American Bankers Association
Building Success. Together.

Robert G. Rowe, III
Vice President/Senior Counsel
Center for Regulatory Compliance
Phone: 202-663-5029
E-mail: rrowe@aba.com

April 9, 2012

Monica Jackson, Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20006

Electronic Fund Transfers (Regulation E) on Remittances
Docket No. CFPB-2011-0009 or RIN 3170-AA15

Dear Ms. Jackson:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment to the Bureau of Consumer Financial Protection (Bureau) on the supplemental proposal to a final rule on remittances that was issued by the Bureau to implement section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or DFA). The proposal, published in the February 7, 2012, *Federal Register,* raises two questions related to the final rule issued that same date.

The first question is designed to help small community banks and credit unions that are low-volume providers that offer remittances primarily as a customer accommodation. Therefore, the Bureau asks for comment on whether to create a safe harbor threshold for what constitutes providing remittances in the "normal course of business."

The second question requests comment on possible approaches to remittances that are scheduled in advance or preauthorized remittances which cannot continue to be offered under the terms of the final rule.

ABA Position

ABA considers the final rule on remittances that the current proposal supplements to be overly-broad and contrary to Congressional intent. The final rule was imposed without adequate consideration of its costs and benefits and will damage consumers and competition. The Bureau's proposal to exempt providers of personal electronic cross border funds transfers that transact fewer than 25 such transfers per year is not a cure for its over-reaching. Perhaps many of the issues raised in this letter could have been adequately noted and addressed had the Bureau followed more closely appropriate rulemaking procedures in connection with this proposal.

Section 1073 of the DFA is the culmination of legislative efforts to improve disclosures for primarily immigrant populations that transfer relatively modest amounts of money from earnings to relatives in their home countries. It has a legislative history focused on such transactions—

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets.

and did not ever focus on other individual cross-border wires or international ACH transactions. Despite this Congressional concentration and a similarly narrow Federal Reserve study (drawn upon in connection with development of the initial proposal), the Bureau issued its sweeping final rule that not only far exceeds the traditional notion of remittances,[2] but placed a heavy thumb of government endorsement in favor of money services businesses by mandating a disclosure regime that cannot be fulfilled using the open-network systems currently employed by depository institutions

Although, the Bureau has often prominently stated that it wants to ensure consistent treatment and a level playing field for all providers of consumer financial products,[3] the final rule directly contradicts that premise. The final rule takes the singularly inconsistent and extremely inappropriate step of creating a rule that favors one industry to the disadvantage of another. The final rule is designed in such a way that money transmitters using closed systems will be able to continue offering remittances while banks which rely primarily on open networks will have to disassemble completely their existing products and offerings to comply with the rule; the preamble to the final rule admits that the open-network systems used by the banking industry is inconsistent with the Bureau's final rule.

Even if it were possible to revamp systems completely to continue offering these services to consumers, the Bureau seems oblivious to the impact this will have on costs. The final rule creates a strict liability on providers in the United States for virtually any error, even errors caused by the sender. ABA believes this potential risk caused by regulation and accompanying liability make remittances incompatible with safety-and-soundness, even assuming a bank could impose sufficient costs to cover the risks.

In summary, ABA believes that the final rule and the attempt to temper it with the current proposal will ultimately reduce the number of consumer funds transfer providers, undermine competition, and cause costs to consumers to increase and quality of service to decline.

[2] For example, the International Monetary Fund in an October 2009 report defined remittances with these words: "As used in everyday discourse (without regard to formal balance of payments terminology), 'remittances' are cross-border payments of relatively low value, often recurrent person-to- person payments by migrants." http://www.imf.org/external/np/sta/bop/remitt.htm; see also, http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/Migration&DevelopmentBrief10.pdf and http://www.un.org/esa/population/publications/2006_MigrationRep/Annex.pdf. More significant, in Congressional hearings, the concept of small dollar transfers sent by immigrants back home was apparent, e.g., statement of Representative Maxine Waters (D-CA), at a 2009 hearing, http://financialservices.house.gov/media/file/hearings/111/cmw_remittance_hearing_statement_6.03.09.pdf .

[3] See, e.g., comments by CFPB Director Richard Cordray at the Credit Union National Association Governmental Affairs Conference, March 20, 2012, http://www.cuna.org/newsnow/12/wash031912-4.html, at the Independent Community Bankers Association annual convention, March 14, 2012, http://www.communitybankertoday.com/top-news/entry/1/1507 & http://cfpbjournal.presspublisher.us/issue/cfpb-journal/article/cfpb-director-cordray-explains-bureaus-responsibility-to-community-banks, during Congressional testimony in January (http://news.firedoglake.com/2012/01/24/cordray-faces-house-republicans-in-financial-services-committee-hearing/ and before the Consumer Bankers Association on March 21, 2012 (http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-before-the-consumer-bankers-association/).

ABA Comments on Specifics of the Proposal

As noted, the two areas of the current proposal where additional comment is sought are: (1) defining when a provider offers remittances in the normal course of business and must comply with the rules, and (2) disclosures and receipts when a sender schedules a transfer more than ten days in advance or where a transfer is one of a series of payments scheduled in advance.

Definition of Remittance Transfer Provider

As defined in the final rule, a provider subject to the requirements is a company that provides remittances transfers to consumers in the normal course of business. Under the rule, normal course of business is determined using a facts-and-circumstances test but does not include a numerical threshold.

In recognition of the problems faced by smaller businesses, particularly community banks and credit unions that only offer these transfers as a customer accommodation, the Bureau is proposing a threshold safe harbor based on 25 remittances sent in the prior calendar year. As proposed, if a provider sent 25 or fewer remittances in the previous year, it would be exempt from the rule in the current year but only if it did not exceed 25 transfers in the current year. If an otherwise exempted provider sent a 26th transfer in the current year, the facts-and-circumstances test would be used to determine if it is sending remittances in the normal course of business.

In our earlier comments to the Bureau, ABA and other associations suggested a more reasonable threshold, based on real experience and market conditions, that we believe would be workable and would cover the many smaller institutions that offer this service only to accommodate their customers. In fact, many of them do not even advertise the existence of the service and only provide it on request. However, the suggested threshold was dismissed by the Bureau. ABA continues to believe that a threshold is a good approach but only if it is one that is easily applied and meaningful. There are two fundamental flaws in the proposed safe harbor that prevent the 25-limit threshold from working.

First, given the extremely broad definition of remittances in the final rule, such a small threshold is not useful or useable, especially since the strict liability and the substantial risk associated with remittances will be powerful deterrents. Generally, the number of consumer transfers for a smaller institution is not 25 per year but closer to 25 per month—or 300 in a year,[4] a number still far too small for a depository institution to rely upon remittance business as a material source of income for the bank. Since many smaller institutions only offer these services to accountholders, this amounts to less than one transfer for every 25 accountholders in the course of a year.[5]

[4] It is important that the threshold allow for an annual calculation, especially since there are likely to be seasonal spikes in traditional remittances, such as when migrant farm workers send funds home.
[5] The average number of non-retirement accounts for banks with between $170 million and $180 million in assets is 8,167.

In addition, there also are many community banks larger than the SBA designated small depository[6] that should not be considered conducting remittance transfers in the normal course of business. Institutions in the range of $500 million to $1 billion in assets average 32,786 accounts, but most report conducting fewer than 1,200 cross border EFTs a year.[7] This also yields approximately one transfer for every 25 accountholders in the course of a year.

One of the unintended consequences from setting a threshold too low is that depository institutions are likely to take steps to ensure they stay below the threshold by restricting availability of the service, something the Bureau does not seem to have considered.

Second, the complexity of the safe harbor for any institution that comes close to the limit of 25 in the second year further undermines the usefulness of a threshold. Any provider that wanted to use the exemption would either have to be prepared to cut off the service completely after the 24th wire transfer or have in place a full compliance regime ready to use when the threshold is crossed. This uncertainty adds an unnecessary complexity to administering the exception for any institution that wanted to rely on the safe harbor. This "cliff effect" is a hazard of any arbitrary cut-off, but it is exacerbated when the threshold is artificially low in relation to the accountholder base. A typical bank, as we have discussed, could find itself up against the safe harbor ceiling within the first few weeks of the year, unable to provide this accommodative service for any remaining customers until almost another 11 months have passed.

The reality is that the vast majority of banks are not in the business of providing cross border transfers. They are in the business of building customer relationships. Eighty percent of banks conducting fewer than 1,200 remittances a year report that more than 90% of those transactions are for existing accountholders.[8] It is through this lens that electronic cross border transfer services and the consumer experience should be evaluated.

Accountholders who seek a remittance once or twice in the course of a multi-year relationship approach their banker for convenience. They are not regular remittance customers.[9] They are not shoppers for this service and have no interest in spending time shopping for what is a "one and done" accommodation. The reasonableness of their accommodation is built on trust earned over the course of the relationship and the customer service provided in walking them through a process that they rarely use and yet reliably fulfills their need for completing the transfer with minimal hassle and in-the-ballpark out-of-pocket expense.

For bankers these infrequent transfers are compensated not on the basis of operating a profitable business line, but rather for conducting a high-touch, individual attention, occasional transaction for an established customer. Residual liability for precision in forecasting disclosures or conducting error resolution when relying on the open system that bankers employ will be viewed as a prohibitive penalty for customer accommodation and will cost far too much to control to the satisfaction of managing the regulatory risk created by this rule.

Given that the study prepared by the Federal Reserve found that most senders were satisfied with existing remittance practices and found providers helpful in resolving any problems, the over-breadth of the final rule and the complications introduced by this proposal will incur

---

[6] The Small Business Administration defines a small bank as one that is less than $175 million in assets.
[7] ABA Weekly Compliance Survey 3/26 – 4/6/12 98% of responding institutions between $200 and $800 million in assets reported conducting fewer than 1,200 cross border EFTs a year.
[8] *Id.*
[9] They are certainly not the regular users that Congress had in mind when asking the Board to study whether remittance history should be considered as a component in credit scoring. Dodd-Frank Section 1073(e).

compliance costs that are far out of proportion with any marginal benefit to consumers. A regulation that more realistically captures remittance market activity and those truly engaged in it as a regular business venture is necessary.

Advance-Scheduled Remittance Transfers

The proposal also seeks feedback on whether to adjust the final rule where a remittance transfer is scheduled in advance, both for single transfers or transfers that are part of a series of advance-scheduled transfers. Because providers face risks setting rates and fees in advance, the Bureau has expressed concern that providers may choose not to incur these risks and not allow consumers to schedule remittances in advance. ABA agrees that the risks and strict liability associated with the final rule will undermine or defeat the ability to continue allowing consumers the convenience of scheduling transfers in advance, but we do not find that the proposal sufficiently addresses the problem.

Overall, ABA believes that given the risks and the complexity of disclosures, the logical outcome is to require consumers to request a remittance at the point when the provider can furnish disclosures that meet or attempt to meet the constraints of the final rule. To do otherwise would compromise safety-and-soundness management by the bank. Lacking sufficient flexibility to provide appropriate information for future transactions, consumers will be compelled to request a single one-time transfer at the point of transfer and not beforehand.

The final rule treats the first transaction in a series like any other remittance and requires a provider to furnish the sender with an accurate pre-payment disclosure and receipt. Therefore, the first transfer can only be requested at the time the funds are sent and not sooner. Any request that is farther removed from the time of the first transfer cannot be accommodated because the disclosures cannot be provided. Simply put, there is no way for a provider to furnish the information demanded unless it is simultaneous with the transfer.

<u>Using Estimates</u>

The proposal asks if a provider should be permitted to use estimates in disclosures where there is a single transfer or the first of a series of transfers is scheduled more than 10 days in advance. The Bureau is also considering letting providers disclose a formula based on publicly-available information that would let the sender calculate the exchange rate.

ABA believes that no provider can furnish information that is not an estimate for any remittance scheduled in advance. Even 24 hours in advance leaves the provider open to risks caused by fluctuations in currency exchange rates, a fact that the Bureau recognized when it adjusted the timing for cancellations in the final rule from 24 hours to 30 minutes. Given the usual volatile fluctuations of international currency markets (particularly with regard to currencies in countries to which most remittances are sent), to do otherwise would be to assume a risk far beyond most business tolerance levels or lead to prohibitive fees far above what most consumers would be willing to bear. Therefore, to continue to allow consumers to take advantage of this service, estimates become critical.

Ironically, the proposal would only let a consumer schedule a transfer in advance if it is more than 10 days away. Unless estimates are permitted during the 10-day window between the time of the transfer and the request, the ability to provide information with the specificity demanded by the rule is impossible. As a result, consumers that are seeking a transfer to occur in less than 10 days must wait until the transfer is to be sent. ABA questions how this benefits consumers. Instead, ABA believes a more consumer friendly method will be to allow estimates for any transfer that is requested by a consumer prior to the business day on which the transfer is to be sent.

There are two critical points for advance-scheduled transfers that should be factored into the permission to use estimates. First, the service is provided as a convenience for consumers to benefit the consumer. Scheduling transfers in advance is an administrative challenge for providers that must track and ensure that the funds are sent in accordance with the request. Second, in order to schedule a transfer in advance, the consumer must have an account with the provider, which means that the likelihood of shopping for the service once the account is established is limited. The additional hurdles being presented by the rule are sure to defeat this service and undermine a consumer benefit.

Disclosures and Receipts

If the Bureau allows estimates for transfers scheduled more than 10 days in advance, to ensure the sender has accurate information, the Bureau also is considering whether to require a second receipt closer to when the transfer is sent. Under this approach a sender would receive three disclosures: (1) a pre-payment disclosure based on estimates; (2) a receipt at the time the transfer is requested based on estimates; and (3) a second receipt giving more accurate information before the funds are sent.

ABA fails to see how this is practical or beneficial to consumers since three disclosures for a single transaction seem excessive and likely to be confusing to the customer. To begin with, when a consumer schedules transfers in advance, the service benefits the consumer, and it is that convenience that is the primary motivator for the consumer, not the opportunity to shop. Therefore disclosure of information for a consumer to shop for remittance services is not as significant.

Three separate disclosures at three separate points for a single transaction will be expensive to provide, and the costs for furnishing this information will necessarily be added to the cost of the transfer to the detriment of consumers. Moreover, multiple disclosures as suggested by the Bureau are only likely to confuse consumers and cause misunderstanding, not clarity or transparency, a further disadvantage to consumers produced by the rule.

There is also another administrative challenge with three separate disclosures. Providers must develop some means to ensure the different disclosures are received in proper order or create a mechanism or format so that a consumer will know which disclosure is the first, which is the second, and which is the third. Again, these steps add to costs and confusion for customers.

Alternative Approach

If the Bureau would like to permit consumers to continue to be able to schedule international electronic transfers in advance, then a system that works within the constraints of international payment systems must be created. ABA suggests that a simple solution that can meet these needs is possible provided estimates are permitted and a simple disclosure system used.

When a consumer requests a transfer in advance, it must be accepted in the final rule that it is not possible to provide the same kind of specific information when the transfer is requested as it would be for a transaction that is to take place immediately. Clearly, when the Bureau put in place the final rules regarding the right to cancel and limited the time to 30-minutes, it recognized the limitations on holding transfers for 24-hour periods and the inherent costs that would be passed on to consumers. Similarly, it should be possible to let a consumer request a fund transfer in advance but not receive precise information. The disclosure can usually verify when the funds will be sent. With the understanding that the request is based on estimates, the provider can then send a confirmation receipt after the funds are sent. For any transfer scheduled after the business day on which the transfer is requested, the final rule should clearly allow estimates, and when the transfer is the first in a series of transfers, the disclosure should only set forth the terms on which the transfer will be made, when the transfer(s) will occur, how and when a consumer may cancel the transfer. Since the type of consumer likely to request advance transfers or repeat transfers is more likely to be a sophisticated consumer, this should be acceptable. If not, ABA questions whether it will be possible to allow consumers to do more than schedule a single transfer at the time it is sent.

Right of Cancellation

While consumers generally have 30 minutes to cancel a remittance transfer, the final rule includes a special provision for cancelling a remittance scheduled in advance. If a remittance is scheduled more than three business days in advance, the cancellation must be submitted at least three business days before the scheduled transfer. This three-day time period is based on existing elements under Regulation E for electronic funds transfers (EFTs), and the Bureau asks whether maintaining this consistency is appropriate.

While ABA believes that the approach the Bureau takes here underscores the fallacy of considering domestic transactions in much the same way as international transactions, a fundamental flaw in the entire rule, ABA agrees that it is fitting to require sufficient time for a cancellation to take place. Unlike the instance where a cancellation takes place almost simultaneously with the initial request where it should be a relatively simple matter to place the hold, providers need time to identify and stop a transfer that is already cued up for processing. Therefore, the three-day rule appears to be appropriate. ABA also believes that the final rule should clearly articulate that in all other instances the right to cancel is restricted to the 30 minute window that otherwise applies under the final rule.

Transition and Effective Date

While comments on the safe harbor and the disclosures for advance scheduled transfers are due April 9, 2012, the Bureau expects to have these additional elements finalized in ample time to allow providers to adjust. ABA believes that imposing an effective date for elements of a rule that have not been finalized is questionable. If the Bureau is going to consider the comments submitted under the proposal with the care that the law requires, then until such time as all aspects of the rule are finalized it is not appropriate to establish a final effective date. Providers will have to consider all aspects of the final rule, and since changes are still being made under the proposal, an appropriate effective date should be one year after the completely final rule is in place.

Conclusion

ABA believes that the flaws in the final rule are underscored by the questions raised in this supplemental proposal. The proposed safe harbor for what constitutes providing remittances in the normal course of business will be ineffectual given the breadth of transactions covered unless a more realistic threshold is adopted. In addition, barring the ability to estimate advance scheduled transfers, providers will take on far too much risk to offer them.

Overall, ABA believes that the outcome from the final rule on remittances will be decreased competition and increased costs for consumers. The inappropriately broad coverage of the final rule that goes far beyond what have been traditionally seen as remittances will affect all consumers–many of whom were clearly not the frequent users that concerned Congress, but the impact also will be felt by those whom the statute was intended to help, but who will face fewer choices when conducting their financial affairs. Finally, many of these issues might have been appropriately addressed and problems avoided had the Bureau followed more carefully the due process for regulations as mandated in statute.

Sincerely,

Robert G. Rowe, III
Vice President & Senior Counsel