a notice along the following lines:

Notice: We are providing a remittance transfer to you, our customer, as an accommodation to you. Because we provide very few remittance transfers, this remittance transfer is not covered by the consumer protection provisions of the Electronic Funds Transfer Act. 15 U.S.C. § 1694 *et seq.* The protections – which you are not receiving in this transaction – include disclosures relating to costs and the amount to be received by the recipient, error resolution procedures, as well as remedies for problems.

There is solid precedent for the concept of providing notice to consumers that they are not protected when they engage in certain transactions. The best example is the requirement that financial institutions provide a notice when deposits will not be covered by FDIC insurance.⁹

If the remittance transfer provider otherwise qualifies for the safe harbor, and is *not* an insured financial provider, it may not be feasible to require this notice to be provided.

B. Clarification that Article 4 of the UCC applies to remittance transfers not covered by the EFTA because of the application of the safe harbor.

As was pointed out in the Final Regulations issued by the CFPB on remittance transfers,¹⁰ Article 4A of the Uniform Commercial Code (in § 4A-108) excludes from its coverage any remittances which are covered by the EFTA. The protections applicable to wire transfers in § 4A-402(c), setting out the rules for wire transfers, provide significant protections against loss for consumers.

There is no reason that Article 4A should not apply to those transactions which are not covered by the EFTA because of the safe harbor. It would be helpful to consumers and the industry alike, and likely avoid considerable litigation, if the CFPB would clarify in the Official Interpretations that transactions which are excluded from coverage under the EFTA are covered by the protections of Article 4A.

⁹ *See*, 12 CFR § 347.216: Depositor notification.

Any state branch that is exempt from the insurance requirement pursuant to § 347.215 shall:

(a) Display conspicuously at each window or place where deposits are usually accepted a sign stating that deposits are not insured by the FDIC; and

(b) Include in bold face conspicuous type on each signature card, passbook, and instrument evidencing a deposit the statement "This deposit is not insured by the FDIC"; or require each depositor to execute a statement which acknowledges that the initial deposit and all future deposits at the branch are not insured by the FDIC. This acknowledgement shall be retained by the branch so long as the depositor maintains any deposit with the branch. This provision applies to any negotiable certificates of deposit made in a branch on or after July 6, 1989, as well as to any renewals of such deposits which become effective on or after July 6, 1989.

¹⁰ 77 Fed. Reg 6194, 6211 (February 7, 2012) (Final Rules on Remittances.)

II. Safe Harbor for Disclosures Provided for Transfers Scheduled in Advance

In § 1005.32(b)(2), the Bureau proposes to allow estimates to be provided for remittance transfers scheduled in advance because of the practical difficulty of knowing the actual costs when the disclosures are made. We understand this issue, and do not disagree that estimates would be appropriate as articulated by the Bureau.

However, we recommend that consumers be informed that by setting up preauthorized transfers or transfers scheduled in advance that they will not be receiving actual notice of the costs of the transfer or of the amount to be received by the recipient. This is valuable information which senders may not understand they are foregoing without a notice to this effect.

Therefore we recommend that § 1005.32(b)(2) be amended to add a sentence at the end along the following lines:

If you request remittance transfers to be scheduled in advance, you will not receive specific information about the actual costs of the transfers or the actual amounts to be received by the recipient until after the transfer.

This additional information simply informs consumers what they are missing by setting up the remittance transfer in advance.

Conclusion

We appreciate the thoughtful and careful work the CFPB has done with regard to remittance transfers and we are happy to discuss these proposed regulations, as well as our suggestions, at any time.